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# THE ALL INDIA REPORTER

1929

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Srinagar

CALCUTTA SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF  
THE CALCUTTA HIGH COURT REPORTED IN

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1929

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## CALCUTTA HIGH COURT

1929

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1929

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**Table No. III**—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1929 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

### TABLE No. I

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ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.
989	1930 C 230	1011	1929 C 633	1070	1930 C 150	1106	1929 C 298	1154	1930 PC 60
1003	1929 PC 99	1048	" PC 103	1074	" " 171	1117	1930 " 34	1157	" " 219
1013	" C 346	1060	" C 492	1079	" " 265	1130	" " 15	1164	" " 253
1023	" " 319	1034	1930 " 163	1085	" " 220	1135	1929 " 337	1170	1929 " 545
1032	" " 343	1067	1929 " 403	1090	1929 " 309	1145	" " 747	1176	" " 529

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

## 49 Calcutta Law Journal=All India Reporter

CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.
1	1928 C 546	119	1929 C 189	261	1929 C 406	371	1929 C 432	497	1929 PC 112
5	" " 361	122	" " 127	264	" " 174	372	" " 431	502	" C 283
12	1929 " 186	129	" " 169	267	" " 423	374	" " 428	506	" " 401
16	" " 188	132	" " 258	270	" " 413	378	" " 457	516	" PC 189
19	" " 177	136	" " 269	274	" " 285	383	" " 452	523	" " 126
32	1928 PC 231	141	" PC 58	278	" " 369	388	" " 281	527	" " 108
38	" " 294	148	" " 24	281	" " 417	394	" " 341	532	" C 636
49	" C 879	164	" C 176	285	" " 385	398	" PC 92	538	" " 532
51	1929 " 225	167	" PC 55	289	" " 366	406	" " 75	540	" " 606
54	1928 " 522	179	" " 34	294	" " 308	415	" " 69	546	" " 459
62	1929 " 204	189	" C 224	298	" " 337	422	" C 508	551	" " 654
65	1928 " 763	191	" " 289	308	" PC 95	425	" " 513	555	" " 651
70	1929 " 110	193	" " 203	315	" " 61	428	" " 468	560	" Notes 5b
81	" " 226	197	" " 182	321	" " 65	432	" " 747	562	" C 717
83	" " 28	205	" " 336	327	" " 99	441	" " 374	566	" PC 115
89	" " 228	207	1928 " 828	335	" " 77	462	" PC 103	576	" " 119
93	" PC 1	212	1929 " 358	342	" C 172	478	" C 492	579	" " 128
98	" " 13	235	" " 373	347	" " 441	482	" " 527	588	" " 139
104	" " 8	237	" " 354	352	" " 450	484	" " 496	594	" " 162
112	" " 50	245	" " 418	357	" " 445	484	" " 496	594	" " 162
118	1928 Notes 90d	252	" " 272	362	1930 " 34	485	" PC 132	595	" C 568

## 50 Calcutta Law Journal=All India Reporter

CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.
1	1929 C 244	149	1929 PC 272	284	1929 C 755	357	1929 PC 228	513	1929 PC 266
8	" " 334	152	" C 609	285	" " 773	369	" " 300	518	1930 C 141
12	" " 676	164	1930 " 65	287	" " 805	375	1930 C 1	524	" " 132
19	" " 545	173	1929 " 789	291	" " 813	382	" " 180	527	" " 222
24	" " 700	176	" " 785	294	" " 614	397	1925 " 166	532	" " 302
30	" PC 152	181	" " 729	300	" " 753	403	1930 " 159	537	" " 38
39	" " 147	183	" PC 176	303	1930 " 17	408	1929 " 756	543	" " 267
45	" " 163	187	" " 174	317	" " 313	467	1930 " 139	549	" " 251
52	" " 166	192	" " 246	323	" " 255	472	1929 " 807	551	1929 PC 254
70	1930 C 55	197	" " 190	328	1929 " 880	476	1930 " 136	555	" " 259
74	1929 PC 158	208	1930 C 113	331	" " 778	481	1929 PC 214	561	" " 256
89	" " 135	239	1929 " 661	333	" " 828	487	" " 269	566	" C 689
99	" " 141	257	" " 422	336	" PC 205	493	" " 249	584	1930 " 228
106	" C 617	260	1930 " 165	345	" " 209	502	" " 243	589	" " 318
135	" PC 231	267	1929 " 577	351	" " 222	509	" " 200	593	" " 209

## 33 Calcutta Weekly Notes=All India Reporter

CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.
1	1928 PC 254	38	1928 PC 258	55	1928 C 769	79	1928 C 691	96	1929 C 237
7	" " 234	39	" " 251	58	" " 745	84	1929 " 170	100	" " 233
15	" C 782	44	1929 C 227	61	" PC 221	88	1928 Notes 92b	106	" " 272
21	" " 786	46	" " 250	70	" " 197	90	" PC 190	112	" " 212
32	1928 " 575	50	1928 " 571	76	1929 C 240	95	1929 C 560	115	" " 216



# Comparative Tables

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## 33 Calcutta Weekly Notes=All India Reporter.--(Concid).

CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.
117	1929 C 218	333	1929 C 101	569	1929 C 736	781	1929 PC 147	934	1930 C 92
126	1928 " 777	343	" " 242	572	" " 513	785	" " 163	997	" " 263
136	1929 " 1	346	" PC 65	574	" " 632	795	" C 374	1000	" " 145
150	" " 263	352	" " 27	576	" " 639	805	" " 494	1002	" " 63
161	" " 253	356	" C 514	578	" PC 115	809	" PC 166	1004	" " 59
165	" " 247	359	" " 519	585	" " 132	822	" " 171	1006	1929 PC 231
169	" " 260	362	1928 " 763	591	" C 548	829	" C 771	1016	" " 225
172	1928 " 359	365	1929 " 407	599	" " 747	833	" " 155	1023	1930 C 190
174	" " 815	367	" " 395	605	" " 785	834	" " 754	1028	1929 " 370
177	1929 " 207	369	" " 176	609	" PC 119	836	" " 768	1032	" Notes 5a
179	" " 208	371	" " 415	612	" " 126	837	" PC 162	1034	" PC 222
186	" " 108	374	" PC 45	614	" C 719	839	1930 C 240	1039	" " 272
189	" " 350	382	" " 53	620	" " 529	845	1929 " 717	1042	1930 C 173
193	1928 " 759	385	1928 C 808	623	" " 385	847	" " 790	1048	" " 298
196	1929 " 255	388	1930 " 207	626	" " 547	848	" " 818	1053	1929 Notes 7d
198	" " 99	390	1927 " 887	629	" " 258	851	" " 666	1054	" " 8a
201	1928 " 879	392	1929 " 407	632	" " 244	852	" " 739	1058	" C 724
202	1929 " 302	395	" " 340	637	" PC 128	858	" " 468	1061	" PC 228
203	" " 257	399	" " 323	645	" " 135	861	" " 762	1037	" C 609
205	" PC 3	402	" PC 61	652	" " 141	865	1930 PC 13	1077	1930 " 225
211	" C 37	407	" " 81	657	" C 544	873	1929 C 819	1081	" " 109
221	" " 315	412	" C 714	659	" " 672	876	1930 " 47	1085	" " 311
227	" " 325	413	" " 177	664	" " 390	881	1929 " 532	1088	1929 Notes 7c
231	" Notes 7a	425	" " 343	668	" " 644	883	" " 470	1091	" PC 243
233	" PC 13	430	" PC 95	669	" PC 113	888	1930 " 51	1097	" " 249
238	" " 8	435	" " 1	675	" " 63	891	1929 " 767	1104	1930 C 154
242	" " 11	439	" C 533	679	Too old	893	" PC 190	1112	1929 " 726
245	" C 303	446	" " 346	681	1929 C 528	900	" " 212	1115	" " 646
248	" " 188	451	" " 62	684	" " 452	904	1930 C 308	1117	" PC 214
250	" " 292	454	" " 457	687	" " 667	908	1929 " 814	1121	" C 617
257	" Notes 6a	458	" PC 92	690	" " 787	910	" " 769	1148	1930 " 252
258	" C 169	463	" " 99	692	1930 " 60	915	1930 " 286	1150	1929 PC 269
260	" " 189	468	" C 319	693	1929 PC 139	918	1929 " 765	1156	1930 C 238
261	" PC 24	474	" " 633	699	" " 143	921	" PC 176	1160	1929 Notes 5d
267	" " 19	477	" " 401	705	" " 134	926	" " 174	1163	1930 C 151
275	" C 399	485	" PC 103	709	" C 703	930	1930 C 69	1168	" " 164
277	" " 297	493	" " 77	711	" " 796	943	1929 " 566	1170	" " 249
279	" " 304	498	1928 C 841	715	" " 568	945	" " 480	1173	" " 306
282	" " 352	501	1929 " 516	722	" " 728	947	" Notes 6d	1174	1929 " 799
284	" " 174	507	" " 515	723	" " 751	948	1930 C 60	1177	" " 661
285	" " 172	509	" " 341	725	" PC 152	949	1929 PC 179	1190	1930 " 178
289	" PC 50	513	" PC 55	734	" " 156	952	1930 C 65	1193	" " 315
293	" " 34	517	" C 542	739	" C 670	958	1929 " 676	1199	1929 " 553
300	" C 387	519	1930 " 34	742	" " 669	963	1930 " 15	1206	1930 " 297
305	" " 409	526	1929 " 83	743	" " 815	965	1929 " 444	1207	" " 262
309	" " 398	535	" " 593	748	" " 507	967	1930 " 57	1211	" " 285
311	" " 397	543	" " 406	751	" " 730	969	1929 " 563	1215	" " 305
312	Too old	545	" PC 103	753	" PC 149	974	1930 " 61	1219	1928 " 306
314	1929 C 380	549	" " 112	761	" " 158	977	1929 PC 209	1221	1930 " 41
318	" PC 58	553	" C 337	769	1930 C 42	984	" " 200	1224	" " 300
323	" " 69	559	" " 651	777	1929 " 731	989	" C 700	1226	" " 193
329	" C 521	554	1930 " 253	777					

For 11 & 12 All India Criminal Reports=All India Reporter  
Please refer to COMPARATIVE TABLE No. II in A. I. R. 1929 Allahabad.

For 30 Cr. L. J., 113 to 120 I. C. & I. R. 1929 Calcutta=A. I. R.  
Please refer to COMPARATIVE TABLE No. II in A. I. R. 1929 Lahore.

For 1929 Criminal Cases=All India Reporter.  
Please refer to COMPARATIVE TABLE No. II in A. I. R. 1929 Nagpur.



TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1929, Calcutta Section, with corresponding references of other REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1929 Calcutta.

Column No. 2 denotes corresponding references of other JOURNALS.

## A. I. R. 1929 Calcutta=Other Journals.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1	48 C L J 307	88	55 Cal 1067	149	48 C L J 489	189	33 C W N 260
	33 C W N 136		113 I C 847		118 I C 566		116 I C 174
	30 Cr L J 494	90	32 C W N 1238	155	48 C L J 597		30 Cr L J 585
	115 I C 561		115 I C 518		33 C W N 833		12 AICrR 463
11	48 C L J 357	91	48 C L J 387		115 I C 177	190	55 Cal 1351
	114 I C 156		114 I C 154	156	48 C L J 590		32 C W N 1138
14	32 C W N 1004	92	32 C W N 1172		115 I C 269		115 I C 47
	115 I C 359		115 I C 522	157	48 C L J 554	191	55 Cal 1280
	30 Cr L J 475		30 Cr L J 484		115 I C 355		115 I C 35
17	32 C W N 811		12 AICrR 262	158	48 C L J 596		30 Cr L J 407
	115 I C 357	93	48 C L J 368		114 I C 672		12 AICrR 271
20	32 C W N 860		114 I C 139	159 (1)	116 I C 172	192	55 Cal 1274
	108 I C 251	96	55 Cal 1190	159 (2)	48 C L J 574		30 Cr L J 352
21	118 I C 863		115 I C 528		114 I C 415		114 I C 800
	30 Cr L J 973		30 Cr L J 484	160	116 I C 369	193	55 Cal 1341
22	55 Cal 1013	97	32 C W N 1101		30 Cr L J 619		115 I C 63
	47 C L J 387		56 Cal 118		13 AICrR 4	195	55 Cal 1277
	32 C W N 559		117 I C 540	162	48 C L J 594		115 I C 36
	112 I C 172	99	48 C L J 586		115 I C 268	196	115 I C 602
26	32 C W N 1020		33 C W N 198	163	48 C L J 577		56 Cal 800
	115 I C 184		115 I C 266		114 I C 129	197	55 Cal 1328
27	111 I C 134		30 Cr L J 440	165	48 C L J 555		115 I C 185
28	49 C L J 83		56 Cal 750		115 I C 354	201	116 I C 637
	115 I C 180		12 AICrR 304	166	112 I C 113	203	49 C L J 193
31	111 I C 142	101	55 Cal 1090	169	49 C L J 129		116 I C 632
33	32 C W N 1055		33 C W N 333		33 C W N 258		30 Cr L J 656
	56 Cal 280		112 I C 865		116 I C 164		13 AICrR 73
	115 I C 515	108	48 C L J 392		30 Cr L J 579	204	49 C L J 62
37	33 C W N 211		33 C W N 186		56 Cal 924		115 I C 95
	116 I C 378		114 I C 150		12 AICrR 456		30 Cr L J 401
	56 Cal 738		56 Cal 524	170	33 C W N 84		12 AICrR 373
42	106 I C 885	110	55 Cal 1216		118 I C 351	206	118 I C 881
	32 C W N 138		49 C L J 70		30 Cr L J 912	207	33 C W N 177
47	32 C W N 993		114 I C 485	172	33 C W N 285		118 I C 887
	115 I C 525	115	32 C W N 1242		49 C L J 342	208	33 C W N 179
50	55 Cal 841		118 I C 565		116 I C 638		56 Cal 262
	47 C L J 376	117	55 Cal 1110		30 Cr L J 658		118 I C 882
	32 C W N 439		115 I C 189		56 Cal 824	212	33 C W N 112
	109 I C 298	120	48 C L J 390		13 AICrR 103	FB	56 Cal 211
57	32 C W N 945		114 I C 153	174	33 C W N 284		117 I C 689
	56 Cal 150	121	32 C W N 1160		49 C L J 264	214	32 C W N 935
	115 I C 258		117 I C 530		116 I C 723	FB	56 Cal 135
	30 Cr L J 435	123	48 C L J 281		30 Cr L J 703		114 I C 88
	12 AICrR 265		32 C W N 1228		56 Cal 831	216	33 C W N 115
62	33 C W N 451		114 I C 84		12 AICrR 129		56 Cal 455
	115 I C 257		56 Cal 598	175	116 I C 722		117 I C 700
	30 Cr L J 434	127	49 C L J 122		30 Cr L J 706	218	33 C W N 117
	12 AICrR 249		56 Cal 630	176	49 C L J 164		119 I C 123
63	32 C W N 684		115 I C 364		33 C W N 369	224	49 C L J 189
	55 Cal 1292	130	112 I C 71		116 I C 721		115 I C 34
	115 I C 85	133	32 C W N 1166		30 Cr L J 705		56 Cal 862
68	55 Cal 1210		117 I C 697	177	49 C L J 19	225	49 C L J 51
	114 I C 483	135	32 C W N 776		33 C W N 418		115 I C 362
69	55 Cal 1121		117 I C 692		116 I C 625	226	49 C L J 81
	32 C W 490	136	48 C L J 548		56 Cal 848		115 I C 368
	113 I C 834		114 I C 155	182	49 C L J 197	227	33 C W N 44
77	111 I C 746	137	32 C W N 1155		116 I C 167		56 Cal 224
78	55 Cal 1084		116 I C 145		30 Cr L J 580		117 I C 854
	113 I C 833	140	112 I C 124		56 Cal 840	228	49 C L J 89
80	48 C L J 534	141	32 C W N 1136		13 AICrR 8		116 I C 153
	32 C W N 1140		117 I C 701	186	49 C L J 12	229	118 I C 572
	113 I C 851	143	107 I C 473		116 I C 630		30 Cr L J 942
	30 Cr L J 241	144	48 C L J 531	188	49 C L J 16		118 I C 574
83	48 C L J 874		113 I C 854		33 C W N 248	231	33 C W N 100
	33 C W N 526	145	48 C L J 523		116 I C 726	233	120 I C 97
	114 I C 142		114 I C 666	189	49 C L J 119		



## A. I. R. 1929 Calcutta=Other Journals—(Contd).

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
237	33 C W N 96	303	33 C W N 245	390	33 C W N 664	452 (2)	33 C W N 684
	119 I C 801		119 I C 299		1929Cr C 26	454	56 Cal 180
240	33 C W N 76	304	33 C W N 279	392	113 I C 904		117 I C 534
	119 I C 383		119 I C 292	395	33 C W N 367	457	49 C L J 378
242	33 C W N 343	306	119 I C 295		119 I C 297		33 C W N 454
	30 Cr L J 1034	308	49 C L J 294	397	33 C W N 311		57 Cal 17
	119 I C 381		34 C W N 47		120 I C 145		1929Cr C 91
244	33 C W N 632		120 I C 155	398	33 C W N 309	459	49 C L J 546
	56 Cal 566	309	56 Cal 1090		120 I C 145	462	56 Cal 427
	50 C L J 1	315	33 C W N 221	399	33 C W N 275		118 I C 895
	30 Cr L J 1031	319	33 C W N 468	401	33 C W N 477	464	56 Cal 444
	119 I C 378		56 Cal 1023		49 C L J 506		118 I C 888
247	33 C W N 165	322	56 Cal 21		31 Cr L J 59	465	56 Cal 416
	56 Cal 467	325	33 C W N 227		120 I C 250		119 I C 113
	117 I C 558		56 Cal 805		1929Cr C 31	468	49 C L J 428
250	33 C W N 46	328	33 C W N 399	406	49 C L J 261		33 C W N 858
	56 Cal 616	330	113 I C 568		33 C W N 543		30 Cr L J 1027
	117 I C 593	332			115 I C 604		119 I C 372
253	33 C W N 161	334	50 C L J 8		30 Cr L J 526		1929Cr C 95
	117 I C 536	336	49 C L J 205		56 Cal 1067	470	33 C W N 883
255	33 C W N 196		115 I C 602		12 A I Cr R 334	473	56 Cal 275
	117 I C 539		30 Cr L J 525		1929Cr C 30		118 I C 353
257	33 C W N 203		12 A I Cr R 343	407 (1)	33 C W N 365	475	56 Cal 412
	116 I C 160	337	49 C L J 298		119 I C 144		119 I C 129
	30 Cr L J 577		33 C W N 553	407 (2)	33 C W N 392	477	56 Cal 447
	12 A I Cr R 448		56 Cal 1135		56 Cal 969		119 I C 21
258	49 C L J 132		120 I C 157	409	119 I C 374		56 Cal 442
	33 C W N 629	340	33 C W N 395		33 C W N 305	479 (1)	118 I C 887
	116 I C 165		118 I C 894		56 Cal 902		51 C L J 44
260	33 C W N 169		30 Cr L J 979	413	120 I C 151	479 (2)	120 I C 458
	117 I C 851		56 Cal 964		49 C L J 270		1929Cr C 95
263	33 C W N 150	341	33 C W N 509	415	120 I C 462		31 Cr L J 128
	56 Cal 487		49 C L J 394		56 Cal 473	480	33 C W N 945
	117 I C 855		118 I C 892		33 C W N 371		1929Cr C 94
269	49 C L J 136		30 Cr L J 977		30 Cr L J 1036		56 Cal 407
	116 I C 161	343	33 C W N 425		119 I C 290	481	119 I C 121
272	33 C W N 106		56 Cal 1032	417	1929Cr C 28		56 Cal 1060
	49 C L J 252	346	33 C W N 446		49 C L J 281	482	121 I C 319
	117 I C 838		56 Cal 1013	418	120 I C 104		56 Cal 390
276	56 Cal 29		33 C W N 189		49 C L J 245	484	119 I C 17
SB	117 I C 837	350	33 C W N 282	422	120 I C 100		30 Cr L J 1026
277	117 I C 834	352	49 C L J 237		50 C L J 257	490	119 I C 369
	30 Cr L J 850	354	56 Cal 588	423	118 I C 341		1929Cr C 172
281	49 C L J 388		120 I C 589		49 C L J 267		49 C L J 478
	121 I C 414		49 C L J 212	425	120 I C 705	492	120 I C 460
283	49 C L J 502	358	56 Cal 940		56 Cal 244		33 C W N 805
285	49 C L J 274		120 I C 577	428	118 I C 365	494	49 C L J 484
286	56 Cal 161	366	49 C L J 289		49 C L J 374	496	120 I C 459
	47 C L J 480		120 I C 149	430	1929Cr C 54		56 Cal 367
	32 C W N 1109	369	49 C L J 278	431	49 C L J 372	437	119 I C 23
	110 I C 422		120 I C 105	432	49 C L J 371		31 Cr L J 58
287	56 Cal 132	370	33 C W N 1028	433	56 Cal 252	506	120 I C 256
	32 C W N 952		118 I C 854		118 I C 561	507	33 C W N 748
	116 I C 171	373	49 C L J 235	437	56 Cal 201		49 C L J 422
	30 Cr L J 584		120 I C 720		116 I C 733	508	30 Cr L J 1030
	12 A I Cr R 458		33 C W N 795	440	1929Cr C 72		119 I C 376
289	49 C L J 191	374	49 C L J 441	441	49 C L J 347	510	...
	115 I C 571	FB	118 I C 857	444	33 C W N 965	512	...
290	56 Cal 55		118 I C 851		121 I C 412	513	49 C L J 425
292	33 C W N 250	379	33 C W N 314	445	49 C L J 357		33 C W N 572
297	33 C W N 277	380	118 I C 849	448	120 I C 458		119 I C 371
	56 Cal 914	383	118 I C 852		1929Cr C 71		33 C W N 356
	119 I C 289	384	118 I C 852		31 Cr L J 127	514 (1)	119 I C 816
298	56 Cal 1106	385	49 C L J 285	449	19 C L J 352	514 (2)	1929Cr C 187
	30 Cr L J 1015		33 C W N 628	450	56 Cal 462	515	33 C W N 507
	119 I C 189		120 I C 147	452 (1)	118 I C 864		117 I C 854
802	33 C W N 202	387	33 C W N 300		49 C L J 383	516	33 C W N 501
	30 Cr L J 1038		120 I C 110	452 (2)			
	119 I C 297						



## A. I. R. 1929 Calcutta=Other Journals—(Concl'd.)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
516	119 I C	132	593 1929Cr C	222	676 33 C W N	958	765 33 C W N
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	56 Cal	622		120 I C	682		767 33 C W N
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## CALCUTTA HIGH COURT

### \* A. I. R 1929 Calcutta 1

C. C. GHOSE AND JACK, JJ.

*Kazi Bazlur Rahman*—Accused—Appellant.

v.

*Emperor*—Opposite Party.

Death Ref. No. 17 and Criminal Appeal No 565 of 1928, Decided on 7th September 1928, from judgment of Addl. Sess. Judge, Chittagong.

\* (a) Criminal P. C., S. 277—Junior pleader present in Court—Senior pleader absent—Accused cannot be said to be unrepresented—Junior pleader not challenging jurors—Constitution of jury cannot be assailed—Criminal P. C., S. 340.

A junior pleader, who had been engaged on behalf of the accused, was present in Court. There was another gentleman who was his senior who had also been engaged on behalf of the defence but he was absent.

*Held*: that it is not correct to say that the accused was wholly unrepresented and that it was open to the defence to challenge the jurors as their names were called out but, as the junior pleader did not challenge anybody but contented himself by saying that he was only a junior, the constitution of the jury cannot be assailed. [P 6 C 1]

\* (b) Legal Practitioner—Counsel of person accused of serious crime must have entire devotion to interest of client and must exercise his utmost learning and ability and must have warm zeal in maintenance and defence of client's rights—Counsel assigned for defence cannot decline office or abate duty to accused and to Court because of querulous attitude of another counsel.

Entire devotion to the interests of the client, warm zeal in the maintenance and defence of his rights and the exercise of his utmost learning and ability, these are the points which can only satisfy the truly conscientious advocate. Every man accused of an offence has a constitutional right to a trial according to law and the duty of his counsel requires him to

scan with legal knowledge the forms of the proceeding against the accused. Counsel assigned for the defence of an accused charged with the offence of murder cannot decline the office, nor can he abate a jot of his duty to the accused and to the Court, because of the querulous attitude taken by another counsel who is asked to associate himself with the counsel assigned to the accused. [P 6 C 1]

(c) Criminal P. C., S. 299—It is for jury to decide whether prisoner when he committed offence was incapable of distinguishing right from wrong—Penal Code, S. 84.

It is for the jury to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong or under the influence of any delusion which rendered his mind at the moment insensible of the nature of the act he was about to commit, since in that case he would not be legally responsible for his conduct. [P 7 C 1]

(d) Penal Code, S. 84—To establish defence of insanity it must be clearly proved that at the time of committing act accused was labouring under such defect of reason from disease of mind as not to know nature of act or if he did, that he did not know that he was doing wrong—Standard to be applied is whether according to ordinary standard adopted by reasonable men act was right or wrong.

To establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act, the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong. If the accused was conscious that the act was one which he ought not to do and if that act was at the time contrary to the law of the land, he is punishable. The standard to be applied is whether according to the ordinary standard adopted by reasonable men the act was right or wrong. [P 7 C 2]

(e) Penal Code, S. 84—Disease of mind.

The accused's disease of the mind must have been formed before the act was done. [P 7 C 2]



(f) **Penal Code, S. 84—Onus of proving insanity lies on accused.**

The onus of proof where the plea of insanity is taken on behalf of the accused lies on him and it must be proved affirmatively that the accused was insane at the time when he committed the act in question. [P 7 C 2]

\* (g) **Penal Code, S. 84—Uncontrollable impulse with full possession of reasoning powers is no defence, nor is moral insanity any defence.**

Uncontrollable impulse co-existing with the full possession of the reasoning powers is no defence in law nor is moral insanity, i.e., existence of delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, any defence in law. [P 7 C 2]

\* (h) **Penal Code S. 84—Mere eccentricity or singularity of manner is no defence.**

It is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shown that the prisoner had no competent use of his understanding so as to know that he was doing a wrong thing in the particular act in question. [P 7 C 2, P 8 C 1]

\* (i) **Penal Code, S. 84—Evidence of premeditation and design or resistance of arrest negative plea of insanity.**

If there is evidence of premeditation and design or evidence that the prisoner after the act in question tried to resist arrest, the plea of insanity may be negated. A prisoner trying to resist arrest after he had committed that act in question shows that he is well aware that he has committed an act which in law is criminal: *Per Erle, C. J., R. v. Leigh*, (1866) 4 F & F 915, *Foll.* [P 8 C 1]

\* (j) **Penal Code, S. 84—Scientific evidence of insanity is unnecessary to satisfy jury—Existence of facts indicating unsound mind is sufficient.**

It is a mistake to suppose that in order to satisfy a jury that the plea of insanity is well-founded, scientific evidence must be adduced. If the existence of facts is such as to indicate an unsound state of mind, that is quite sufficient: *Per Bret, L. J., R. v. Dart*, (1878) 13 Cox. C. C. 143, *Foll.* [P 8 C 1]

(k) **Criminal Trial—If facts proving commission of crime are clear, motive is irrelevant.**

If the facts are clear so far as the act complained of is concerned, the motive is irrelevant. If the facts are not clear, motive may explain what otherwise would be difficult of explanation. The want of motive for the commission of a crime and its being committed under circumstances which renders detection inevitable are important points to be taken into consideration coupled with other evidence on record bearing on the question of insanity. [P 8 C 2]

(l) **Penal Code, S. 84—From absence of apparent motive in committing crime conclusion of madness cannot be drawn.**

It is not the law that because a horrible crime has been committed with no apparent motive, one may conclude therefrom that the

perpetrator of the deed in question must have been mad at the time. [P 8 C 2]

*A. K. Fazlul Huq, Jahnnavi Charan Das Gupta and Nurul Huq*—for Appellant.

*B. L. Mitter and Debendra Narayan Bhattacharjya*—for the Crown.

**C. C. Ghose, J.**—The accused in this case was charged under S. 302, I. P. C., with having committed the murder of Mr. G. H. W. Davies, I. C. S., District Magistrate and Collector of Chittagong, on 20th April 1928, and was tried before the learned Additional Sessions Judge of Chittagong Mr. A. E. Porter and a jury.

It was urged on behalf of the accused in the Committing Magistrate's Court and also in the Sessions Court that at the time when it was alleged that he had committed the murder in question he was of unsound mind and that, in the circumstances, he was not responsible for what he did. The jury unanimously found the accused guilty under S. 302, I. P. C., and further that the accused could not claim any exemption under the provisions of S. 84, I. P. C. In answer to a question put by the learned Sessions Judge, whether the jury were of opinion that the accused was of unsound mind at all, six of the jurors were of opinion that he was not but the remaining three thought that he might have been. The learned Judge accepted the unanimous verdict of the jury and sentenced the accused to death. The learned Judge observed as follows:

"I agree with the minority of the jury that the accused was of unsound mind at the time when the crime was committed. As there is a clear finding that his unsoundness of mind was not such as to exempt him from criminal liability, however, I do not consider that this opinion, especially in view of the finding of the majority of the jury, justifies the imposition of any sentence by me save the maximum. I therefore sentence the accused to be hanged by the neck until he be dead, subject to the confirmation of the High Court."

In his letter of reference to this Court the learned Judge further observed as follows:

"There is clear oral evidence on the record that the conduct of the accused for some considerable time preceding the commission of the offence was such as is identical or analogous with conduct upon observation of which the Civil Surgeon declared it to be his opinion that the accused is of unsound mind; there is no reason to disbelieve this evidence and it is corroborated by a considerable number of documents, in the proved handwriting of the accused, which must have been in preparation



over a long period and which there is no reason to believe to have been fabricated for any fraudulent purpose. There appears to me to be no ground for holding that the madness displayed by the accused was feigned. I am clearly of opinion that, upon the evidence, the jury erred in not finding that the accused was of unsound mind when he committed the crime although I hold that, there is nothing to show that, even so, he is entitled to the benefit of S. 84, I. P. C. In view of the clear verdict of the jury, however, I did not consider it open to me to give effect to my own conviction that the accused is of unsound mind and was so when he committed the offence."

The facts involved, shortly stated, are as follows: The accused Kazi Bazlur Rahman called on the late Mr. Davies at his bungalow on 20th April 1928, at about 7 a. m. and asked the orderly on duty Kala Mian to take in his card which ran as follows:

"Kazi Bazlur Rahman. I have got title Byron Lord. And Student Oxford University England."

This card is Ex. 11 in this case. Mr. Davies had not come to his office room then and the orderly asked him to wait. In the meantime, another visitor, namely Babu Kali Sankar Dutta (Witness No. 8) who is the local Government pleader attached to the Munsif's Court, arrived. He too, was asked to wait. Shortly thereafter Mr. Davies came into his office room and the orderly Kala Mian took the accused's card to him and, under Mr. Davies's orders, the accused was called in. The accused sat down on a chair on the left of Mr. Davies who was facing the west. Mr. Davies gave to Kala Mian a key to open a box containing certain papers. Kala Mian opened the box and took out the papers and then went outside the room. Mr. Davis and the accused were then conversing. The Collectorate Nazir Babu Mahendra Lal Sarkar (Witness No. 2) had meanwhile arrived with a deputation of about 50 people for submitting a representation to the Magistrate in connexion with a night-soil depot for the removal of which the Municipality had taken and was taking no steps. About 5 or 6 of the members of the deputation accompanying the Nazir came inside the southern verandah where Bubu Kali Sankar Dutta was waiting and some others remained in the compound and some on the steps leading up to the gate. The Nazir was speaking to Kala Mian when the latter heard a sound of something falling. What happened thereafter is described by Kala Mian as follows:

"I heard the Collector say '*pakro pakro*.' I ran forward up to the threshold of the room. I saw that the Collector had fallen with his head slanting and on a shelf which had fallen. He was on his back and was struggling. The accused was drawing out a knife from the chest of the Collector who was kicking. The accused stabbed again and the blow fell on his leg. I can't say which leg it fell on. I went to seize the accused and he threatened to stab me. I jumped back and the Nazir caught hold of the accused from behind. After that I also seized his elbow and Kadar Baksh (the Collectorate peon, witness 4), seized his wrist. The gardener and others came and seized him and Kader Baksh snatched away the knife which I can recognize. This (Ex. 1) is the knife and the price ticket on it was on it then. It was then open. The Collector was bleeding from the chest. He could not speak. The Ayah and the bearer Dasarath took him away. He took the accused on to the verandah. The police came and took him into custody. The accused is the man who came and stabbed the Collector. The Collector died 4-5 minutes after. I was then present. He was unable to say anything after the wound. There was no one but the Collector and the accused in the room."

The Nazir's account is as follows:

"I saw that the accused was then withdrawing a knife from the chest of the Collector. The Collector was kicking. I raised an alarm. I called out that the Collector was stabbed, catch the murderer. Kala Mian and I entered the room. Kala Mian went to the right and I went behind him. The accused was then trying once more to stab the Collector on the chest but as he was kicking the blow fell on his left leg. Kala Mian went to the right and tried to catch the hands of the accused. He was trembling. Seeing him the accused jumped up and threatened to stab him. I went round to his back and pinned his arms to his sides with my arms. Kala Mian, Kadar Baksh, Abdul Malek (Witness 5) and Antil came up and seized the accused. Kadar Baksh caught the right wrist of the accused in which the knife was and took the knife from him. The Collector was bleeding from the chest. The bearer and the Ayah took the Collector away. The Collector looked at me when I pinned the accused's arms to his side but he could not speak. We removed the accused to the verandah. I left the accused with my peons etc., and went into the room to see the Collector. I found him gasping but unable to speak."

Kadar Baksh (Witness 4) after describing how he seized the accused's wrist states:

"We did not strike nor abuse the accused. He did not say anything to us. He struggled to escape when we seized him."

Dasarath, the bearer (Witness 6) who was in the southern verandah of the house talking with the Nazir gives a similar account and states as follows:

"I saw the accused taking out a knife from the chest of the Collector. He struck again but, as the Collector was kicking his legs, the blow fell on his leg. Kala Mian went to catch



him but the accused aimed a blow at him and he went back. The Nazir went to the back of the accused and secured him."

After the accused had been taken into custody he was brought to the bungalow of the Sadar Sub-Divisional Magistrate (witness 10). The latter's evidence is as follows :

"I told him I was a Magistrate, that he was not bound to make any statement, but that if he made any statement I should record it and it would go in evidence against him. He replied that if it was to be used against him he would not make a statement."

The Sadar Sub-Divisional Magistrate wrote in his order-sheet as follows :

"Accused Kazi Bazlur Rahman brought under arrest under S. 302, I. P. C. He is remanded to jail till 2nd May 1928. He refused to make any statement before me. He has got slight marks of injury on the left temple and right leg."

At the trial before the learned Additional Sessions Judge the main contention on behalf of the defence, as indicated above was that the accused was insane at the time when it was alleged that he had committed the crime in question. No less than 29 witnesses for the defence were called in support of this contention. The learned Additional Sessions Judge has in the course of his very careful charge to the jury analyzed the evidence on behalf of the accused including the documentary evidence and has shown what the state of the accused's mind was from 1921 up to shortly before the date of the occurrence. According to the witnesses on behalf of the accused, the latter was subject to fits of insanity, the last of which beginning in 1925-1926 had been practically uninterrupted up to or shortly before the date of the occurrence. It is not necessary for the purposes of this judgment to reiterate herein the summary of the evidence as given by the learned Judge. The learned Judge states as follows :

"We have evidence which, if believed, shows him suffering from delusions, e. g. that he is a person with ability and qualifications which he has not, with titles to which he has no right, claiming unusual powers (a saint, Imam Mahdi etc.) anxious to complete his education in England. All these delusions are evidenced not by witnesses only but by documents whose volume makes it unlikely that they were fabricated for the purposes of any possible action. They are amongst the observations on which P. W. 1 (Major Hodge, I. M. S.) the local expert, bases his opinion that the accused is unsound in mind. As I said before whilst directing the jury to consider the fitness of the accused to stand his trial, the opinion of P. W. 1 (Major Hodge) on the point may be disregarded but only on very valid and certain grounds

and to disregard it, would be extremely unusual and unwise. If the jury accept it for the present state of the accused and believe the evidence of conduct of the accused before trial I am unable to point to any consideration on which the jury can fail to come to the conclusion that from 1925-1926 up to the day before the crime the accused was of unsound mind. That unsoundness also evidently was of the cognitive faculties for it prevented him from knowing what he was doing when, e. g. he addressed imaginary audiences, thought he was a person of distinction, imagined he could become a barrister in England within a few months, etc. If the unsoundness that is now present is proved up to a short time before the crime, in the absence of evidence, the presumption is that it continued up to the time of the commission of the crime."

It appears that the accused was committed on 16th May 1928 after the necessary preliminary enquiry by the Committing Magistrate to the Sessions Court for trial. At the enquiry before the Magistrate the accused was represented by a vakil named Babu Jogendra Chandra Dutta, a Member of the Comilla Bar. On 17th May 1928 the Sessions Judge directed that the trial should begin on 11th June 1928. On the last-mentioned date the trial opened before the Additional Sessions Judge and the charge under S. 302, I. P. C. being read over to the accused he pleaded not guilty. The jurors were then chosen in accordance with the directions contained in the judgment of this Court dated 5th December 1927\*. Babu Rama Prosanna Singha, pleader, a member of the Chittagoing Bar, who was present in Court, intimated to the learned Additional Sessions Judge that he had been engaged and had received a power from the accused, but that a senior having been also engaged under whom he was to act he had no instructions. The senior referred to was apparently Babu Jogendra Chandra Dutta and he was absent. Babu Rama Prosanna Singha stated that he had received instructions from his senior that in the event of the trial being taken up on 11th June the accused would be undefended, whatever that might mean. A petition purporting to be filed by the brother of the accused was put in applying for an adjournment. This application was refused. The case thereupon proceeded and the first point for determination was whether the accused was in a fit condition to stand his trial. Major Hodge, the Civil Surgeon of Chittagong, was examined-in-chief. Babu Rama Prosanna Singha having stated that he was not

[\* Vide A. I. R. 1928 Cal. 83 (F.B.).]



prepared to conduct the case for the accused in the circumstances, the accused was asked to cross-examine Major Hodge. He refused or was unable to put to Major Hodge any relevant questions in cross-examination. The jury after listening to Major Hodge's evidence were unanimously of opinion that the accused was capable of making his defence and of standing his trial. The learned Judge agreed with and accepted the verdict of the jury on this point and it was directed that the case should proceed. It then became necessary to consider whether steps should not be taken to secure the representation of the accused by a legal adviser. The learned Judge in his order-sheet observed as follows.

"In the present case the accused was represented in the Committing Court by Babu Jogendra Chandra Dutta. Three lists of witnesses were filed for him after the commitment. He was represented in this Court by Babu Rama Prosanna Singha who, on 5th June 1923, filed an application for adjournment on his behalf. At the time of hearing, Babu Rama Prosanna Singha intimates that he is a junior only in this case and is not prepared to prosecute the defence as he has not acquainted himself with the brief, and that his senior is Babu Jogendra Chandra Dutta. No power for this pleader has been filed in the Sessions Court, but none is apparently necessary. I see no reason to disbelieve Babu Rama Prosanna Singha. If what he says is true, legal advice was retained for the accused and I cannot find that he is unable to afford to employ counsel for his defence. I am prepared to certify in the circumstances that the accused can afford to engage lawyers for his defence. At the same time the rules do not appear to take away my discretion to require the accused to be represented for the ends of justice. In the present case I am clearly of opinion that he should be represented because there is already on the record evidence that the plea of insanity suggested in the lower Court is a genuine plea and I hold it to be essential in the interests of justice to determine the fact of the accused's sanity at the time of the crime. A large number of witnesses have been cited for the defence and their evidence cannot be elicited satisfactorily without great waste of time unless a pleader appears for the accused. The District Magistrate will therefore be requested to arrange as early as possible for the representation of the accused. Meantime the witnesses for the prosecution will be examined and the accused will be given an opportunity to cross-examine them. If he applies for their recall for further cross-examination after the appointment of a representative they will be recalled for further cross-examination."

It appears that thereafter the District Magistrate appointed Babu Mahim Chandra Guha, Vakil, of the Chittagong Bar, to defend the accused. Mr. Wilkinson,

the District Magistrate, in his affidavit filed in his Court states as follows :

"That it was on 12th June that I was asked by the Additional Sessions Judge to engage a pleader to defend the accused and that I thereupon selected Babu Mahim Chandra Guha, a leading pleader of this Bar and of the same calibre as the Government Pleader in order that the accused might be defended as ably and vigorously as possible."

But Mahim Chandra Guha appeared before the learned Additional Sessions Judge on 12th June, but as he had no previous instructions the learned Addl. Sessions Judge acceded to his request to allow him to take notes of the deposition of the prosecution witnesses who had been examined up to that date and to postpone their cross-examination till all the prosecution witnesses had been examined and then to begin the cross-examination from the next day, i. e., 13th June 1928. On 13th June Babu Jogendra Chandra Dutta of the Comilla Bar appeared for the accused before the learned Additional Sessions Judge but he said that he would refuse to act as junior to the vakil appointed by the Crown for the defence of the accused. There was some discussion about the power which Babu Jogendra Chandra Dutta had from the accused. The facts will be found set out in the learned Additional Sessions Judge's order dated 13th June 1928 in the order-sheet. In the end, the learned Addl. Sessions Judge came to the conclusion that the trial should proceed and that in the circumstances the accused should be represented by the vakil appointed by the District Magistrate, i. e., Babu Mahim Chandra Guha.

It appears that thereafter all the prosecution witnesses were cross-examined by Babu Mahim Chandra Guha and that 29 witnesses for the defence were examined by him. Major Hodge, the Civil Surgeon, who had the prisoner under his observation since 4th May and who had given evidence before the learned Sessions Judge on 11th June 1928, was not cross-examined by Babu Mahim Chandra Guha apparently because of the fact that according to him, Major Hodge's opinion on the question of insanity was not unfavourable to the accused.

The accused has been defended before us by a very able Advocate Mr. A. K. Fazlul Huq. If we may say so, the accused's case could not have been in better hands, Mr. Fazlul Huq has argued that there



has been no proper trial in this case and that, in the circumstances which have happened, our obvious course is to set aside the verdict of the jury and the sentence passed on the accused and to direct a retrial. Mr. Huq's point is that at the time when the jury were empanelled the accused was unrepresented and that the jurors not having been challenged the constitution of the jury was not in accordance with law. Mr. Huq has further argued that the learned Additional Sessions Judge was wrong having regard to the provisions of S. 340, Criminal P. C., in not allowing Babu Jogendra Chandra Dutta to conduct the defence on behalf of the accused when he appeared in Court on 13th June 1928 and that the trial was vitiated thereby. Mr. Huq has also argued that Major Hodge, the Civil Surgeon, not having been recalled for cross-examination on behalf of the accused, his evidence should go out of the record altogether and that that in itself is a sufficient circumstance, justifying his prayer for a retrial of the accused.

Before I proceed further into the merits I propose to dispose of the three points taken by Mr. Fazlul Huq and indicated as above.

In my opinion it is not correct to say that on 11th June 1928 the accused was wholly unrepresented. As will appear from the order-sheet, Babu Rama Prosanna Singha, pleader, who had been engaged on behalf of the accused, was present in Court. Apparently there was another gentleman who was his senior who had also been engaged on behalf of the defence but he was absent. It was open to the defence to challenge the jurors as their names were called out but Babu Rama Prosanna Singha did not challenge any body. He contented himself by saying that he was only a junior. In this proceeding I am not concerned with the conduct of Babu Rama Prosanna Singha or of his senior. The only question which is immediately before me is whether the constitution of the jury was in accordance with law. There can be no doubt, in my opinion, on the facts appearing on the record that the constitution of the jury cannot be assailed and that Mr. Fazlul Huq's first point must be decisively negatived. The duty of an advocate charged with the defence of a person accused of a very serious crime will be found dwelt upon by Lord Brougham in his celebrated

defence of Queen Caroline where the topic of fidelity to the client is exhaustively discussed. Entire devotion to the interests of the client, warm zeal in the maintenance and defence of his rights and the exercise of his utmost learning and ability, these are the points which can only satisfy the truly conscientious advocate. Every man accused of an offence has a constitutional right to a trial according to law and the duty of his counsel requires him to scan with legal knowledge the forms of the proceeding against the accused. (See in this connexion Professor Christian's note to 4 Blackstone's Commentaries, 356; Lord Erskine, 6 Campbell's Lives of the Lord Chancellors, page 361).

As regards Mr. Fazlul Huq's second point, there is no substance in it and it will appear from the record that there were justifiable grounds for coming to the conclusion that the absence of representation of the accused by legal advisers, the ineffective representation by them between the 11th and 13th June was part of a plan which had already been determined upon: See in this connexion the petitions put in on 5th and 11th June respectively. No exception can be taken to the conduct of Babu Mahim Chandra Guha for it is to be remembered that counsel assigned for the defence of an accused charged with the offence of murder cannot decline the office, nor can he abate a jot of his duty to the accused and to the Court, because of the querulous attitude taken by another counsel who is asked to associate himself with the counsel assigned to the accused: See per C. J. Hale 3 Campbell's Lives of the Lord Chief Justices 20; Sharswood's Professional Ethics, p. 92. I am satisfied that the learned Sessions Judge in the orders he passed on 13th June did not seek to interpose between the accused and his friends.

As regards Mr. Fazlul Huq's third point, I am satisfied from the affidavit of Babu Mahim Chandra Guha placed before us that in the circumstances of this particular case, no prejudice whatsoever has been caused to the accused by reason of the non-cross-examination of Major Hodge, the Civil Surgeon. The examination-in-chief of Major Hodge showed that his opinion was not hostile to the accused and I am not prepared to say that Babu Mahim Chandra Guha did not exercise a



wise discretion in not cross-examining Major Hodge. The object of cross-examination is not to produce startling effects but to elicit facts which will support the theory intended to be put forward. If the facts are already on record, the skilful cross-examiner knows when not to make an unskilful use of the right of cross-examination.

In this view of the matter, I must negative Mr. Fazlul Huq's plea for a retrial of the accused and I will now proceed to consider the other points urged by him. Mr. Fazlul Huq has argued that at the time when it was alleged that the accused had committed the crime in question he was of unsound mind and that his condition of mind was such as would bring him within the rule of law laid down in S. 84, I. P. C. He said that upon the evidence it might be perfectly clear that the accused was the man who had inflicted the fatal wound on Mr. Davies but the question of his culpability for the act which the accused committed had not been properly considered. The Civil Surgeon was examined before the Committing Magistrate and the Sessions Judge who asked him if the accused was in a fit condition of mind to stand the trial. But that did not prove that the accused had lapsed into sanity at the time of the alleged murder. The Civil Surgeon also said that he did not know the accused's past history. There was evidence that the accused thought himself to be a great poet, he had written cart-loads of poetry and thought that he was Byron, Shelly, and Wordsworth, that he lectured before imaginary audiences on every conceivable subject under the sun for several hours together every day. The opinion of the Civil Surgeon should have been asked as to what he thought of the man with such a history.

The law relating to the plea of insanity has been laid down by eminent Judges from time to time, but it may not be wholly out of place to state very briefly what I conceive to be the true position. It is for the jury to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong or under the influence of any delusion which rendered his mind at the moment insensible of the nature of the act he was about to commit—since in that case he would not be legally responsible for his

conduct. On the other hand provided the jury should be of opinion that when he committed the offence he was capable of distinguishing right from wrong and not under the influence of such a delusion as disabled him from discerning that he was doing a wrong act or one contrary to law, he would be amenable and held guilty in the eye of the law. In other words, to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act, the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong. If the accused was conscious that the act was one which he ought not to do and if that act was at the same time contrary to the law of the land, he is punishable. The standard to be applied is whether according to the ordinary standard adopted by reasonable men the act was right or wrong.

Once it is clear that the appellant knew that the act was wrong in law, then he was doing an act which he was conscious he ought not to do, and as it was against the law, it was punishable by law. It has also been said by a very high authority that one must see that the accused's disease of the mind was formed before the act was done. Any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong. The onus of proof where the plea of insanity is taken on behalf of the accused lies on him and it must be proved affirmatively that the accused was insane at the time when he committed the act in question. Uncontrollable impulse co-existing with the full possession of the reasoning powers is no defence in law nor is moral insanity i. e., existence of delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, any defence in law. It is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shown that the prisoner had no competent



use of his understanding so as to know that he was doing a wrong thing in the particular act in question. If there is evidence of premeditation and design or evidence that the prisoner after the act in question tried to resist arrest, the plea of insanity may be negatived. A prisoner trying to resist arrest after he had committed the act in question shows that he is well aware that he has committed an act which in law is criminal: per *Erle, C. J., R. v. Leigh* (1). It is a mistake to suppose that in order to satisfy a jury that the plea of insanity is well-founded, scientific evidence must be adduced. If the existence of facts is such as to indicate an unsound state of mind, that is quite sufficient: per *Brett, L. J., R. v. Dart* (2).

Bearing these principles in mind I have examined the record in this case minutely and I have not failed to keep ever present in my mind the terms of the verdict of the jury, of the judgment of the learned Sessions Judge and of his letter of reference to this Court. I am unable to come to the conclusion that the evidence on record discloses circumstances which would enable the accused to claim exemption under the provisions of S. 84, I. P. C. It is abundantly clear on the evidence on record that it was the accused who killed Mr. Davies and that there was premeditation and design on the part of the accused. Some evidence of the state of mind of the accused in 1924, 1925 and 1926 had been given which showed that he was of an eccentric character and had occasional delusions about his position and capacities. But what was his condition in 1928? He had come all the way from Tippera to Chittagong, written perfectly lucid letters, asked for an interview with Mr. Davies, went there correctly attired, and had taken the precaution of going there early in order to avoid the presence of other interviewers. When he was caught, he struggled. Six hours after the occurrence when the Committing Magistrate saw him and told him that if he made any statement to him (Magistrate) the same might be used against him (accused) the accused declined to make any statement. The accused had provided himself with a knife which was new: see the evidence on record, pp. 16, 19, 21, 22, 25 and 26. If as a matter of fact there was premedi-

tation and design, as we hold there was, the plea of insanity must at once be negatived. The accused cannot claim any exemption whatsoever under S. 84, I. P. C. Further, there is considerable evidence that immediately after the act in question there was a struggle between the accused and those who rushed up to him for the purpose of arresting him. The accused tried his best to resist arrest. He did not succeed because he was overpowered by the people who had assembled in the verandah of the Magistrate's bungalow. The fact that the accused tried to resist arrest shows unmistakably that he was well aware at the time that he had committed an act which in law was criminal. This circumstance would also show that the accused cannot claim any exemption under S. 84, I. P. C. The jury found that the accused cannot claim exemption under S. 84, I. P. C., an opinion with which the learned Judge agreed. Nothing has been shown to me which would justify me to take a different view. I am therefore constrained to hold that the accused has committed an act punishable under S. 302, I. P. C. It was argued before us that no motive is discernable on the record and that that lent considerable support to the plea of insanity. Now if the facts are clear so far as the act complained of is concerned the motive is irrelevant. If the facts are not clear, motive may explain what otherwise would be difficult of explanation. The want of motive for the commission of a crime and its being committed under circumstances which render detection inevitable are no doubt important points to be taken into consideration coupled with the other evidence on record bearing on the question of insanity. In my opinion it is not the law that because a horrible murder has been committed with no apparent motive, in circumstances as have been spoken to by the prosecution witnesses, one may conclude therefrom that the perpetrator of the deed in question must have been mad at the time.

The question now arises about the sentence which we should pass on the accused. There can be no doubt that he was not in a healthy state of mind for some considerable time before the date of the occurrence. His mind was one which had been morbidly affected. The evidence on record abundantly justifies that view and we are to a considerable extent

(1) [1866] 4 F. & F. 915.

(2) [1878] 13 Cox. C. C. 143.



fortified by the opinion of Major Hodge. On the question of sentence the learned Sessions Judge's opinion must carry great weight with us. In these circumstances, we think the ends of justice will be sufficiently met by our commuting the sentence of death passed on the accused to one of transportation for life. We direct accordingly.

**Jack, J.**—The appellant has been convicted of the murder of Mr. G. H. W. Davies, I. C. S., and sentenced to death.

The prosecution case is that on the morning of 20th April the appellant called on Mr. Davies and, at the close of an interview lasting about 10 or 15 minutes, stabbed him in the chest with a knife inflicting injuries of which Mr. Davies died in the course of a few minutes. No one was present at the time but, hearing the noise caused by Mr. Davies falling and crying out, Mahendra Lal Sarkar Nazir and Kala Mian, orderly, who were in the verandah attached to the office room where this took place, rushed into the room followed by others. They saw the appellant withdrawing a knife from Mr. Davies' chest and then inflicting another wound on his leg as he lay on the floor helpless but kicking out with his legs. The Nazir seized the appellant from behind and Kala Mian then snatched from him this knife Ex. 1.

That the appellant stabbed Mr. Davies with a knife and so caused his death is not now disputed. It is merely urged that he did not use the knife Ex. 1 to which a price label is attached showing that it was newly purchased. This suggestion loses all force in so far as it is intended to negative premeditation, when we find that during the course of the examination of the prosecution witnesses, the accused stated that his knife had no price ticket, he had removed it the night before. This statement shows that, in any case, he brought a knife with him. Moreover there is overwhelming evidence that Ex. 1 is the knife actually taken from the hand of the accused at the time.

It is admitted that the learned Judge's summing up was eminently fair but it is urged on behalf of the appellant that he was not properly represented at the trial inasmuch as the learned Judge refused to allow the pleader engaged by the appellant's brother, to defend the appellant. The order on the order-sheet dated 13th June 1928 shows that, in fact, the

learned Judge refused to allow Babu Jogendra Dutta to appear for the accused on that date without a power from the accused whom the jury had found to be capable of defending himself and as the pleader refused to certify that he was satisfied that the accused had validly executed a power. Whatever may have been the propriety of this order, a perusal of the affidavit filed by the defence pleader Babu Mohim Chandra Guha Dey Barma (one of the leaders of the Chittagong Bar) shows that there is no substance in this objection to the manner in which the trial was conducted. On the first day of the trial, viz., 11 June Babu Rama Pd. Singha intimated to the Court that he had received a power from the accused and that a senior was also engaged under whom he was retained, but that he had no instructions and that his senior had instructed him that if the trial were taken up that day the accused was to be undefended. Thereupon Mahim Babu was appointed by the District Magistrate to defend the accused.

It is urged that the accused was prejudiced inasmuch as Major V. S. C. Hodge, the Civil Surgeon was not recalled for examination after he had had the past history of the accused put before him as detailed by the witnesses. However, in the affidavit referred to above, it is explained that Major V. S. C. Hodge was not recalled because his evidence as it stood was very favourable to the accused, and that Mahim Babu's decision not to examine him again was entirely approved by the relatives of the accused. It is significant that in the very detailed and elaborate petition of appeal filed by the appellant there is no suggestion that the appellant was in any way prejudiced by the District Magistrate's appointment of a pleader to defend him, on the contrary he candidly admits that the vakil did whatever lay in his power, and further makes no complaint regarding the non-appearance of Babu Jogendra Dutta.

But in any case these preliminary points need not be considered as the learned advocate for the appellant does not press them in view of the order which we propose to pass.

The only question which remains to be considered is whether, at the time he stabbed Mr. Davies, the appellant was, in the words of S. 84, I. P. C. by reason of unsoundness of mind, incapable



of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

There is evidence indicating that since 1925, the appellant used at times to talk incoherently and to himself. In 1926 he claimed at different times to be (or to have received the titles) Shelley, Wordsworth, Byron, and Iman Mahdi. Then in 1927 we find him writing the incoherent and unintelligible letters Ex. D, Ex. D/1, Exs. E and E/1 which certainly indicate a disordered mind.

On the day before the occurrence he wrote the letter Ex. 18, which, though indicating a weak intellect and wandering mind, is quite intelligible. Finally just before the occurrence he sent in his card to Mr. Davies inscribed :

"Kazi Bazlur Rahman—I have got title Byron Lord and student Oxford University, England."

It is clear therefore that up to the time of the occurrence he was more or less mentally unsound. Notwithstanding this, his conduct up to the time of the occurrence and the evidence of the Post Master and other witnesses regarding his enquiries on the previous day about the non-delivery report of a telegram, shows that he was quite capable of transacting business intelligently.

The evidence of Mr. Siddique Rahman, Public Prosecutor, Comilla, throws some light on the object of his visit to Mr. Davies. Eight or ten days before the occurrence he wanted to see the District Magistrate at Comilla in connexion with some previous correspondence (cf. Ex. D and Ex. D/1) and Mr. Siddique Rahman told him that, Mr. Nelson, the Magistrate with whom he had corresponded was no longer there. He then said that he would go to see the Commissioner at Chittagong if his case had been transferred there. He further made a parade of his poetic powers referring to Byron, Shelly and Wordsworth and said he had heard that Mr. Nelson talked very highly of his diction and language and he had wanted to pay his respects to him. In the correspondence referred to (Ex. D and D. 1), so far as it conveys any sense at all, he complains of domestic troubles and that his wife had been hypnotizing him, also he wants to be recognized as a great poet and to be permitted to go to College. On the day before the occurrence as the evidence of the Post Master

and Station Master shows he had wired to his uncle for Rs. 3,000 and was agitated because no reply had come; he wanted also a passport to go to England. On Mr. Davies' table were found five note books of the accused containing unintelligible poetry and the inference is that the appellant wanted recognition of his poetic powers and some facilities for going to College in England. There is evidence showing that at times the appellant acted violently when opposed e. g. when witness Hosani (D. W. 18) pressed the appellant to take medicine the latter gave him a kick on the chest and knocked him down. Again Amir Hossen (D. W. 24) says the appellant used at times to get furious with people who tried to remonstrate with him and when urged to take food would beat those who approached him. We can only conjecture what took place at the interview with Mr. Davies. It was just after Mr. Davies had concluded the interview by saying "good morning" that the appellant stabbed him. There is no evidence as to motive but on the one hand it seems possible that the appellant was exasperated by not getting what he wanted or again it may be that the apparently morbid condition of his brain had produced a grave craving for relief by some such passionate action.

Whatever may be the explanation of his cruel and apparently unprovoked attack there are circumstances which seem to indicate that the appellant realized at the time what he was doing and that he was doing wrong. When Kala Mian went to seize him the appellant threatened to stab him. Again Kader Bux (P. W. 4) says the appellant struggled to escape when seized and this seems to be corroborated by the fact that he received slight injuries which the doctor says might have been caused by a struggle. When questioned few hours later by the Magistrate and told that any statement he made would be used in evidence he said that, if his statements were to be used against him, he would not make a statement. His purchase of the knife of this unusual description and bringing it with him probably indicates premeditation and, in any case, since he must have opened it (and its hinge is quite stiff) before stabbing Mr. Davies there was at least some deliberation. Finally his statements show that he remembers



clearly the circumstances in which he stabbed Mr. Davies and, altogether, the facts are clearly incompatible with the theory that he did not know the nature of the act. The Civil Surgeon who had the appellant under observation from 4th May up to the time of his trial gave his opinion that he was of unsound mind during that period. He added however:

"As far as I can judge his cognitive faculties are all right. His knowing and perceiving are correct, but his power of conceiving must be to some extent 'biased' if his delusions are genuine . . . . there is that in his behaviour and in his physical condition which suggest that his nervous system is unbalanced."

As to his mental condition subsequent to the occurrence we have also the appellant's post card (Ex. 6) written in the jail two days after the occurrence. Apart from bad English this does not necessarily indicate an unsound mind and a post card (Ex. 5) written two days later is quite sensible and shows that, whatever delusions he suffered from, he quite realized his position. The same applies to another post card (Ex. 3) written a fortnight later.

Taking all the circumstances leading up to and connected with the occurrence into account, there can, to my mind, be no doubt that the appellant has failed to show, at the time he fatally stabbed Mr. Davies, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was wrong or contrary to law. He cannot therefore claim exemption from criminal liability under S. 84, I. P. C. The weapon employed, an unusually large and heavy clasp knife, pointed like a dagger, the force used, which was sufficient to cut through a rib, the accuracy with which the blow penetrated the heart and the second blow all show that the appellant must have deliberately intended to kill Mr. Davies; he has therefore been rightly convicted of murder. There remains the question of sentence. On the evidence there can be no doubt that the learned Judge is correct in his opinion that the appellant was of unsound mind at the time of committing the offence. The six jurors who were of opinion that he was not of unsound mind must have thought that he was feigning insanity, but the apparent absence of motive and many other circumstances indicate that this cannot have been the

case. The learned Judge seems to have thought that he was bound by this finding of the jury to pass a capital sentence. This is not so, and though the appellant is guilty of an atrocious and dastardly murder, in view of the evidence as to his mental condition at the time, and particularly the evidence of the Civil Surgeon, I think that this is a case in which a sentence of transportation for life will meet the ends of justice.

The appeal is dismissed except that the sentence of death on the appellant is commuted to a sentence of transportation for life.

D.B./R.K.

*Appeal dismissed.*

### \* A. I. R. 1929 Calcutta 11

B. B. GHOSE AND BOSE, JJ.

*Utanka Lal Mookerji*—Appellant.

v.

*Tarak Nath Seal and others*—Respondents.

Appeal No. 198 of 1926, Decided on 15th August 1928, from original decree of Sub-Judge, Burdwan, D/- 11th August 1926.

\* (a) Civil P. C., O. 30, R. 4—Suit by a firm—Death of one partner—Representation is not necessary—Suit does not abate—Civil P. C., O. 22, R. 1.

Where a suit is brought by a firm and one of the members dies during the pendency of the suit, it would not be necessary to join the legal representatives of the deceased as party to the suit and therefore there can be no abatement of the suit: 17 C. L. J. 648, *Foll.*

[P 12 C 2]

(b) Civil P. C., O. 34, R. 5 — Instalment compromise decree is not preliminary decree—Compromise decree puts end to mortgage suit—Application for final decree under compromise is not one under R. 5.

A compromise decree in a mortgage suit in which the decretal amount is payable by instalments according to the agreement between the parties is not a preliminary decree. The compromise decree puts an end to the suit. Therefore although under the terms of the compromise the decree-holder is bound to make the application for a final decree, that would not be an application falling under O. 34, R. 5: A. I. R. 1923 Cal. 626 and A. I. R. 1927 All. 67 (F.B.), *Foll.*: A. I. R. 1924 Cal. 645, *Dist.*

[P 12 C 2, P 14 C 1]

(c) Legal Practitioner—Delivery of vakalatnama by gumasta is sufficient authority—Civil P. C., O. 3, R. 1.

Where a pleader is satisfied that a gumasta is authorized to deliver the vakalatnama signed by the party and accepts it, it is a sufficient authority for him to act on behalf of the party.

[P 13 C 1]



*Gunada Charan Sen, Kanai Dhone Dutt and Mritunjoy Dey*—for Appellant.

*Sarat Chandra Bose and Narendra Krishna Bose*—for Respondent.

**B. B. Ghose, J.**—This appeal arises out of a final decree made by the Subordinate Judge in a suit on a mortgage. The appeal is by the defendant. The mortgage suit was settled between the parties by a compromise and what is said to be the preliminary decree was passed on 26th May 1916. In that decree it was provided amongst other things that the appellant should pay the decretal amount to the extent of Rs. 12,500 within 15 days of the decree and the remainder Rs. 11,500 in certain instalments spreading over several years. The last instalment was said to be payable on 30th Baisakh 1333 B. S. There was a further stipulation that in default of payment of two instalments the whole amount of the balance then remaining due would at once be recoverable. It was stipulated that the mortgage lien would remain intact and the plaintiffs would be entitled to execute the decree by obtaining a final decree with reference to their dues still remaining unpaid. One of the persons named Kali Prosanna Seal who was entitled to the decretal money died on 15th February 1922. The instalments were paid up upto 1329. Default was made of the instalment payable in 1330. Thereupon the plaintiffs made an application for the final decree according to the terms of the compromise. The objection on behalf of the defendant was that the suit had abated and, therefore, the plaintiffs were not entitled to a final decree as prayed for. An application was made for substitution of the legal representative of the deceased person Kali Prosanna Seal by a petition which was filed on 7th June 1923. The petition was alleged to be a joint petition by Tarak Nath Seal, the legal representative of the deceased Kali Prosanna and of the defendant the appellant before us. In that petition it was stated that the amount of Rs. 1700 payable for the Baisakh kist of 1329 was received by Tarak Nath Seal and the prayer was that Tarak Nath Seal might be substituted in the place of his father and the payment of Rs. 1700 recorded. The plaintiffs admitted that payment and, therefore, their contention before the Subordinate Judge was that although there

was no order substituting the representative of the deceased plaintiff on the record made by the Court, as a matter of fact, by consent of parties he was substituted. There was also an objection raised by the defendant that the application was barred by limitation. The Subordinate Judge rejected the plea of limitation. He, however, held that there was abatement of the suit so far as the share of Kali Prosanna Seal was concerned. In that view he made a final decree for half of the amount due under the compromise to which sum the surviving plaintiffs were entitled according to his view, and he also held that a half of the properties would be liable under the final decree.

Defendant 1 has appealed from that judgment and decree of the Subordinate Judge and the plaintiffs have preferred a cross-objection against that part of the decree which is against them. On behalf of the defendant it is urged that the mortgage decree is one and indivisible and if the suit fails so far as one of the mortgagees is concerned the whole suit abates. The decree made by the Subordinate Judge therefore cannot be maintained. It is contended on behalf of the respondents that the whole question that was discussed by the Subordinate Judge was irrelevant. The fact was that the suit was brought by a firm. The compromise decree was with the firm and, therefore, under O. 30, R. 4, Civil P. C., if one of the persons who was a member of the Firm died during the pendency of the suit it would not be necessary to join the legal representative of the deceased as a party to the suit; and therefore assuming that the suit was a pending suit after the compromise decree there is no question of abatement on account of the death of Kali Prosanna Seal. It is further contended that it is not a case in which the decree was made under O. 34, R. 4, Civil P. C. It was a compromise decree in which according to the agreement between the parties the decretal amount was made payable by instalments spreading over a large number of years. Although there was a stipulation that on failure of payment of two instalments the decreeholders would be entitled to apply for a final decree being made, that application could not be an application under O. 34, R. 5, Civil P. C. The compromise between the parties took the case quite out of the provisions of O. 34, Civil P. C.



And therefore the plea that the suit abated on the death of one of the partners of the firm cannot be maintained. This argument of the respondents covers both the appeal as well the cross-objection preferred by them. It was further urged that the Subordinate Judge had on insufficient grounds rejected the contention of the plaintiffs that the application for substitution of the legal representative of Kali Prosanna Seal was jointly made by Tarak Nath Seal, the representative as well as the defendant.

The last point is quite a short one and may be disposed of in a few words. It appears that the vakalatnama which bears the signature of defendant 1 was tendered to a pleader named Panchanan Mukerji by a gomasta of Utankalal Mukerji, the defendant. On the margin of the vakalatnama it is written that

"this vakalatnama is presented through me on behalf of the defendants. Finis 6th June 1923."

The signature is of Madhob Chandra Sinha, gomasta. The endorsement on the vakalatnama is :

"Received from Madhob Chandra Sinha, agent for the executant and I am satisfied that he has authority to deliver this vakalatnama to me and accepted. (Sd.) Panchanan Mukerji, pleader."

The petition was filed on the strength of this vakalatnama. The Subordinate Judge observes with reference to this matter as follows:

"The pleader's endorsement on the vakalatnama shows that he received it from a servant of the defendant but he does not mention any written authority of the servant in this behalf. So this application cannot be taken as a consent of the defendant to the substitution of Tarak or to the setting aside of the abatement. Moreover, this application was dismissed by the Court as the applicants did not comply with the Court's order for payment of process fees for service of notice on the parties."

With regard to this matter it seems to me that the Subordinate Judge held that the application could not be taken as made with the consent of the defendant on very insufficient grounds. Defendant 1 of course says that he did not authorize his gomasta to present the vakalatnama. The mere fact that the pleader does not mention that there was written authority does not go against the authority given to him by the vakalatnama. It was the duty of the pleader to satisfy himself as to the authority of the person who presented the vakalatnama and he stated that he was satisfied that

the gomasta had authority to deliver the vakalatnama to him. The pleader has not been examined by the defendant nor has the gomasta been examined. Under such circumstances it cannot be supposed that this vakalatnama and the petition were filed without the authority of defendant 1. Moreover in the petition, receipt of Rs. 1700 from defendant 1 is admitted which is adopted by the other plaintiffs as having been received by them. It can hardly be supposed that the admission was made by the legal representative of Kali Prosanna Seal of having received Rs. 1,700 without the knowledge or consent of the defendant or his agent. Then with regard to the fact about the dismissal of the petition there was no other person on whom it was necessary to serve notice for the substitution. Defendant 1 was the only defendant who was liable under the decree and the other persons concerned were the plaintiffs. So it is difficult to understand what procedure was followed by the Subordinate Judge in dismissing such an application as that.

The most important point, however, in the case is the first point raised on behalf of the respondents. The point as I have already stated was by the proprietors of the firm under the name and style of late Nitai Charan Seal and Kali Prosanna Seal situated at 41, Moirahatta Street, Calcutta. After that the names of the proprietors are given. Under O. 30, R. 4, Civil P. C. to which reference has already been made, where two or more persons sue in the name of a firm, if any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. Now assuming that the suit was pending after the compromise decree as if it was a continuing suit under O. 34, Civil P. C. Under this rule it is not necessary to join the legal representative of the deceased Kali Prosanna Seal as a party in order to have a final decree made. It is argued on behalf of the appellant by reference to R. 2, sub-R. (3) of O. 30, that where the names of the partners are declared the provisions of O. 22 cannot be said to be inapplicable. Reference is made to the concluding words of the sub-rule which run thus :

"The suit shall proceed in the same manner and the same consequence in all respects shall



ollow as if they had been named as plaintiffs in the plaint."

But there is a proviso which follows the sub-rule which says :

"Provided that all the proceedings shall nevertheless continue in the name of the firm."

This sub-rule in no way contradicts the provisions of R. 4 where the words are :

"Where two or more persons may sue in the name of a firm."

In this case two or more persons have sued in the name of the firm. There is nothing therefore which prevents the operation of R. 4, and in that view it was not at all necessary that there should be any substitution of the legal representative of the deceased Kali Prosanna Seal in order to entitle the plaintiffs to obtain a final decree. Reference has been made by the respondents to the case of *Bal Kissan Das Daga v. Knahya Lal* (1), which is quite in accordance with the provisions of this rule.

The next point urged is that the compromise decree is not a preliminary decree under O. 34, R. 4, Civil P. C. and therefore after the compromise decree the suit could not be considered as a pending suit. It has been settled in this Court by a long series of cases that a compromise decree in a mortgage suit in which the decretal amount is payable by instalments according to the agreement between the parties is not a preliminary decree as contemplated by R. 4, O. 34. The earliest case that may be referred to on that point is the case of *Abir Pramanik v. Jahar Mohammed* (2), and the latest case is that of *Hemendra Lal v. Fakir Chandra* (3). This principle has also been laid down in the Full Bench case of the Allahabad High Court in *Askari Hasan v. Jahan-giri Mal* (4). In that view it may very well be said that the compromise decree put an end to the suit. Although under the terms of the compromise the decree-holder was bound to make an application for a final decree, that application would not be an application falling strictly under O. 34, R. 5, Civil P. C. As there was no suit pending in the Court there was no reason for applying for substitution of the heirs of the deceased person Kali Prosanna Seal. But it would be sufficient if the application was made by the persons entitled to do so under the decree

at the time when the application was made, if the application was made within the period of limitation. The appellant relied upon the case of *Kashi Chandra v. Priya Nath Bakshi* (5) in support of his contention that it was incumbent upon the plaintiffs to have the final decree made in terms of the compromise. But in that case it has been clearly laid down that the obligation to have a final decree was based upon the terms of the compromise and it was not an application under O. 34, R. 5. This contention of the respondents also seems to me to be quite substantial and in my judgment it is right. In this view it is not necessary for me to consider in this case whether a suit in which a preliminary decree has been passed abates if one of the parties dies and no substitution is made within the period of limitation under O. 22, Civil P. C. The only observation that I think it necessary to make is that this point requires consideration in a proper case, as it would be very inconvenient if after the preliminary decree all persons who are parties to the suit are required to be on the alert to see whether any of the decree-holders or judgment-debtors under the preliminary decree dies before the application for the final decree is made.

In my opinion this appeal should be dismissed with costs and the cross-objection allowed with costs. The hearing fee for the appeal as well as the cross-objection is fixed at 500 Rupees altogether.

**Bose, J.**—I agree.

W.S./R.K.

*Appeal dismissed.*

*Cross-objection allowed.*

(5) A. I. R. 1924 Cal. 645.

### \* A. I. R. 1929 Calcutta 14

CUMING AND LORT-WILLIAMS, JJ.

*Gour Chandra Das and another*—Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeals Nos. 802 and 823 of 1927, Decided on 23rd April 1928, from order of Spl. Tribunal, appointed under Bengal Criminal Law Amendment Act, 1925.

(a) Evidence Act, S. 30—"Same offence" means identical offence and not offence of same kind.

The expression "same offence" in S. 30 means the identical offence and does not mean

(1) [1913] 17 C. L. J. 648=21 I. C. 503.

(2) [1907] 34 Cal. 886=6 C. L. J. 95=11 C. W. N. 879.

(3) A. I. R. 1923 Cal. 626=50 Cal. 650.

(4) A. I. R. 1927 All. 167=49 All. 297 (F.B.).



an offence of the same kind. The legislature did not intend the section to cover different offences in the same transaction by different persons. The illustration to S. 30 makes the meaning of the section quite clear. [P 16 C 1]

**\* (b) Evidence Act, S. 30—There is no distinction between retracted and unretracted confession—Both are equally admissible.**

The Evidence Act makes no distinction whatever between a retracted or unretracted confession. Both are equally admissible and may be taken into consideration against the accused though it may be that less weight would be attached to a retracted confession.

[P 16 C 2]

**\* (c) Penal Code, S. 120-B—S keeping bombs and pistol and subsequently making them over to G—Bombs and pistol discovered at G's house and both G and S arrested—Statement made by G and S containing nothing to show that the articles were to be used for innocent purposes—There must have been an agreement to keep the articles for endangering life and hence there was conspiracy.**

One S kept a bomb, pistol and cotton wool for some three months in his possession and then for fear of the police made them over to one G. The bomb and pistols were subsequently discovered at G's house and both G and S were arrested. There was nothing in their statements to show that the bombs and pistols were to be used for any innocent purpose.

*Held:* that even if G knew nothing about the possession of these things by S before they were made over to him, it is quite clear that from the moment that these things were made over by S to G, there was an agreement between these two persons to keep the bombs, pistol and gun cotton and to keep them for the purposes described in sub-S. 4 (b), Explosive Substances Act, namely, with intent either themselves to endanger or to enable other persons by means of them to endanger life. The charge under S. 120-B had therefore been clearly brought home to both the persons. [P 17 C 1]

*Mrityunjoy Chattopadhyaya, Sachindra Nath Banerji, Sitanga Bhusan Bose and Bhusan Dutt*—for Appellants.

*Khundkar and Debendra Narayan Bhattacharji*—for the Crown.

**Cuming, J.**—These are the appeals of of two persons Gour Chandra Das and Satish Chandra Dang. The two appellants were tried by a Special Tribunal appointed under Bengal Criminal Law Amendment Act, 1925 on charges under S. 120-B, I. P. C. of conspiring to commit offences punishable under S. 4-B and S. 5, Explosive Substances Act and also under S. 19-F, Indian Arms Act and also on substantive charges under the same sections and were sentenced to various terms of imprisonment on these charges.

The facts of the case are briefly these: the police in consequence of certain in-

formation received searched the house of Gour Chandra Das at 191, Babudanga Road on the early morning on 27th August when certain articles which the prosecution contend were bombs and pistols were discovered. Gour Chandra made a statement as the result of which the house of Satish Chandra Dang at 15, Kaldanga lane was also searched and Satish Chandra Dang was arrested. Satish also made certain statements. The result was that the two persons were put upon their trial as stated above. Gour Chandra pleaded not guilty to a conspiracy to commit offences punishable under S. 4-B, S. 5, Explosive Substances Act and under S. 19-F, Arms Act, and pleaded guilty to the other charges. Satish pleaded not guilty to all the charges.

The main evidence which may be considered as practically the whole evidence in the case is the statements of the two accused persons and also the finding of the articles in Gour Chandra's house.

The first point that has been taken is that the trial was bad for misjoinder, at any rate so far as regards the substantive charge of being in possession of explosive articles and being in possession of the pistol. The case on this point is that Satis was in possession of the articles in his own house during April while Gour Chandra was in possession of the same articles at a different place and at a different time. Hence the offences were separate and could not be tried together. The short answer to this contention is that it would appear on a consideration of the whole case that the prosecution case was that the possession of these articles at different places at different times by different persons formed part of the same transaction.

The next point that has been urged on behalf of Satish is that the charge as to the possession of bombs in both cases viz., the case against himself and also Gour Chandra related to the same bombs and that Satish understood that he was charged with being in possession of the bombs and pistol which were found in possession of Gour. It has been contended that there is nothing to show and that the prosecution have failed to prove that the bomb or bombs kept by Satish were the same bombs as were found with Gour. It has been contended on behalf of Satish that he was not charged with being in possession of bombs generally but of those



specific bombs. I think it is quite clear, if I understand the Crown rightly, and it was not seriously contended that it was not the case of the Crown in the trial Court that Satish had been in possession of the identically same bombs that were found in the possession of Gour. This, I think, is quite clear from the fact that Satish was charged with being in possession of 11 bombs. Now it was the case for the Crown that 11 bombs were found in possession of Gour Chandra. Satish himself in his statement merely states that he was in possession of bomb without giving any number. It is then argued that the only evidence to show that they were the same bombs is the confession of Gour who stated that he had received the bombs found in his possession from Satish. The question then remains as to whether the confession of Gour can be used against Satish so far as the charges of being in possession of bombs and pistol are concerned. So far as the charges against Satish of being in possession of bombs and pistol are concerned Satish was no doubt being tried jointly with Gour Chandra on other charges. But Gour was not being tried on a charge of being in possession of explosives and arms at Kaldanga lane between April and May. Only Satish was being tried on those particular charges. So far therefore as the charges against Satish under heads 2, 3 and 4 are concerned Gour and Satish were not being tried jointly for the same offence. The expression "same offence" in S. 30, Evidence Act means, in my opinion, the identical offence and does not mean an offence of the same kind. If the legislature had intended the section to cover different offences in the same transaction by different persons it would have said so. The illustration to S. 30 which was added in 1891 makes the meaning of the section quite clear in my mind. The charges under headings 2, 3 and 4 related to the articles found in the house of Gour. There is no evidence to show that they were in the possession of Satish if the confession of Gour is excluded. Satish therefore must be acquitted on charges 2, 3 and 4.

It has further been urged that Gour's confession is not a confession but only a self-exculpatory statement and so not admissible and cannot be taken into consideration as against Satish. It is, I

think, sufficient to read the statement of Gour to dispose of this objection. It is quite clear from a perusal of Gour's statement that he implicates himself equally with Satish.

It has next been argued that Gour retracted his confession and, therefore, it cannot be taken into consideration against his co-accused Satish. I am not aware that the Evidence Act makes any distinction whatever between a retracted or unretracted confession. Both are equally admissible and may be taken into consideration against the accused though it may be that less weight would be attached to a retracted confession. This, however, is not a question of admissibility but a question of weight to be attached to the confession which will depend to a great extent on the confession itself and the intrinsic evidence which may or may not be found in the confession showing that it was genuine.

Then it has been argued that Gour pleaded guilty to charges 2, 3 and 4 and so far as they were concerned he was no longer being tried jointly with the accused Satish. No doubt it is correct to say that Gour was not being tried jointly with Satish on those three charges. The point is not, however, of any importance, because I have already held so far as regards charges 2, 3 and 4 against Satish, the confession was inadmissible and Satish has been acquitted on these charges. But Gour pleaded not guilty to the charges of conspiracy to commit offences under S. 4-B and S. 5, Explosive Substances Act, and S. 19-F, Arms Act, and on this charge he was being tried jointly with Satish. As it was the same offence the confession of Satish was admissible against Gour and that of Gour against Satish and could be taken into consideration so far as this charge is concerned.

I now have to consider whether the charge of conspiracy to commit the offences has been proved against the appellants. The evidence against these two appellants is their two confessions and the finding of an article in Gour's house. I see no reason to think that these confessions were not genuine and voluntary looking at the circumstances and the confessions themselves. There is internal evidence in the confession of Satish as has been pointed out by the learned Commissioners to show that it was his own untu-



tored statement. It is suggested that it was a tutored confession put into his mouth by the police. In his confession we find these statements "I did not do the moulding" and "I do not know the work of moulding." As the learned Commissioners have pointed out, had this confession been a tutored one it is unlikely that we should find those two statements in it. After a careful consideration of the evidence I am of opinion that the confessions of both these appellants are genuine and voluntary.

The question that now remains is whether these two confessions and the finding of bombs and pistols in the house of Gour are sufficient to establish that there was a conspiracy between these two persons. As has been pointed out in numerous cases direct evidence of conspiracy will seldom be forthcoming and it is necessary to look at the circumstances to see whether the conspiracy actually existed. Satish on his own statement kept the bomb, pistol and cotton wool for some three months in his possession and then for fear of the police made them over to Gour. If he was not keeping the bomb and pistol for some unlawful purpose where was the fear of the police. Then it will be found he made these things over to Gour. Surely Gour must have asked why he was making over these things to him. That is a fact that requires some explanation. Neither Gour nor Satish would seem to suggest in either of their statements that the bombs and pistols were to be used for any innocent purpose. Nor has it been suggested to us that the bombs could be used for any innocent purpose. Even if Gour knew nothing about the possession of these things by Satish before they were made over to him I think it is quite clear that from the moment that these things were made over by Satish to Gour there was an agreement between these two persons to keep the bombs, pistol and gun cotton and to keep them for the purposes described in sub-S. 4 (b), Explosive Substances Act, namely, with intent either themselves to endanger or to enable other persons by means of them to endanger life. I am therefore of opinion that the charge under S. 120-B, I. P. C. has been clearly brought home to both the appellants.

With regard to charges 2, 3 and 4 against Gour he pleaded guilty and it

has not been shown that he did not understand what he was doing. Gour is a person of education and not merely an ignorant or illiterate person. So far as Satish is concerned he is acquitted on charges 2, 3 and 4. But his conviction and also that of Gour under S. 120-B, I. P. C. and the sentence passed against both the appellants under that section must stand.

We have been addressed on the question of sentence. The sentence, no doubt, is a heavy one, possibly these young men were dupes of some other persons who have kept themselves in the back ground. But the offence is a most serious one and in view of the extremely serious nature of the offence we are not prepared to interfere with the sentence.

With the modification stated above in Appeal No. 823 both the appeals are dismissed.

**Lort-Williams, J.**—I agree generally with the conclusion to which my learned brother has come. I should have thought that a charge of being in possession of 11 bombs on a particular date would have been sufficiently proved if evidence were given of less than 11 bombs being in the possession of the accused irrespective of the course which the prosecution took. I do not, however, think it necessary to disagree upon this point.

D.B./R.K.

*Appeals dismissed.*

### \* A. I. R. 1929 Calcutta 17

MUKERJI AND JACK, JJ.

*Sourendra Nath Mitra*—Defendant—Petitioner.

v.

*Jatindra Nath Ghose and another* — Plaintiffs—Opposite Parties.

Civil Rule No. 161 of 1928, Decided on 25th April 1928, from order of Sub-Judge, Backergunge, D/- 22nd September 1927, in Misc. Case No. 28 of 1926.

(a) Civil P. C., O. 9, R. 9—R. 9 does not apply to restore an application under R. 9.

Where an application under R. 9 to restore a suit is dismissed for default there can be no application under R. 9 to restore such application. [P 18 C 2]

\* (b) Civil P. C., O. 47, R. 1 — Suit in forma pauperis dismissed for default—Application, under S. 151 to restore case, dismissed holding S. 151 inapplicable — Petitioner applying under S. 115—Refusal to revise does not imply approval as to inappli-



**ability of S. 151—Acceptance of application for review is not without jurisdiction.**

A suit in forma pauperis was dismissed for default. The plaintiff applied under S. 151 to restore the case. The application was dismissed, the Judge holding that S. 151 was inapplicable. The plaintiff then applied to the High Court for revision of this order. The High Court refused to interfere with order of the lower Court. The plaintiff ultimately applied to the lower Court for review of the order under O. 47, R. 1.

*Held* : that the refusal to revise the order of the lower Court did not imply approval of the view of that Court as to the inapplicability of S. 151 to the case, and that the mere fact that the plaintiff was unsuccessful in revision does not prevent him from applying for review and an acceptance of such application by the Court is not without jurisdiction. [P 19 C 1]

\* (c) Civil P. C., S. 151 — Suit in forma pauperis dismissed for default—Application under O. 9, R. 9 to restore case — Application rejected on plaintiff failing to appear on day of hearing of application — Plaintiff applying under S. 151 for restoration of application—Judge's view that S. 151 is inapplicable is erroneous—Error is not one apparent on the face of record—O. 47, R. 1.

A suit in forma pauperis was dismissed for default. The plaintiff applied under O. 9, R. 9, for restoration of the case. He, however, did not appear when the application was taken up for hearing and the application was hence dismissed. The plaintiff then applied under S. 151 for restoration of the application. The Judge holding S. 151 inapplicable dismissed the application.

*Held* : that the Judge was wrong in his view : *A. I. R. 1924 All. 446, Dist. : A. I. R. 1927 Cal. 534, Foll.* [P 19 C 2]

*Held further* : that in view of the fact that the Judge declined to deal with the merits of the case upon an erroneous view of S. 151, it cannot be gainsaid that the error was an error apparent on the face of the record. [P 19 C 2]

*N. N. Sircar, Sarat Chandra Roy Choudhury and Nund Gopal Banerji—*for Petitioner.

*Brojendra Nath Chatterji and Satindra Nath Roy Chowdhury—*for Opposite Parties.

**Judgment.** — This rule is directed against an order passed by Mr. B. K. Pal, Subordinate Judge of Backergunge, on 22nd September 1927. The facts which led up to the passing of the said order, shortly stated, are these : The petitioner in this rule was the defendant in a suit which had been instituted by the opposite party in forma pauperis some time ago. That suit was dismissed for default on 19th May 1926 as neither the plaintiffs nor the defendant appeared. On the same day, an application was made by the plaintiff, the opposite party in this rule under O. 9, R. 9, Civil P. C. On 14th

August 1926 when this application was taken up for hearing, neither the plaintiffs nor their pleader happened to be present in Court and it was dismissed for default at about 12-35 p. m. On the same day, the plaintiffs opposite party filed another application for the restoration of the application under O. 9, R. 9, Civil P. C., that had been dismissed for default as aforesaid and it is this last-mentioned application which has given rise to the proceedings and the order against which this rule is directed. This application was filed as an application under O. 9, R. 9 and also under S. 151, Civil P. C. So far as O. 9, R. 9, Civil P. C., is concerned, it is obvious that it had no application to the case and the learned Subordinate Judge Mr. A. C. Banerji holding that O. 9, R. 9, had no application whatsoever to the case and expressing the opinion that S. 151 was also inapplicable dismissed the said petition by his order dated 2nd October 1926. On that, we are told, this Court was moved in revision under the provisions of S. 115, Civil P. C., and it ultimately declined to interfere in revision with the order of the learned Subordinate Judge dated 2nd October 1925.

On 17th December 1926, a further application was made in the Court below by the plaintiffs opposite party headed as one under O. 47, R. 1 and S. 151, Civil P. C. It was entertained by Mr. A. C. Banerji who had passed the order of 2nd October 1926, and the said learned Judge ordered the issue of notices of the said application upon the present petitioner. This application was ultimately heard by Mr. B. K. Pal and disposed of by him on 22nd September 1927, and it is against this order of Mr. B. K. Pal dated 22nd September 1927, that the present rule is directed. The rule is to show cause why this order should not be set aside as having been passed without jurisdiction. In order to make out that the order was passed without jurisdiction, reference has, in the first place, been made to the fact that an application for revision of the order passed by Mr. A. C. Banerji on 2nd October 1926, was made to this Court and was unsuccessful, the petitioner's contention being that the refusal on the part of this Court to interfere with the said order should be taken as implying an approval of the view of S. 151, Civil P. C., which was expressed by the learned Subordinate Judge in that order. We are



unable to agree in this contention of the petitioner. There may have been very good reasons why this Court did not feel it necessary to interfere under the provisions of S. 115, Civil P. C., and, simply because the opposite party was unsuccessful in having the order revised by this Court, there was nothing to prevent them from applying under O. 47, R. 1, Civil P. C., to the lower Court for review of its own order.

It has next been contended on behalf of the petitioner that the order which Mr. B. K. Pal has passed was passed without jurisdiction, inasmuch as O. 47, R. 1, Civil P. C., does not apply to a case of this nature. What is said is that the view which Mr. A. C. Banerji took of the provisions of S. 151 of the Code may have been an erroneous view and yet it cannot be said that there was in Mr. A. C. Banerji's order an error apparent on the face of the record which would justify his successor Mr. B. K. Pal to review the said order. Now, so far as this argument is concerned, two questions would arise for consideration. First of all, whether or not the view which Mr. A. C. Banerji took of the scope of S. 151, Civil P. C., was correct and secondly, whether, if that view was erroneous, it can be said that it was an error apparent on the face of the record within the meaning of O. 47, R. 1, Civil P. C. In order to show that the view taken by Mr. A. C. Banerji was in point of fact, correct, reference has been made on behalf of the petitioner to the case of *Shib Prakash v. Jhinguria* (1). That case, however, is clearly distinguishable because there the party who had made the application under S. 151, Civil P. C., had neglected to avail himself of another remedy which was available to him under the Code and, after the time during which such remedy could be pursued had elapsed, made the application under S. 151. In that case, it was held by the learned Judge that, although it was frequently desirable to apply the provisions of S. 151, Civil P. C., to a case in respect of which the Civil Procedure Code is silent, the following qualification should always be applied to cases of this nature, namely, that where the applicant's laxity resulted in a neglect on his part to avail of the provisions of the Code itself, the applicant could not get the benefit of S. 151 of the Code. The facts of that case are en-

tirely distinguishable from the facts of the case before us. On the other hand, as regards the true scope of S. 151, Civil P. C., reference may be made to one of the recent decisions of this Court, namely, the decision in the case of *Sarat Krishna v. Bisseswar Mitra* (2). In that case, it has been said that in order to meet cases in respect of which there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which the Courts exist, the provisions of S. 151 may and should be resorted to. In support of the proposition enunciated as aforesaid, several other decisions have been referred to in that case and these decisions amply support the said proposition. In our opinion, therefore, the learned Subordinate Judge Mr. A. C. Banerji took a wrong view of S. 151, Civil P. C., and, acting upon that erroneous view, he refused to exercise a jurisdiction which the law vested in him and which he might have exercised if a proper case had been made out calling for action under that section.

Turning now to the other question which arises, namely, whether this error which appears in the order of the learned Subordinate Judge Mr. A. C. Banerji was or was not an error apparent on the face of the record, in view of the fact that the learned Judge declined to deal with the merits of the case upon an erroneous view of S. 151--and it so appears from the order itself which the learned Judge passed—it is clear to our minds that it cannot be gainsaid that it was an error apparent on the face of the record. In any case, even if it be assumed that the Subordinate Judge was mistaken in his interpretation of the expression "order apparent on the face of the record," that will hardly be a legitimate ground for our disturbing the order that he has passed, especially in view of the circumstances under which the application of 14th August 1926 was dealt with and dismissed in the absence of the opposite party. The only effect of our not interfering in this rule will be to enable the Court to consider the application of 19th May 1926 and see if the dismissal of the suit for default on that date should be set aside or not.

(1) A.I.R. 1924 All. 446=46 All. 144.

(2) A.I.R. 1927 Cal. 534=54 Cal. 405.



For these reasons, we are of opinion that the order against which this rule is directed is not one which can be said to have been passed without jurisdiction and, in this view of the matter, we decline to interfere with the said order. The rule is accordingly discharged; but in the circumstances of the case, we make no order as to costs.

D.E. R.K.

*Rule discharged.***A. I. R. 1929 Calcutta 20**

B. B. GHOSE AND CAMMIADE, JJ.

*B. N. Elias*—Claimant—Appellant.

v.

*Secy. of State*—Respondent.

Appeal No. 32 of 1926, Decided on 22nd December 1927 from a decree of President, Calcutta Improvement Tribunal, D/- 17th November 1925.

(a) Land Acquisition Act (I of 1894), S. 23 as amended by Calcutta Improvement Act (5 of 1911), Sch. S. 9—An owner is not entitled to compensation for having been prevented from taking active steps in order to make an income out of the property.

Under the provisions of sub-S. (3), S. 23, Land Acquisition Act as amended by the Calcutta Improvement Act, Cl. (b), the owner is not entitled to compensation for having been prevented from taking active steps in order to make an income out of the property. [P 20 C 2]

Where the owner claimed that he was entitled to compensation for being obliged to keep the land vacant after the scheme had been sanctioned as he could not erect any structures for the building of which he had pulled down the old structure.

*Held*: that he was not entitled to any compensation. [P 20 C 2]

(b) Land Acquisition Act (amended by Calcutta Act 5 of 1911), S. 23 (3) (b)—Owner includes the owner of a leasehold right.

The lessee is certainly the owner of the leasehold interest in the property and he is the "owner" within S. 23 (3) (b). [P 21 C 1]

*B. C. Mitter, Probodh Krishna Shome and Kusi Prasun Chatterjee*—for Appellant.

*Langford James and Surendra Nath Guha*—for Respondent.

**B. B. Ghose, J.**—The appeal is by claimant 2 arising out of the acquisition which has been dealt with in the judgment immediately delivered in *Swarananjuri Dasi v. Secretary of State* (1). If it had been a question of apportionment between the parties, we should ordinarily have remanded this case also

for consideration by the President. But having regard to the agreement between the parties in the lease of 1st March 1920 no question of apportionment arises, as claimant 1 would get the whole amount of compensation which has been awarded on account of the acquisition of the land. This case may, therefore, be decided on its own merits.

The contention raised on behalf of this appellant is that he is entitled to an excess amount of money as compensation under the provisions of sub-S. (3), S. 23, Land Acquisition Act as amended by the Calcutta Improvement Act. Cl. (b), which is specially referred to in the course of the argument runs thus:

"If it be shown that, before such declaration was published, the owner of the land had taken active steps and incurred expenditure to secure a more profitable disposition of the same, further compensation based on his actual loss may be paid to him."

It is pointed out that in awarding the compensation for his actual loss the Collector has only given the appellant the value of the structure and damages for preparing the plan of the site. He claims that he is entitled to compensation for being obliged to keep the land vacant after the scheme had been sanctioned as he could not erect any structures for the building of which he had pulled down the old structure. Now this clause as I read it is a rider to Cl. (a) which runs thus:

"The market-value of the land shall be deemed to be the market-value according to the disposition of the land at the date of the publication of the declaration relating thereto under S. 6."

and under Cl. (b) further compensation based on his actual loss which is payable to the owner must be on account of his having taken some active steps and incurred expenditure to secure a more profitable disposition of his property. In this case the argument amounts to this that the claimant is entitled to compensation for having been prevented from taking active steps in order to make an income out of the property. I do not think that this falls within the provisions of this clause. It may be a grievance that the claimant, although he had demolished the old structure, was unable to build a new one on account of the sanction of the scheme and thus had to incur loss. But it seems to me that the legislature has not provided for any compensation on that ground.



I must, however, observe while rejecting the contention of the appellant that the opinion of the learned President that the lessee should not be considered to be an owner under this clause cannot be supported. He is certainly the owner of the lease-hold interest in the property and I fail to understand why the learned President had dealt with this person as if he was not the owner. The learned Government Pleader does not support the learned President's view of the meaning of the term, but he explains to me the reason why the learned President has made such a distinction by referring us to S. 23 of the Act where the expressions "owner" and "person interested" are used for the purpose of determining the compensation payable to different persons and probably the learned President was pressed with that distinction in his mind. It seems to me, however, that if the lessee suffers loss as provided in that clause that should be taken into consideration in determining the market-value of the land and compensation awarded with reference to it. To hold otherwise would amount to this that if a lessee erects a building even at a very great cost no compensation would be allowed for such buildings. That would lead to a very undesirable result. The appeal, however, should be dismissed with costs for the reason already stated.

**Cammiade, J.**—I agree.

N.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 21

C. C. GHOSE AND JACK, JJ.

*Ganga Prosad*—1st Party—Petitioner.

v.

*Khitish Chandra Sanyal*—2nd Party—Opposite Party.

Criminal Revns. Nos. 752 and 753 of 1928, Decided on 28th August 1928, from order of 1st Class Magistrate, Howrah, D/- 26th June 1928.

**Criminal P. C., S. 133**—Magistrate cannot cancel an order made under S. 133 merely on the written statement by opposite party without taking evidence.

On application by a petitioner a Magistrate made a conditional order requiring the opposite party to remove the obstruction, or to appear before him and to show cause against the order. The opposite party filed a written

statement showing cause against the aforesaid order and alleging that there had been litigation between the parties and ultimately a passage five feet wide had been left for the public. The Magistrate, who succeeded the previous Magistrate, on perusing the statements of the parties, but without taking any evidence, cancelled the order under S. 133, Criminal P. C.

**Held**: that the Magistrate had not followed the provisions of Part 4, Ch. 10 and that the order could not, therefore, be allowed to stand.

[P 21 C 2]

*Mritunjoy Chatterji and Bholanath Roy*—for Petitioner.

*Santosh Kumar Pal, Sachindranath Banerji, Sudhansu Kumar Bose, Hiran Kumar Roy and Sukumar Hazra*—for Opposite Party.

**Facts.**—A petitioner applied in the Criminal Court at Howrah, alleging that a public pathway, which was the only exit from the garden house of the petitioner's master, had been encroached upon and obstructed and praying for an order under S. 133, Criminal P. C., directing the persons causing the obstruction to remove the same. The Magistrate thereupon called for a police report. The police submitted a report stating that the disputed pathway was "a public pathway used by the people of the locality" and that the same had been obstructed by the opposite party. Thereupon the Magistrate made a conditional order requiring the opposite parties to remove the obstruction by a certain date or to appear before him on the said date, and to show cause against the order. On the appointed date, the opposite parties filed a written statement showing cause against the aforesaid order and alleging that there had been litigation between the parties and ultimately a passage five feet wide had been left for the public. The succeeding Magistrate, on perusing the statements of the parties, but without taking any evidence, cancelled the order under S. 133, Criminal P. C.

**Judgment.**—In these cases we are satisfied on an examination of the record that the Magistrate has not followed the provisions of Part 4, Ch. 10, Criminal P. C. The order complained of cannot, therefore, be allowed to stand and they are accordingly set aside. The matters will go back for a proper enquiry in accordance with law. The rules are accordingly made absolute.

D.B./R.K.

*Rules made absolute.*



## \* A. I. R. 1929 Calcutta 22

CUMING AND MUKERJI, JJ.

*Jogendra Lal Sarkar*—Plaintiff—Appellant.

v.

*Mahesh Chandra Sadhu and others*—Defendants—Respondents.

Appeal No. 486 of 1925, Decided on 17th January 1928, from appellate decree of District Judge, Burdwan, D/- 24th November 1924.

\* (a) Landlord and Tenant—Mere payment of rent to a third person is not sufficient to terminate tenancy—Party alleging discontinuance of tenancy must prove it.

Mere payment of rent to a third party claiming paramount title is not enough to determine the original tenancy and discontinuance of the tenancy must be satisfactorily proved by the party who alleges that he took the lease from the paramount title-holder, without reference to the lessor and without giving the lessor to understand that he would thenceforward hold not under the lessor but under the paramount title : 3 C. L. R. 576, *Ref.*

[P 24 C 1 ; 2]

\* (b) Landlord and Tenant—Attornment means act of putting one person in place of another under English law.

An attornment to a third party is a disclaimer. But "attornment" in the sense in which the word is used and understood in English law is not a mere agreement in favour of a third party to pay rent, but has been defined as "the act of the tenants" putting one person in the place of another as his landlord : *Per Holroyd, J., Cornish v. Searell*, 8 B. & C. 471, *Ref.*

[P 24 C 2]

(c) Evidence Act, S. 116—Estoppel operates as to beginning of tenancy—Plea of non-liability of rent does not amount to disputing landlord's title but amounts only to confession and avoidance and can be taken.

Estoppel would operate only as regards the denial in so far as it relates to the beginning of the tenancy and not to any other point of time. Though the tenancy may be continuing, it is quite open to the tenant to plead and show that his liability to pay the rent has wholly or partially or for a time ceased. Such a plea does not amount to disputing the landlord's title but is really one of confession and avoidance, and is available to the tenant : 2 *Mad.* 226 ; 12 *W. R.* 109 ; 14 *W. R.* 85 ; and 21 *W. R.* 5, *Foll.*

[P 24 C 2, P 25 C 1]

(d) Landlord and Tenant—Rent—Eviction by paramount title is a good defence for non-liability of rent—But there must be eviction from the premises, party evicting must have a good title and tenant must have quitted against his will.

Against the covenant to pay the rent, eviction by title paramount is a good defence and to constitute it three conditions must be fulfilled. The eviction must have been from something actually forming part of the premises demised ; the party evicting must have a good title and the tenant must have quitted against his will.

[P 25 C 1]

(e) Landlord and Tenant — Eviction — To constitute eviction forcible expulsion is not necessary.

To constitute eviction forcible expulsion is not necessary : 18 C. W. N. 552, *Foll.*

[P 25 C 1]

It is not necessary that the tenant should go out of possession, and if upon a claim being made by a person with title paramount he consents to an attornment to such person to change the title under which he holds or enters into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking : *A. I. R.* 1921 *Cal.* 532 and *A. I. R.* 1922 *Cal.* 232, *Ref.*

[P 25 C 2]

(f) Landlord and Tenant—Title paramount defined.

Title paramount is a title superior to those both of the lessor and the lessee against which neither is able to make a defence : *Neale v. Machenzie*, 1 M. & W. P. 759, *Rel. on.*

[P 25 C 2]

(g) Bengal Patni Regulation (8 of 1819)—Provisions are not retrospective.

Terms of Regulation 8 of 1819 cannot be called in aid for the purpose of determining the incidents of a pre-regulation patni.

[P 25 C 2]

*Dwarka Nath Chakravarthi, Sarat Chandra Bose, Jyotish Chandra Sarkar and Bhuth Nath Chatterjee*—for Appellant.

*Braja Lal Chakravarti, Sures Chandra Das, Surjya Kumar Aich and Jyotish Chandra Paul*—for Respondents.

**Mukerji, J.**—The facts, so far as they are necessary for the purposes of the present appeal, are these :

The suit out of which this appeal has arisen was for recovery of minimum royalty (from kist Bhadra 1319 B. S. to kist 15th Joistha 1325 B. S.) and coal rent (from Aswin 1319 to Aswin 1324) for some coal lands which the defendants are alleged to be holding under the plaintiff under a darpatni lease. The lease is dated Falgun 1314 (= February 1908) being in respect of the three annas four pies share of touzi No. 12 lot Churulia, to the extent of which share the plaintiff had then the interest of a patnidar in the said lot under the zemindar, the Burdwan Raj, and is one for a period of 999 years. The defendants were at the date of the lease the patnidars in respect of the remaining share in the lot. They subsequently purchased at an auction two-thirds of the plaintiff's patni interest. The suit accordingly was for the amount due to the remaining one-third of the three annas four pies share which still belongs to the plaintiff.

Of the defences that were taken all that is relevant at the present stage is that the



plaintiff is only a patnidar and as such has no title to the underground, that the defendants were evicted by title paramount, namely the Burdwan Raj, who in February 1913 served a notice on the defendants or their sub-lessees informing them that they had no title to the underground and asking them to stop work in the underground and that accordingly the defendants were obliged to take a prospecting lease from the Burdwan Raj on 19th Magh 1323 B. S. (= February 1917).

The suit was instituted on 31st August 1918. Thereafter in October 1919, the defendants, it is said, have taken a regular mining lease of the underground from the Burdwan Raj. It is clear, however, that the incidents of this transaction can have no bearing on the rights of the parties as they were during the period in suit.

The Subordinate Judge who tried the suit gave the plaintiff a decree substantially for the entire period in suit. Its correctness has not been challenged before us except as regards the view of the defendants' liability on which he proceeded and in respect of which the District Judge has differed from him. On the decree being thus given the defendants appealed to the District Judge. In the appeal the patni kabuliati under which the plaintiff is alleged to be holding under the Burdwan Raj was produced on behalf of the defendant and was proved and marked as Ex. 10, being received as a piece of additional evidence. The plaintiff complained that the question of eviction by title paramount was not put in issue in so many words and so he had no opportunity of meeting the point. On this the District Judge remanded the suit to the trial Court to determine two issues one of which was issue 3 and the other an additional issue on the question of eviction by title paramount.

Issue 3 was worded thus :

"Whether the plaintiff had no title to the underground coal when he created the lease for the same in favour of defendant 1 and his co-sharer? Whether the plaintiff has no title to the underground of the lease-hold? Whether defendant 1 executed the kabuliati under the representation of the plaintiff that he had such right and in honest belief in that representation?"

This issue had been decided by the trial Court in plaintiff's favour, but it was now to be decided again in the light of the document Ex. 10. The additional issue that was framed by the District Judge was in these words :

"Was there eviction of the defendants by title paramount prior to their taking a lease of the underground right from the Maharaja?"

The Subordinate Judge on remand found on the third issue that the patni kabuliati Ex. A was not the original patni kabuliati by which the patni was created but it was merely a confirmatory kabuliati which was executed by the predecessors-in-interest of the plaintiff by way of getting mutation of their names in the sherista of the Burdwan Raj, that the terms of the original grant not being in evidence it was not possible to ascertain whether the grant included minerals, that merely because the plaintiff was a patnidar it could not be held that he was entitled to the underground, that the defendants themselves being patnidars to the extent of about 15 annas cannot be said to have executed the darpatni kabuliati in plaintiff's favour by reason of any representation on the part of the plaintiff as regards his title to the underground and that they themselves had the belief that the plaintiff had such title. As regards the additional issue the Subordinate Judge held that there was no eviction of the defendants by title paramount, that they never went out of possession or surrendered their tenancy under the plaintiff but that they attorned to the Burdwan Raj only with a view to facilitate their subletting of the lands which was in their contemplation, but the effect of that attornment was not a renunciation of their character as darpatnidars under the plaintiff, though there was a sufficient claim or demand by the Burdwan Raj which was the reason for their adopting this course; in other words by adopting this course, to use a homely phrase, the defendants only added a second string to their bow.

On the findings arriving before the District Judge (who was the successor of the District Judge who had made the order of remand), that learned Judge came to a series of findings which, to my mind, do not seem to be altogether clear or reconcilable with each other except one very definite finding at which he ultimately arrived and which he put down in the following words :

"the legal dispossession by title paramount must be held to have taken place in this case with effect from 19th Magh 1323 B. S., that is, the date of the prospecting lease"

(meaning the prospecting lease which the defendants executed in favour of the



Burdwan Raj in February 1917). On that finding the learned District Judge modified the decree of the trial Court by limiting it to the period down to 18th Magh 1323 B. S.

From this decree of the District Judge the plaintiff has appealed. The arguments that have been advanced on his behalf give rise to two questions: first, whether the defendants are estopped from pleading that the plaintiff has no title to the underground, and second, whether there has been an eviction such as would disentitle the plaintiff to recover.

The first question must be decided upon the provisions contained in S. 116, Evidence Act. The section as applicable to the case runs thus:

"No tenant of immovable property . . . shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenancy had, at the beginning of the tenancy, a title to such immovable property."

The Judicial Committee in the case of *Bilas Kunwar v. Desraj Ranjit Singh* (1), had occasion to consider the provisions of this section and what was said by their Lordships in that case was this:

"Section 116, Evidence Act, is perfectly clear on the point and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he was not openly restored to possession by surrender to his landlord.

This, however, it may be contended and indeed it has been so contended, is not an exhaustive exposition of the section, as the case in connexion with which these observations were made was one in which a tenant who had received a notice to quit never gave up possession and yet denied his landlord's title. At the same time in the words of the section the estoppel operates only during the continuance of the tenancy. There has not been, it must be conceded, a discontinuance of the tenancy in any of the modes by which a tenancy is ordinarily put an end to. Treating the matter as a matter of fact only, all that was done by the tenants, upon the findings of the Courts below, is that they took a prospecting lease from the Burdwan Raj and this they did, as far as can be made out, without reference to the plaintiff and without giving him to understand that they would thenceforward hold not under him but under the Burdwan Raj. As was pointed

out in the case of *Parbutti Dassi v. Ram Chand* (2), in which the circumstances were somewhat similar, mere payment of rent to a third party is not enough to determine the tenancy and discontinuance of the tenancy in such circumstances must be satisfactorily proved by the party who alleges it. Now

"a tenancy determines either by having run its prescribed course or by act of parties whilst it is running or by act of law. Instances of a determination of the first kind are where lease is made for a certain period and that period expires or where an event happens in itself uncertain (e.g., the death of the lessee or some other person), upon the happening of which the term is expressly limited. A determination of the second kind is brought about by one of the following acts: determination of the will (in tenancies-at-will), disclaimer and notice to quit (in yearly or other periodical tenancies), surrender, merger, and forfeiture (in tenancies generally). A determination of the third kind i.e., by act of law only, results from the operation of the Statute of Limitation." (Foa on Landlord and Tenant 6th Edition, p. 649).

An attornment to a third party is a disclaimer (*Ibid* p. 653); but "attornment" in the sense in which the word is used and understood in English law is not a mere agreement in favour of a third party to pay rent, but has been defined as "the act of the tenants' putting one person in the place of another as his landlord" [*Cornish v. Searell* (3), per *Holroyd, J.*]

In the present case the tenancy of the defendant under the plaintiff has not run its prescribed course, nor has it been determined by any act of the parties or by operation of the statute, and in my judgment that tenancy was continuing at the date of the suit. In connexion with the question of estoppel however, there is another part of the section that has got to be considered, namely, the point of time to which the denial would relate. It is true that the defence was that the plaintiff as patnidar had no title to the underground, and from that point of view the denial of title related to the beginning of the tenancy as well as to any other point of time, but the estoppel would operate only as regards the denial in so far as it relates to the beginning of the tenancy and not to any other point of time. Though the tenancy may be continuing it is quite open to the tenant to plead and show that his liability to pay the rent

(1) A.I.R. 1915 P.C. 96=37 All. 557=12 I.A. 202 (P.C.).

(2) [1879] 3 C. L. R. 576 (P.C.).

(3) [1828] 8 B. & C. 471=1 M. & Ry. 703=6 L. J. (O.S.) K. B. 254.



has wholly or partially or for a time ceased. Such a plea does not amount to disputing the landlord's title but is really one of confession and avoidance. One such plea is that of nonliability to pay the rent on the ground that the lessor's title has been defeated by a title paramount or in other words that there has been eviction by title paramount. In the case of a complete eviction it is not quite easy to see the distinction as the question of continuance of tenancy and the question of eviction by title paramount terminating the liability to pay the rent would go hand in hand. But in the case of a partial eviction demanding not suspension but abatement of rent the distinction is quite apparent. That under such circumstances a plea of this description is available to the tenant has been held in cases both before and after S. 116, Evidence Act came into being (*Ammu v. Rama Krishna* (4), *Gopanund Jha v. Gobind Pershad* (5), *Burn & Co. v. Rushomoyee Dossee* (6) and *Mohan Mahtu v. Shamsul Huda* (7)).

The second question then comes up for consideration. Against the covenant to pay the rent eviction by title paramount is a good defence. That defence obviously must be established by the party who sets it up. For this proposition of onus no authority is needed.

"Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term and the paramount title is the title paramount of the lessor which destroys the effect of the grant and with it the corresponding liability for payment of rent; so that mere eviction from or deprivation of the use and enjoyment of the demised premises or part of them, whether such eviction be lawful or unlawful, is insufficient where the lessor's title is not affected or called in question. To constitute a good defence in this case three conditions must be fulfilled. The eviction must have been from something actually forming part of the premises demised; the party evicting must have a good title, and the tenant must have quitted against his will." (*ibid* p. 194).

Of these elements the first is undoubtedly present and as regards the last its presence on the facts is at the least extremely doubtful; but as regards the second element it is impossible to hold that the defendants have succeeded in making it out. To constitute eviction forcible expulsion is not necessary [*Hill v. Saun-*

*ders* (8), followed in *Nourjani Sardar v. Bimala Sundari Gupta* (9)]. It is not necessary that the tenant should go out of possession, and if upon a claim being made by a person with title paramount he consents to an attornment to such person to change the title under which he holds or enters into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking, [Foa on Landlord and Tenant, 6th Edition, pp. 194 and 195; *Banka Behari v. Madan Mohan* (10), *Ram Chandra v. Pramatha Nath* (11)]. But what the defendants did amounts not to an attornment in favour of, but merely an agreement to pay rent to, the Burdwan Raj, as I have already said.

Moreover as explained by Lord Denman, C. J., in *Neale v. Mackenzie* (12), title paramount is a title superior to those both of the lessor and the lessee against which neither is enabled to make a defence. This the defendants have failed to prove. The patni kabuliati Ex. 10 is not the original document creating the patni. It is dated 19th December 1818 only a few months prior to the enactment of Regulation 8 of 1819. It describes the status of the plaintiff's predecessors as being that of patnidars and neither adds to nor subtracts from the rights that they or their predecessor-in-interest had as holders of the patni. The preamble to the Regulation gives an idea as to the nature of the patni taluks such as they were understood to mean in those days, but the mere use of the words "patni" and "patnidar" would not enable one to judge the exact incidents of the tenures or the rights of the holders thereof to which or to whom the terms were applied. It is obvious that the terms of the Regulation cannot be called in aid for the purpose of determining the incidents of a pre-regulation patni such as the one in the present case.

In my view it was for the defendants to show affirmatively that the Burdwan Raj and not the patnidar had the right to the underground, and that they have failed to discharge that burden. It has been urged on behalf of the respondents that the fact that the Burdwan Raj is the superior

(8) [1825] 4 B. & C. 529=28 R. R. 375=7 D. & R. 17.

(9) [1913] 18 C. W. N. 552=18 I. C. 87.

(10) A. I. R. 1921 Cal. 532.

(11) A. I. R. 1922 Cal. 237.

(12) [1836] 1 M. & W. 747=2 Gale 174=6 L. J. Ex. 263.

(4) [1878] 2 Mad. 226.

(5) [1869] 12 W. R. 103.

(6) [1870] 14 W. R. 85.

(7) [1879] 21 W. R. 5.



landlord relieves them of the burden they have to discharge, but in this I cannot agree.

In this view of the matter I am of opinion that the effect of the grant made by the plaintiff in favour of the defendants has not been destroyed and that their liability to pay the rent therefor continued.

It is not necessary in the present case to deal with the question whether in the absence of evidence as to the grant itself the plaintiff as patnidar can be held entitled to the underground, a position that has been contended for on behalf of the appellant on the supposed authority of the decision in *Rajeswar Prosad Bhakal v. Bhupendra Narayan* (13).

The result is that in my judgment the appeal must succeed. I therefore allow the appeal, reverse the decision of the District Judge and restore that of the Subordinate Judge with costs in this and the lower appellate Court.

**Cuming, J.**—I agree.

A.L./R.K.

*Appeal allowed.*

(13) A. I. R. 1927 Cal. 956=55 Cal. 35.

## \* A. I. R. 1929 Calcutta 26

PAGE AND MALLIK, JJ.

*Fajar Banoo and others*—Plaintiffs—Appellants.

v.

*Rahim Bux and others*—Defendants—Respondents.

Appeal No. 930 of 1926, Decided on 9th July 1928, from appellate decree of Dist. Judge, Zillah Noakhali, D/- 21st January 1926.

(a) Evidence Act, S. 115—Further evidence allowed on an issue of fact in the appellate Court—Opposite party adducing evidence to rebut cannot complain of allowing of such evidence.

In appeal, appellants were allowed to adduce further evidence on an issue of fact. The respondents did not take up their stand on the inadmissibility of such evidence but adduced further evidence to rebut the contention of the appellants.

*Held:* that the respondents could not complain of the allowing of evidence. [P 27 C 1]

\* (b) Civil P. C., O. 22, R. 3—"Legal representative"—Meaning explained.

"Legal representative" in O. 22, R. 3, means the legal representative or representatives of the deceased plaintiff, or all the representatives of whom the representative applying knew or ought to have known: 16 All. 211 and 30 All. 117, *Ref.* [P 27 C 1]

(a) Civil P. C., O. 22, R. 3—Some legal representatives applying to be brought on record—The fact that other representatives were existing brought to notice—No proof that the latter were unwilling to join—Suit abates.

If one or more of the legal representatives are unknown or are unwilling to join in the application, a bona fide application by all the representatives who are willing to join in making the application will be a sufficient compliance with O. 22, R. 3: 10 Bom. 220; 23 Mad. 125; and 1 Lah. 481; *Ref.* [P 27 C 1]

During the pendency of a suit, plaintiff died and his two sons made an application for substituting them as legal representatives. The opposite party pointed out that there was a third son of the deceased plaintiff. The two sons did not apply to have him substituted.

*Held:* that as there was no evidence that if the third son were informed that an application was to be made he would not have been willing to join in the application, the suit abated. [P 27 C 2]

(d) Civil P. C., S. 105—Decision must affect merits.

Affecting the decision of the case within S. 105 means affecting the decision of the case on merits: 52 Cal. 472, *Ref.* [P 27 C 2]

(e) Civil P. C., S. 105—An error, defect or irregularity under S. 105 must be of law and not of fact.

Any error, defect or irregularity in any order under S. 105 is an error, defect or irregularity in law or procedure and not an incorrect finding of fact: 12 All. 200 and 27 Bom. 162, *Ref.* [P 27 C 2]

*Gunada Charan Sen and Subodh Chandra Roy Choudhury*—for Appellants.

*Basak and Radhikaranjan Guha*—for Respondents.

**Judgment.**—This was a suit brought to recover possession of certain property by one Abdul Majid. During the pendency of the suit Abdul Majid died and an application for substitution under O. 22, R. 3, Civil P. C. was made by two of his sons. At or before the hearing the defendant pointed out that Abdul Majid died leaving him surviving a third son Ahamadulla. Notwithstanding this warning the other two sons did not apply to have Ahamadulla substituted as one of the heirs of Abdul Majid, nor did Ahamadulla apply to be made a party to the suit. At the trial an issue was raised as to whether Ahamadulla was one of the legal representatives of Abdul Majid, and the trial Court held that he was not, and, proceeding to hear the suit on the merits, decided the case in favour of the plaintiffs. The defendant appealed, and it appears that at the hearing of the appeal an application was made by the appellant to adduce further evidence in support of



his contention that Ahamadulla was the son of Abdul Majid. Now, the respondents did not take their stand upon the inadmissibility of such evidence but applied for leave to adduce further evidence to rebut the appellants' contention that Ahamadulla was one of the sons of Abdul Majid. In the circumstances obtaining in this case we do not think that it is open to the appellants now to complain that this additional evidence was given by the appellants. We have considered whether there was evidence before the lower appellate Court upon which the learned District Judge could reasonably have arrived at the conclusion to which he came, namely that Ahamadulla was one of the sons of Abdul Majid. In our opinion, in second appeal, having regard to the evidence upon this issue of fact that was before the learned District Judge, we are unable to disturb the finding at which he arrived.

The learned District Judge dismissed the suit upon the ground that the legal representatives of Abdul Majid not having been duly substituted the suit abated under O. 22, R. 3, Civil P. C. On behalf of the appellants it is urged that O. 22, R. 3 does not apply because an application for substitution was duly made by the "legal representative" of Abdul Majid within O. 22, R. 3. In our opinion, "legal representative" in O. 22, R. 3 means the legal representative or representatives of the deceased plaintiff, or all the representatives of whom the representative applying knew or ought to have known: *Ghamandi Lal v. Amir Begum* (1), *Haider Hussan v. Abdulahad* (2). It may well be that if one or more of the legal representatives are unknown or are unwilling to join in the application under O. 22, R. 3, different considerations will arise, and that a bona fide application by all the representatives who are willing to join in making the application will be a sufficient compliance with O. 22, R. 3: *Bhikaji v. Purshottam* (3), *Musala Reddy v. Ramayya* (4) and *Abdul Rahim v. Shahab-ud-Din* (5). But that question does not arise in this case, for there is no evidence that if Ahamadulla had been informed that the

application was to be made he would not have been willing to join in it. That contention, therefore, fails.

The learned advocate on behalf of the appellants further urged that, even assuming that that is so, under O. 22, R. 5 the trial Judge erroneously decided the issue as to whether Ahamadulla was the son of Abdul Majid, and, inasmuch as the learned District Judge has found that that erroneous finding did not affect the decision of the case within S. 105, Civil P. C., the failure on the part of Ahamadulla either himself or through his brothers to join in the application under O. 22, R. 3 was not fatal to the proceeding. Now, it has been held that "affecting the decision of the case" within S. 105 means "affecting the decision of the case" on the merits": (*Sayma Bibi v. Madhusudan* (6) and cases therein cited), and the learned advocate for the appellant contends that inasmuch as this error on behalf of the learned trial Judge did not affect the decision of the case on the merits, the appeal has not abated. The answer to that contention appears to be that any "error defect or irregularity in any order" under S. 105 (1) has been held to mean an error, defect or irregularity in law or procedure and not an incorrect finding of fact: *Sankali v. Murlidhar* (7) and *Balabai v. Ganesh* (8). In this case, however, the error which the learned trial Judge made was that he arrived at an erroneous conclusion of fact and, therefore, in our opinion, S. 105 does not apply. This contention also fails. For these reasons, in our opinion, the appeal fails and must be dismissed with costs.

A.L./R.K. *Appeal dismissed.*

(6) A. I. R. 1925 Cal. 766=52 Cal. 472.

(7) [1890] 12 All. 200.

(8) [1903] 27 Bom. 162=4 Bom. L. R. 980.

## A. I. R. 1929 Calcutta 27

B. B. GHOSE AND BOSE, JJ.

*Kinu Sundari Devi*—Appellant.

v.

*Narendra Nath Mukerjee*—Respondent.

Appeal No. 426 of 1926, Decided on 1st June 1928, from original order of Dist. Judge, Hooghly, D/- 23rd July 1926.

**Guardians and Wards Act, S. 45 (1)—Guardian appointed—Minor being in custody of third person—Order under S. 12 (1) cannot be passed—Order under S. 25 (1) is a**

(1) [1894] 16 All. 211=(1894) A. W. N. 22.

(2) [1908] 30 All. 117=5 A. L. J. 62=(1908) A. W. N. 41.

(3) [1886] 10 Bom. 220.

(4) [1900] 23 Mad. 125=9 M. L. J. 313.

(5) [1920] 1 Lah. 481=55 I. C. 883.



proper course—In the absence of such order no fine can be imposed.

Where a guardian of a minor is appointed but the minor is in custody of a third person, no direction can be made under S. 12 (1) of the Act. The proper course is to direct the third person to compel the minor to return to the custody of her guardian in obedience to an order under S. 25 (1). In the absence of such an order an order imposing a fine on the third person is not correct. [P 28 C 1]

*Nanda Gopal Banerjee*—for Appellant.

*Promatha Nath Mitter and Hari Charan Banerjee*—for Respondent.

**Judgment.**—In this case the appellant was directed to produce a minor in Court. The minor was according to the Judge's judgment a young woman of 20 years of age. Apparently she wanted only a few months to attain her majority. Under such circumstances it seems rather difficult to ask an old lady like the appellant to produce that young woman in Court. It is also doubtful whether the Judge had power to make an order under S. 45 (1), Guardians and Wards Act to direct this third person to produce the minor in Court. No direction was made under S. 12 (1) of the Act, and apparently as a guardian for the person of the minor was appointed no such order was competent. The learned Judge of course, could direct the grand-mother to compel the minor to return to the custody of her guardian in obedience to an order S. 25 (1) of the Act, but the learned Judge refused to make an order under S. 25 (1).

Under these circumstances the order imposing a fine on the maternal grand-mother does not seem to be correct. That order of the learned Judge is, therefore, set aside and the fine, if paid, will be refunded. Barring that order the observation made by the learned Judge in his judgment cannot be taken exception to in any way.

We make no order as to costs in this appeal.

R.K.

*Order set aside.*

**A. I. R. 1929 Calcutta 28**

MITTER, J.

*Naresh Chandra Basu*—Plaintiff—Appellant.

v.

*Hayder Sheikh Khan and others*—Defendants—Respondents.

Appeal No. 1269 of 1926, Decided on 7th September 1928, from the appellate decree of the Sub-Judge, Zillah Jessore, D/- 29th January 1926.

(a) **Landlord and Tenant—Rent—Suit for, against some heirs of a Muhammadan tenant—Tenancy is not properly represented.**

A Muhammadan died leaving behind him six heirs. In regard to the land held by him a rent suit was instituted against some of the heirs.

*Held:* that the defendants could not represent all the heirs: *A.I.R. 1921 Cal. 584. Dist.*

[P 30 C 2]

(b) **Civil P. C., S. 100—Whether tenancy was properly represented is a question of fact.**

The question as to whether the tenancy was adequately represented or not is a question of fact and it is not permissible to a Court sitting in second appeal to interfere with that finding where both Courts below arrive at it on proper consideration of evidence before them.

[P 30 C 1]

(c) **Ejectment—Cosharer—Suit to eject trespasser—Cosharer can recover possession of his share only.**

Where a person who is entitled to a lesser share in a land, brings a suit for ejecting a trespasser, he cannot get a decree for possession of the whole of the land, but is entitled to recover possession only to the extent of his share, although he can retain possession of the whole of the joint property as against a trespasser. *12 All. 51 (P.C.), Dist. and Doe Hellyer v. King, 6 Ex. 791, Foll.*

[P 31 C 1]

(d) **Civil P. C., O. 41, R. 33—Respondents not appealing nor filing cross-objection—Court can still grant relief to them.**

Although there is no appeal or cross-objection by the respondents, it is still open to the appellate Court to make a decree which would be proper in the circumstances of the case.

[P 31 C 1]

*Bireswar Bagchi*—for Appellant.

*Gopendra Nath Das*—for Respondents.

**Judgment.**—This is an appeal by the plaintiff and arises out of a suit for a declaration of his tenancy right in the disputed land and for recovery of possession of the same.

The facts of the case lie within a short compass. The defendants who are two in number and their cosharers had an occupancy holding which carried an annual rental of Rs. 10-4-0 under Nityamani Dasya who sued the defendants Erfen Bibi, Asirennessu Bibi, Chandjan Bibi who are her tenants and whose names are alleged to be recorded in the sherista of Nityamani for arrears of rent in respect of the said holding, obtained a decree in that rent suit (No. 1217 of 1919) and executed the same in Rent Execution Case No. 474 of 1922; the plaintiff purchased the holding in execution of the said decree on 12th September 1922; the defendants were living on the disputed land by the erection of huts and in Falgun 1329 the plaintiff called



on them to give up possession of the land by removing the huts therefrom but the defendants refused to vacate. Hence this suit.

The defence of defendant 1 substantially is that the decree and the sale referred to in the plaint, are not rent decree and rent sale as all the persons having an interest in the said holding were not parties in the rent suit brought by Nityamani and that consequently only the right, title and interest of those persons, who are parties to the rent suit, passed by the sale.

It is common ground that the disputed holding belonged originally to one Bazari Sheikh, father of the defendants who died leaving behind him the defendants Tomez and Adam and Kadam and Gopal Sheikh, his four sons, and two daughters named Arfemassa and Masirunnessa Bibi as his heirs. It has been found that Garaz Bibi, the widow of Gopal, and the sisters of the present defendants were not impleaded in the Rent Suit No. 1217 of 1919. The Munsiff found that the persons who were defendants in the Rent Suit No. 1217 of 1919 did not represent the entire holding of Rs. 10-4-0 in the books of Nityamani Dasya. The Munsiff found further that none of the two defendants has got any subsisting title to the disputed land. He accordingly decreed the plaintiff's suit declaring his title to 57/80th share in the disputed land and he directed that plaintiff do recover possession of the said undivided share with persons owning the remaining 23/80th share in that land.

An appeal was taken by the plaintiff to the Court of the Subordinate Judge of Jessore against the decision of the Munsiff and the learned Subordinate Judge affirmed the decision of the Munsiff subject to this modification that plaintiff will recover possession of 57/80th share in the land in suit jointly with the defendants. The lower appellate Court found that the decree in the rent suit was not a rent decree, that not only the persons mentioned by the Munsiff were not included in the rent suit but also Junmat, the son of Gopal, was not impleaded in that case. The appellate Court found that persons who were parties to the rent suit did not represent the tenancy and the sale was not a rent sale.

The plaintiff has appealed against the decision of the Subordinate Judge to this Court and three grounds have been taken

in support of this appeal : (i) that there has not been a proper determination of the question of representation of the tenancy in the rent suit by the persons who were parties to the same; (ii) that as the plaintiff obtained symbolical possession through Court on 3rd February 1923, against the defendant that possession is equivalent to actual possession as against them and the defendants who do not pretend that they have any manner of right to the disputed property after the sale cannot resist eviction; (iii) that as there was no appeal by the defendants to the lower appellate Court, the Subordinate Judge was in error in modifying the decree of the Munsiff by directing joint possession of the plaintiff with the defendants to the extent of their 57/80th share.

With regard to the first ground taken, the argument of the appellant is put in this way. It is true that the question as to whether the persons who are parties to the rent suit of 1919 represented the tenancy or not is in one sense a question of fact, but at every point in the process of reasoning considerations of law have to be regarded, and consequently the finding that there was not a proper representation of the tenancy could not be accepted as final: see *Hyder Khan v. Secry of State* (1). The following elements which were necessary to be considered in determining the question of representation were not taken into account by the lower appellate Court, (i) the settlement proceeding under Chap. 10, Bengal Tenancy Act, shows that persons against whom the rent suit was instituted were the persons who are recorded as tenants of the holding in the finally published Record-of-Rights; (ii) no step had been taken by the heirs of Bazari Sheikh who were not made parties to the rent suit to set aside the decree of sale; (iii) that no proper weight has been attached to the circumstance that Erphan Bibi and the other sisters of the defendants were not in possession of the disputed holding at the time of the rent sale; (iv) the endorsement on the back of the writ of delivery of possession shows that symbolical possession was delivered to the plaintiff as against the defendants and the Court of appeal below is in error in finding notwithstanding this endorsement that symbolical possession was

(1) [1903] 36 Cal. 1=1 I. C. 182=35 I. A. 195 (P.C.).



not delivered; (v) it has not been hinted in the present litigation that the arrears claimed in the rent suit were not due in fact or that the decree was erroneous or otherwise unjust in any particular. It is further said that the question as to whether the tenancy was not adequately represented in the rent suit and that the decree made therein did not operate as a rent decree has not been tested with reference to the considerations of the five matters just referred to. In support of this contention reliance has been placed on the decision of the Judicial Committee of the Privy Council in the case of *Ganpat v. Bindubashini* (2), and on the decision in the case of *Sarat Chandra v. Bibhabati* (3).

On the other hand it is argued for the respondent that as Exs. 3 and 3-A show that the recorded tenants are the persons against whom the decree was obtained and Ex-B shows that the defendants Julmat and Erfan are the tenants, the landlord knew at some point of time that Julmat, son of Gopal, was interested in the tenancy and that Nityamani knew that there were tenants other than those against whom the rent decree was obtained. It is pointed out that the Record-of-Rights have not been filed in the case. It is also urged that the name of the original tenant Bazari Sheikh appeared in the sherista of Nityamani so that it is not a case where the names of the persons who were parties to the rent suit were recorded as tenants in the sherista of Nityamani so that it could not be said that the suit was brought against the recorded tenants. It is strenuously urged that the questions as to whether the tenancy was adequately represented or not is a question of fact and it is not permissible to me sitting in second appeal to interfere with the said finding.

After giving my most anxious consideration to the case I think the contention of the respondent must prevail. Both the Courts below have concurrently found on evidence before them that the parties to the rent suit did not adequately represent the tenancy and by this finding of fact I am bound in second appeal. It is not said that there was no proper evidence before the lower appellate Court to sustain the finding on this part of the

case. I am unable to see how the defendants can be estopped from contending that the decree was not a rent decree or that the sale was not a rent sale. In the case in *Sarat Chandra v. Bibhabati* (3), the sale was not set aside for a number of years. Ram Narayan and Lakshmi Narayan the two brothers of Tara Prosad were joined as defendants. The interest of Ram Narayan as a cosharer of the tenancy was identical with that of his nephews. The evidence showed that the defendants were aware of the suit, the decree and the execution proceedings. Although many years elapsed since the decree was made and the sale was held, no endeavour had been made to reopen the proceedings. In those circumstances the Court held that there was an adequate representation of the tenancy in the rent suit. The facts of this case are not similar to those of the present. Here the family is a Mahomedan family and it could not be said that the brothers and sisters were members of the same family. The first ground, therefore, taken by the appellant, fails.

In support of the second ground reliance has been placed on the decision of the Judicial Committee of the Privy Council in the case of *Sundar v. Parbati* (4), and it is argued on the authority of that decision that the plaintiff being a cosharer to the extent of 57/80th share are entitled to evict the defendants who are mere trespassers. An examination of the case before the Judicial Committee will, however, show that in that case the widows were in lawful possession of the property of their deceased husband and it was held that they have an estate or interest therein in respect of their possession notwithstanding that under an adoption or a will by the deceased husband a preferable title thereto might exist. It was said by their Lordships that they (the widows) were entitled to maintain their possession against all new-comers except the only person who can plead a preferable title but as the possible claimants were not in the field each of the widows could divide the joint estate between them. This case is no authority for the proposition that where a plaintiff brings a suit in ejectment he can get a decree for possession of the whole of the lands from which he seeks ejectment although

(2) A. I. R. 1920 P. C. 1=47 Cal. 924=47 I.A. 91 (P. C.).

(3) A. I. R. 1921 Cal. 584.

(4) [1890] 12 All. 51=16 I. A. 186=5 Sar. 448 (P. C.).



he may be entitled to a lesser share in the said lands. All that the case decides is that a cosharer of joint property can maintain possession of the whole of the joint property as against a trespasser. Reference has also been made to Art. 343 of Freeman on Co-tenancy and partition in which the author states that a cosharer of joint property can recover possession of the whole of the joint property from a trespasser and not merely to the extent of his share therein. But the same learned author points out that there is a respectable body of authority even in America, the opposite way and it is held in some of the States that a cosharer can only recover joint possession even as against the trespasser to the extent of his share in the joint property. The true rule is laid down in the decision in the case of *Doe Hellyer v. King* (5), where Baron Parke said that a tenant-in-common is entitled to recover possession as against a trespasser only to the extent of his share. This was the view which was adopted by the majority of the Court. Baron Parke said:

"I am, therefore, of opinion, that the lessors of the plaintiff being tenants-in-common with other persons are not entitled to a verdict for the whole of the premises though they might recover less."

Baron Parke and Baron Alderson took a view different from Baron Platt who said:

"Now a tenant-in-common is the owner of the whole estate in common with his co-tenants; therefore as soon as he has proved his right to the possession in common with others and that the defendant having no such right is a wrong-doer as against him, he is, in my opinion, entitled to a general verdict for the purpose of recovering possession of the whole."

The view of Baron Platt is the view contended for by the appellant but as Baron Platt was in the minority the appellant cannot rely on his view as his opinion did not prevail.

In this view I think the second ground taken fails and the lower appellate Court was right in granting a decree to the plaintiffs for joint possession with the defendants to the extent of the plaintiffs' 57/80th share.

I now proceed to deal with the third ground. Although there was no appeal by the defendants it was open to the lower appellate Court to make a decree which would be proper in the circumstances of the case under O. 41, R. 33, Civil P. C. The decree of the Munsif

(5) [1851] 6 Ex. 791=20 L. J. Ex. 301.

directing that plaintiff should have joint possession with the other cosharers who were not parties to the suit does not seem to be in accordance with law. The lower appellate Court has put the decree in the right form. There is no substance in this ground also.

All the grounds fail and the appeal will be dismissed with costs.

W.S./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 31

MUKERJI, J.

*Taser Mondal*—Defendant—Appellant  
v.

*Prokash Chandra Mukherjee and others*—Plaintiff and Defendants—Respondents.

Appeal No. 1984 of 1925, Decided on 9th February 1928, from appellate decree of 1st Sub-Judge, 24-Parganas, D/- 1st May 1925.

**Bengal Cess Act (9 of 1880), S. 20 (b)—Rent fixed in paddy—Sum mentioned in cess-return as price of paddy—Suit to recover arrears of paddy is not suit for rent and S. 20 does not apply.**

Where the real rent is a fixed quantity of paddy, the sum of money entered in cess-return is not the rent itself but what is considered the fair value of the paddy deliverable as rent. A suit, therefore, to recover certain arrears of paddy or its value at a particular rate is not a suit for rent and the entry of the sum in the return is not a bar and S. 20, has no application: 2 P. L. J. 617, *Rel. on*; 2 P. L. J. 653, *Ref.* [P 32 C 2]

*Probodh Kumar Das*—for Appellant.

*Narendra Nath Mitra*—for Respondents.

**Judgment.**—This appeal arises out of a suit which was instituted by the plaintiff to recover arrears of rent for the years 1325 to 328. The plaintiff's case was that the defendants held 8 bighas 2 kottas of land under them at an annual rental of 14 aris of paddy. He alleged that rent for the period covered by the suit had not been delivered notwithstanding demands and, therefore, he prayed for recovery of Rs. 360 being the total amount calculated at the rate of Rs. 5 per ari of paddy together with cesses and damages. The defendants contended that the rent of the holding was Rs. 21 and that in any case the plaintiff was not entitled to recover at a rate in excess of the said rate of Rs. 21 as that was the rate mentioned in the Road Cess Return which the plaintiff



had filed under the provisions of the Cess Act 9 of 1880. The trial Court decreed the suit at the annual jama of Rs. 21 only together with cesses and damages at the rate of 25 per cent. The learned Subordinate Judge on appeal has reversed that decision and calculating the price of 14 aris of paddy at the rate of Rs. 2 he has arrived at a certain figure on which he has added the cesses at 6 pies per rupee and damages at 25 per cent and has thus enhanced the decree that was passed by the trial Court. The defendants have then preferred this second appeal.

The contention that has been urged in support of this appeal is that the learned Subordinate Judge has been in error in enhancing the amount of the decree of the trial Court, because the plaintiff is precluded from suing for or recovering at any higher rate than what is mentioned in the cess return. The learned Subordinate Judge has found that the annual rent of the holding had not been changed at any time and has pointed out that it was nobody's case that it had undergone any alteration. He has observed further that the prohibition contained in Cl. (b) of S. 20, Cess Act, does not apply, because it is difficult to say that the paddy rent of 14 aris is higher than the money rent of Rs. 21 and although in the present suit the plaintiff's claim was laid at Rs. 70 for 14 aris of paddy per year, still as the price of paddy varies from time to time though the plaintiff would get rent at a higher rate than Rs. 21 in this suit, it does not follow that if in any particular year when the price of paddy goes down the plaintiff would not get a less amount for rent in that year. The appellants contend that the decree passed by the Subordinate Judge is unsustainable in view of the clear prohibition contained in Cl. (b) S. 20, Cess Act.

The section says :

"Every holder of an estate or tenure in respect of which a return has been made as required by this chapter shall be precluded from suing for or recovering rent at any higher rate than is mentioned in such return for any land, holding or tenure included in such return, unless it be proved that the rent of such land or tenure has been lawfully enhanced subsequently to the lodging of such return."

There being no suggestion that there has been any enhancement of rent subsequent to the lodging of the return by the plaintiff in the present case the prohibition contained in S. 20, Cess Act, will unquestionably operate as a bar, if the

section itself can at all be held to be applicable to the present case.

On behalf of the defendants-appellants it is contended that the plain words of S. 20, Cess Act, cover the present case. On behalf of the plaintiff-respondent it is said that the section does not apply and reliance is placed in this behalf on the decisions of the Patna High Court in the cases of *Upendra Lal v. Moti Thakur* (1) and *Ram Gobind v. Thakur Dyal* (2). In the former of these two cases Chamier, C. J., said :

"It appears to me to be impracticable to apply S. 20 (b) to such a suit as this. Strictly speaking the plaintiffs are not suing for rent at all but for compensation, and what they entered in their return was not the rent but the annual value of the whole or part of an estate. The rate of rent which they were entitled to recover when they made their return was, and now is, not any sum in cash, but one half of whatever their share may be of the produce of holding. The reference in the latter part of Cl. (b), S. 20 to the enhancement of rent suggest that the clause is intended to apply only to cash rents."

This was, no doubt, said in a case relating to a bhaoli batai holding in which the rent is an indefinite quantity of produce which varies from year to year and is fixed at half the produce of each year and in respect of which, under S. 4 of the Act, the money value representing the price of produce deliverable calculated on an average taken for three years is to be put down in column 5 of the return. But it having been found in the present case that the real rent is a fixed quantity of paddy, Rs. 21 that was entered in column 5 was not the rent itself but what was considered the fair value of the paddy deliverable as rent. The suit strictly speaking is not a suit for rent. The entry, therefore, in my opinion, is not a bar, and to a case such as the present S. 20, Cess Act, has no application.

The view taken by the Subordinate Judge, in my opinion, is correct and the appeal is accordingly dismissed with costs.

R.K.

*Appeal dismissed.*

(1) [1918] 2 Pat. L. J. 617=2 Pat. L. W. 35=41 I. C. 61=(1918) P. H. C. C. 166.

(2) [1918] 2 Pat. L. J. 653=43 I. C. 501=Pat. L. W. 41.



## \* A. I. R. 1929 Calcutta 33

SUHRAWARDY AND CAMMIADÉ, JJ.

*Nuddea Mills Co., Ltd.* — Defendant 1 — Appellant.

v.

*Sidheswar Chatterjee and others* — Plaintiff and Defendants—Respondents.

Appeal No. 1483 of 1927, and Civil Rule No. 23 (S) of 1928, Decided on 8th May 1928, from appellate decree of 1st Addl. Dist. Judge, Zillah 24-Parganas, D/- 30th April 1927.

\* (a) Civil P. C., S. 9—Municipality acting ultra vires—Civil Court can interfere and grant relief to aggrieved party.

If the Municipality acted ultra vires, the civil Court has the power to interfere as also the power to grant proper relief to the aggrieved party. This is the principle on which civil Courts interfere with acts of public bodies such as Municipalities, created by statutes : 27 Cal. 849, *Foll.* [P 34 C 2]

(b) Bengal Municipal Act, S. 34—Scope.

The power of the Commissioners to transfer lands including roads &c., must be exercised for the purposes of the Act, namely, the improvement of the Municipality. [P 35 C 2]

(c) Bengal Municipal Act, S. 34—Greater portion of road in question being closed and becoming useless to general public—Remaining small portion useful only to plaintiff—Municipality selling this portion of the road regarding it as no longer required for purposes of Act cannot be said to have acted beyond power.

The road in question as a road had become useless to the general public. The greater portion of it had been closed and was of no use, only a small portion still remained. It could only be used by the plaintiff and votaries of the temple to which it led.

*Held* : that in these circumstances Municipal Commissioners cannot be said to have acted beyond the power vested in them by the law in regarding this portion of the road as no longer required for the purposes of the Act and selling it. They did not certainly do something prohibited by law or inconsistent with the Act. [P 35 C 2]

\* (d) Interpretation of Statutes—Though an Act may be construed with reference to another when *pari materia*, absence of express provision in one does not imply intentional omission in other—The Act must be construed within four corners.

Though it may be permissible to construe an Act with reference to another Act when they are *pari materia*, the absence of an express provision in one does not necessarily import intentional omission in the other without clear words to that effect. The Act, as it stands, must be construed within its four corners. [P 36 C 1]

(e) Bengal Municipal Act, S. 34 — Commissioners can stop or divert or dispose of road for purposes of Act.

There is nothing in the Act which prohibits the Commissioners to stop or divert a road or

to dispose of a road. The only limitation to their power given by the Act is that they must exercise such power only for the purposes of the Act : 1 *All.* 557, *Foll.* : 2 *Cal.* 425, *not Foll.*

[P 35 C 1]

(f) Bengal Municipal Act, S. 34—Amendment of S. 30 in 1894 empowered Commissioners to dispose of roads—They have however no such power over bridges, tanks, ghats etc., even now, since the soil under them is not their property—Bengal Municipal Act, S. 30 as amended.

Before the amendment of 1894 the Commissioners had no power to dispose of the roads but since the amendment they have obtained a proprietary right over the roads, by becoming owners of the soil and can now dispose of the roads. But they cannot even now dispose of bridges, tanks, ghats etc., because they have no proprietary right over the soil beneath them.

[P 35 C 1]

(g) Bengal Municipal Act, S. 34—"Land" includes roads.

There is no sufficient reason why the ordinary significance of the word "land" should be abridged by excluding roads only. [P 35 C 1]

\* (h) Easement—Right of way—Houses on both sides of public road except temple built by plaintiff's ancestor, acquired by defendants — Defendants including road in their mill compound leaving separate passage for plaintiff to reach temple — Plaintiff has no absolute right of passage over road.

There was a road called Radhaballav Road leading from Ferry Fund Road westward to the Hooghly ; there were houses on both sides of the road all of which except the temple built and dedicated by one of plaintiff's ancestors, were acquired by the defendant company and they erected at great cost a jute mill which they were working. The Municipality sold the whole of Radhaballav Road to the defendant company who included it in their mill compound by a boundary wall. The dispute was with regard to the portion of Radhaballav Road from the temple to Ferry Fund Road. The Municipality finding it probably not worthwhile to maintain this portion of the road sold the entire road to the mills. In order to allow the plaintiff to reach the temple a separate passage was given to the plaintiff by the mill.

*Held* : that the plaintiff had no absolute right of passage over the road. [P 34 C 1]

*B. C. Mitter and Probodh Chandra Chatterjee*—for Appellant.

*Naresh Chandra Sen Gupta, Mrityunjay Chatterjee, Biraj Mohan Roy, Panna Lal Chatterjee Santosh Kumar Bose and Prokash Chandra Pakrashi*—for Respondents.

**Judgment.**—This appeal arises out of a suit brought by the plaintiff-respondent against the appellant company and the Naihati Municipality for a declaration of the plaintiff's right of way over a certain public road called Radhaballav Road and for other consequential reliefs. The



plaintiff's case is that long ago a temple was built and dedicated by one of his ancestors on Radhaballav Road, a little away from another public road called Ferry Fund Road connected by Radhaballav Road. The plaintiff further claimed easement of necessity over the road. He sought for a further declaration that the act of the Municipality in closing up the road was ultra vires and also for a permanent injunction restraining the defendants from interfering with his right of way over the road to reach the temple and for a direction on the appellants to remove obstructions put by them across the road. The facts are that there was a road called Radhaballav Road leading from Ferry Fund Road westward to the Hooghly; there were houses on both sides of the road all of which except the temple were acquired by the appellant company and they have erected at great cost a jute mill which they are working. The defendant Municipality sold the whole of Radhaballav Road to the appellant company who have included it in their mill compound by a boundary wall. The road from the Hooghly to the temple has been closed and there is no objection to this because the appellants have acquired all the lands on both sides of the road. The dispute is with regard to the portion of Radhaballav Road from the temple to Ferry Fund Road. The Municipality finding it probably not worth while to maintain this portion of the road sold the entire road to the mills. In order to allow the plaintiff to reach the temple a passage was given to the plaintiff by the appellants of which we will speak later.

The defence of the appellants and of the Municipality is that in the exercise of the power vested in the Municipality under the law it has transferred this road to the appellants that the plaintiff has no absolute right of passage over it and that the passage given by the appellants to the plaintiff is sufficient for the purpose. The trial Court found for the plaintiff on all the points on which he based his title to the road, and held that the Municipality had no right to sell the land to the mill; and further that the plaintiff had an easement of necessity over the road. The lower appellate Court confirmed all these findings but in view of the decision of the Allahabad High Court in *Fazal Haq v. Maha Chand* (1) thought

that the plaintiff should be given a passage in lieu of the road and the passage proposed by the appellants from Ferry Fund Road to the temple almost diagonally across the appellant's lands would suit but that it should be walled up on both sides by the appellant without the gate put up by them at the head of the passage. In this view the learned Additional District Judge passed a decree to the effect that the appellant company should remove their gate from the passage keeping an intermediate space of at least six feet in width and should wall it up on both sides. If they failed to do so in a fortnight the plaintiff would be at liberty to execute the decree and to have the old Radhaballav Road reopened on demolishing the company's boundary wall and to have access to the temple by that road. This order to a certain extent, makes our position easy and leaves us to consider what should be the proper order passed in the circumstances of the present case. But as the lower appellate Court has confirmed the views of the first Court on the questions of law raised which have been pressed before us by the learned advocate for the respondents it is necessary to examine them in brief.

It is argued in the first place that the Municipality has no power under Act 3 of 1884 to sell the road to the appellants. The learned counsel for the appellants has, on the other hand, broadly contended that the Court has no power to question the discretion of the Municipality in this matter. This contention should not be acceded to for if the Municipality has acted ultra vires the civil Court has the power to interfere as also the power to grant proper relief to the aggrieved party. This is the principle on which civil Courts interfere with acts of public bodies, such as Municipalities, created by statutes. There are numerous cases on this point but it is enough to refer to *Kameshwar Pershad v. Chairman of the Bhabua Municipality* (2).

Now with regard to the Municipality selling the road to the appellants it is contended on behalf of the respondents that no such power is vested in the Municipality whereas it is argued by the appellant that the act of the Municipality was within the law. Under S. 30, Bengal Municipal Act 3 of 1884 all roads includ-

(1) [1875] 1 All. 557.

(2) [1900] 27 Cal. 849.



ing the soil have been made to vest and belong to the Commissioners of the Municipality. The words "including the soil" were introduced by Act 4 of 1894. The section, as it now stands means that the roads together with the sub-soil belong to the Municipality and so do all bridges, tanks, ghats etc., but not the soil under them. Under S. 34, the Commissioners are empowered to sell, let, exchange or otherwise dispose of any land not required for the purpose of this Act. Before the amendment of 1894 it would appear that the Commissioners had no power to dispose of the roads and after the amendment it would equally appear that they have obtained a proprietary right over the roads. Now the question is whether the word "land" as used in S. 34 includes roads. The learned advocate for the respondent has strenuously argued that "land" in S. 34 does not include road but means lands other than roads which belong to the Municipality. We are unable to agree with this interpretation of the law. Land has not been defined fully in the Act but in S. 6 (5) it is said to include the benefits arising out of the lands etc. This definition does not help us very much in determining whether the word "land" as used in S. 34 includes road and the soil. There does not appear to be sufficient reason why the ordinary significance of the word "land" should be abridged by excluding roads only. The amending Act of 1894 left S. 34 which is reproduction of S. 34 of the Act of 1875 and of S. 13 of the Act of 1864 untouched, but widened the rights of the Commissioners over roads without any reservation. In the old Acts of 1864 and 1875 only the surface of a road vested in the Commissioners and, therefore, the view was rightly held that under the old law the Commissioners had no power to dispose of or transfer a road as it may now be maintained that they have no such power over bridges, tanks &c., the sub-soil of which does not vest in them.

This brings us to the next question as to whether the land, assuming it to include road, was disposed of as it was no longer required "for the purpose of this Act." If it was, then the civil Court has no right to challenge or investigate into the propriety of the Commissioner's action. If it was not, then, however reasonable the act of the Commissioners might appear, the Court would declare

such act illegal and ultra vires. Now "the purpose of the Act" is not defined in the Act itself but some indication as to what the purposes of the Act are may be gathered by a reference to S. 69 of the Act which details some of the objects to which the Municipal fund may be devoted. After indicating some of the heads on which the Municipal funds may be expended, Cl. (17) of the section, says "generally, to carry out the purposes of the Act." This does not bring us very much nearer to what "the purposes of the Act" means. In Cl. (3), S. 69 it is again said that the Commissioners may do all things, not being inconsistent with this Act, which may be necessary to carry out the purposes of this section. The purposes of the Act must be the purposes for which the Municipalities in the mufussil are created. The preamble to Act 3 of 1864 which may be taken to be the earliest Act relating to mufussil Municipalities runs in these words :

"An Act to provide for the appointment of Municipal Commissioners in towns and other places in the Provinces under the control of the Lieutenant Governor of Bengal and to make better provision for the Conservancy, Improvement and Watching thereof, and for the levying of rates and taxes therein."

The objects therein mentioned may be taken to be the purposes for which the Municipalities came into existence. The power of the Commissioners to transfer lands including roads &c., must, therefore be exercised for the improvement &c. of the Municipality. Now, in the present case we find that Radhaballav Road as a road had become useless to the general public. The greater portion of it had been closed and was of no use, only a small portion still remained from the temple to Ferry Fund Road. It can only be used by the plaintiff and votaries of the temple. In these circumstances we cannot say that the Municipal Commissioners were acting beyond the power vested in them by the law in regarding this portion of the road as no longer required for the purposes of the Act and selling it to the appellant. They did not certainly do something prohibited by law or inconsistent with the Act.

It has again been argued that no Municipality has the power to close or divert a road. If we are right in our view that the Municipality has the power to sell or dispose of a road under the law as it stands, it cannot be argued that it has not



also the power to close or divert a road "for the purpose of the Act." In fact it was conceded that it had such power in the Allahabad case on which the Court below has relied. There is an old case of this Court to which reference may be made in this connexion. In *Empress v. Brojonath De* (3) it was held that the Municipal Commissioners had no power under the law to stop or divert public ways. That decision was passed before the amending Act of 1894 and therefore is not of much help to us. If it is of any authority at the present day it has to be reconsidered. The English Law relating to highways is not of much assistance to us in construing a Bengal Act. Under that law the soil beneath the road belongs to the owner of the land or to the owners of the lands on the two sides of the road. There is no enactment there which vests the subsoil of the highways in a local authority. But although under that law the local authority has not been expressly empowered to stop or divert a road it can do so by observing certain formalities mentioned in the Highways Act of 1835.

In *Brojo Nath Das's* case a reference was made to the Calcutta Municipal Act. It was pointed out there that such power is vested in the Commissioners of the Calcutta Corporation, but as it was not expressly given by the Bengal Municipal Act to the Commissioners of the mufussil Municipalities, it must be held to have been denied them. The same reasoning has been adopted in this case but it seems to us that though it may be permissible to construe an Act with reference to another Act when they are *pari materia*, the absence of an express provision in one does not necessarily import intentional omission in the other without clear words to that effect. The Act, as it stands, must be construed within its four corners. There is nothing in the Act which prohibits the Commissioners to stop or divert a road or to dispose of a road. The only limitation to their power given by the Act is that they must exercise such power only for the purposes of the Act. We cannot say that the sale of the road by the Municipality to the appellant was not in the proper exercise of the power vested in it by law. It was for the purposes of the Act, namely, the improvement of the

Municipality and what the Commissioners thought advantageous to it.

Now, we are to consider the propriety of the passage suggested by the Court below which must be provided to the respondent for access to the temple. The passage which is suggested runs through the mill area and the appellants agreed to it if they could exercise control over it for the protection of the mill. In our opinion it is not a convenient passage even if the directions given in the decree of the lower appellate Court are accepted.

It appears that in place of the Radhaballav Road a new road has been substituted a little to the north called New Road as shown in the map. It seems to us that there can be no objection to access being given to the plaintiff from this road. The plaintiff-respondent maintains that he has the legal right to claim access from the Ferry Fund Road. We think that he has no such absolute right; but he is entitled to claim a reasonably convenient access to the temple. The appellant before us has suggested a road opposite the temple running straight on the New Road which seems to us convenient. This is objected to by the respondent on the ground that it is so close to the septic tank. We are unable to determine the exact site of the passage and what directions should be given to make it a convenient road for the plaintiff and those people who have to visit the temple.

We must accordingly send this case back to the lower appellate Court in order to determine what should be the proper passage to the temple from the New Road and of what width it should be; and also directions should be given to make it a convenient passage. Whatever directions are given should be to the Municipality which is liable to provide a suitable passage to the plaintiff.

As a result of the above observations this appeal is allowed and the decree of the Court below is set aside and the case is sent back to the lower appellate Court in order that it might take into consideration all the circumstances of this case and determine the alignment of the road as suggested above. Each party will bear his costs so far. Future costs will be in the discretion of the Court below.

No order is necessary in the rule.

D.B./R.K.

*Appeal allowed.*



**A. I. R. 1929 Calcutta 37**

RANKIN, C. J. AND MUKERJI, J.

*Kamal Kumar Datta and another—Appellants.*

v.

*Nandalal Dubey—Respondent.*

Letters Patent Appeals Nos. 30 and 31 of 1928, Decided on 12th September 1928 from appellate decrees of Mitter, J., D/-9th March 1928, in Appeals Nos. 554 and 553 of 1926.

**(a) Landlord and Tenant—Person claiming to be permanent tenant must prove existence, nature and extent of interest granted to him.**

When a person claims to hold land as a permanent tenant, it is for him to prove the existence, the nature and the extent of the interest which the owner of the full rights has granted to him. It is not the business of the landlord to explain the possession, it is the business of the tenant to show that it leads to the inference of a permanent tenancy: 16 Cal. 223, *Foll.* [P 41 C 1, P 38 C 1]

**(b) Civil P. C., S. 100—Proper effect of proved fact is question of law—Question whether tenancy is permanent is legal inference from facts.**

The proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is a legal inference from facts and not itself a question of fact: *A. I. R. 1927 P. C. 102, Foll.: 32 Cal. 51 (P.C.), Ref.: 8 Cal. 960, not Foll.: 3 Cal. 696 and 25 Cal. 896, (F.B.): Cons.* [P 39 C 1]

**(c) Landlord and Tenant—Permanent tenancy—Inference based merely on facts ambiguous in themselves is unwarranted in law.**

For the purpose of ascertaining the character of the tenancy an inference based merely upon facts which are in themselves ambiguous or equivocal, in the sense that they are not necessarily referable to the existence of a permanent right in the tenant, is an inference which is unwarranted in law. [P 39 C 1]

**(d) Landlord and Tenant—Permanent tenancy—Presumption—Residence of tenant and his family for very long time without variation of rent is by itself insufficient to hold that tenancy is permanent.**

The mere circumstance that the tenant and his family have for a very long time been allowed to continue residing in the same place without any variation in the rate of rent is a circumstance which by itself is an insufficient foundation for holding that the tenant's right was permanent in its origin: 16 Cal. 223 and *A. I. R. 1925 Cal. 309, Rel. on.: 34 Cal. 902 and 30 C. W. N. 709, Cons.* [P 40 C 1]

**(e) Landlord and Tenant—Permanent tenancy—Land held for residential purposes—Absence of permanent structure is not evidence negating permanency of tenancy—Existence of permanent structure is not unequivocal fact for inferring permanent tenancy.**

Where land is held for residential purposes, the absence of permanent structures is not to

be regarded as evidence negating the permanency of the tenancy, nor can it be laid down that the existence of permanent structures is the only unequivocal or unambiguous fact for the purpose of an inference in favour of the tenant: *A. I. R. 1925 Cal. 309, Rel. on.* [P 40 C 1, 2]

**(f) Landlord and Tenant—Prior to Transfer of Property Act, non-permanent tenancy was not heritable—Tenancy created before Transfer of Property Act—Successions are poor evidence that tenancy is heritable.**

Although prior to the Transfer of Property Act a tenancy which was not permanent would not be heritable, successions are in themselves poor evidence that the tenancy is being treated as a tenancy heritable as matter of right. The effect of such evidence is in no way comparable to the effect of a recognition by a landlord of a tenant's claim to transfer the original tenancy to an assignee. [P 40 C 2]

**(g) Evidence—Circumstantial evidence should not merely point to inference but must lead to no other inference.**

*Per Mukerji, J.*—Circumstantial evidence should not merely point to the inference that is to be drawn, but that the evidence must be of such a nature that it can possibly lead to no other inference. [P 41 C 2]

**(h) Landlord and Tenant—Origin of tenancy known—Inferences from history of tenancy and circumstances obtaining during last fifty years cannot be drawn upon same principles as when origin is unknown.**

If the origin of tenancy is known, if for example it was created by an agreement which is evidenced by writing, inferences from the history of the tenancy and the circumstances obtaining during last fifty years cannot be drawn upon the same principle as are applicable to a tenancy of unknown origin. [P 39 C 1]

**(i) Landlord and Tenant—Abstention to enhance rent.**

*Per Mukerji, J.*—Abstention to enhance the rent, to lead to an inference, of permanent tenancy should be accompanied by circumstances making it unlikely to be due to mere inaction on the part of the landlord. [P 42 C 1]

*Rupendra Kumar Mitter and Bijon Behari Mitter—for Appellant.*

*N. C. Sen Gupta and Urukramdas Chakaravarti—for Respondents.*

**Rankin, C. J.**—These two appeals arise out of two suits for ejectment brought by the same plaintiffs as landlords against the tenant, defendant, Nando Lal Duli.

The land in question is homestead or bastu land and the area is in each case about two cottahs. The annual rent is in one case 13 annas and 9 pies and in the other case one rupee six annas and three pies.

The sole question for decision in each case is whether or not the tenancy of the defendant is a permanent tenancy. Both tenancies are very old and have been



traced back to the time of the defendant's grandfather and grandfather's brother. Kabuliats put forward by the plaintiff dated in 1876 and 1846, have been rejected as spurious by both the Courts below. The origin of the tenancies is unknown and the finding is that they have been in existence for about a hundred years. It is proved that they have been held throughout for residential purposes; it is proved that they have been held at the same rate of rent for forty years and according to the plaintiff's case, the rent has not varied during the last 60 years. There is nothing to show that the rentals have ever been changed. The holdings are in a village and near to a road. The defendant is a labourer. The land is entirely occupied by mud-walled huts, some of which are very old and six or seven of which have been raised by the defendant according to his evidence since his father's death some 32 years ago. The two plots of land, according to the defendant, are in one place and a way runs between them. Four or five of the huts are let out to sub-tenants so as to produce income to the defendant from which he maintains himself.

In these circumstances it is contended for the defendant that the tenancies are very old, that they are of unknown origin, that rent has been paid at a uniform rate for a very long time, that the tenancy is one for residential purposes and that it has passed from one generation to another in the same family by succession twice, if not three times. In view of the fact that a labourer in the position of the defendant would not be likely to have pucca or masonry buildings, it is said that the absence of such permanent structures upon the land is a circumstance which in no way goes to show that the tenancy was not a permanent one.

The landlords contend on the other hand that before an inference can legitimately be drawn to the effect that the defendant has a permanent right, facts must be proved which are unequivocally referable to a right of this character and that the mere fact that a tenant has been allowed to hold homestead land for a long time without any enhancement of his rent is not a sufficient basis for an inference that he has a permanent right even when it is coupled with the circumstance that the holding has remained in the same family for three generations.

The principles applicable to cases of this class may be stated as follows: (1). When a person claims to hold land as a tenant under a landlord it is for him to prove the existence, the nature and the extent of the interest which the owner of the full rights has granted to him: (2) The terms of a holding as between landlord and tenant must in these cases be a matter of contract, either expressed or implied (3). The legislature, as regards this province, has regulated the terms of agricultural holdings. The letting of land for residential purposes is regulated by the Transfer of Property Act of 1882, but from the operation of this statute old tenancies, such as those now in question, are excluded by S. 2. (4). Ordinarily the person who sets up a contract will be required to give reasonable particulars and direct proof of the contract relied upon, but in the case of tenancies proved to be of long standing this principle is inapplicable, and from the history of the tenancy and the circumstances of the case it is open to the tenant to show that the origin of the tenancy being unknown the correct inference is to the effect that the right granted to the tenant and enjoyed by him is a permanent right.

In addition to these principles of law we have to bear in mind certain general considerations of fact applicable to Indian conditions prior to the Transfer of Property Act that is to a period which ended about fifty years ago: (a) It was not unusual and is in no way incredible either that an owner of land should mean to give a permanent right for residential purposes to a tenant in an Indian village or that the tenant should be content to take such a right by mere oral agreement coupled with possession. (b). The fact that a tenancy was for residential purposes in no way involved of itself that the tenant's right to the land was to be permanent as the land could be used for kutchha structures to be erected by the tenant. (c) In ordinary circumstances documents are difficult to preserve in India and in a case like the present are little likely to survive for a hundred years. (d) Lastly there is the consideration remarked upon by Chakravarti, J., in *Abdul Hakim v. Elahi Baksh* (1) at p. 60 [of 52 Cal.]

"The fact that a tenant is allowed to continue in possession of land for generations.

(1) A. I. R. 1925 Cal. 309=52 Cal. 43.



without alteration of the rent is a common occurrence in this country and is usually attributable to the reluctance of a landlord to eject a tenant from his home so long as he does not make himself objectionable and regularly pays his rent."

Quite recently it was held by the Judicial Committee of the Privy Council in *Dhannamal v. Motisagar* (2) that the question whether a tenancy is permanent is not a question of fact upon which the opinion of the lower appellate Court is conclusive in second appeal.

"It is clear that the proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious seems to them, in a case like the present to be a legal inference from facts and not itself a question of fact. The High Court has described the question here as a mixed question of law and fact a phrase not unhappy if it carries with it the warning that in so far as it depends on fact the finding of the Court of first appeal must be accepted."

This ruling must be accepted and applied: it is in consonance with much Indian authority: but it creates a difficulty in cases which are near the boundary line. In those, at all events, it is not easy to see that the ultimate inference is not itself a question of fact. As a matter of law it is clear that if the origin of the tenancy is known—if, for example, it was created by an agreement which is evidenced by writing—inferences from the history of the tenancy and the circumstances obtaining during the last fifty years cannot be drawn upon the same principle as are applicable to a tenancy of unknown origin. It is clear also that for the purpose of ascertaining the character of the tenancy an inference based merely upon facts which are in themselves ambiguous or equivocal, in the sense that they are not necessarily referable to the existence of a permanent right in the tenant, is an inference which is unwarranted in law. In numerous and various respects such an inference may be erroneously drawn and the error be error in law. But on the other hand, we are in this class of case dealing not with the effect of a fact upon the rights of the parties but with the inference to be drawn from subsequent facts as to the nature and extent of the right previously granted by the landlord to the tenant. For this purpose it would rather seem that the proper effect of a proved fact is a question of evidence. So long as it was

thought that cases of this kind fell within a few readily recognizable classes it was possible to regard these cases as though the inference to be drawn could be ascertained as a matter of law. If the tenant could bring his case within one or other of these classes he was held to be entitled to a presumption of law. This is really the standpoint of the earlier Calcutta decisions e.g., *Prosunno Coomaree Debea v. Rutton Bepari* (3) and of Rampani, J., in *Nabu Mondul v. Cholim Mullick* (4). But it is clear now, if only from the decided cases, that the present question is constantly arising in widely different circumstances and has to be answered in each case upon the circumstances of that case. Lord Robertson in *Nilratan v. Ismail Khan* (5) at 61 said:

"The question here as in other similar cases is whether the true inference from the facts is that the tenure is permanent or precarious, the burden of proof being on the tenant."

If this be so the ultimate inference that the right of a tenant was a permanent right must be open to the Court in point of law, but it is difficult to see how in its nature it can be other than an inference of fact.

I make these observations because I recognize that in the present case on the facts found by the lower appellate Court, it may be thought to be difficult to say that the conclusion at which it arrived was either inadmissible in law or compulsory in law: to say that there is no evidence upon which the Court could find that the tenancy was permanent or to say as a matter of law that the facts upon which it did so find were evidence with which it was obliged to be satisfied.

In view of *Dhanna Mal's* case, however, I think that we must decide the case for ourselves on the facts found by the Subordinate Judge. We cannot confine ourselves to saying as was said by Garth, C. J., in *Gangadhur v. Ayimuddin* (6) (at p. 962) that

"upon these circumstances we think that the Courts below were at liberty to presume, if they thought fit . . . that the grant itself was of a permanent character."

In the judgment of Chakravarti, J., in *Abdul Hakim's* case (1) (supra) the principle relied on by the tenant is stated to be "the principle of a lost grant." This

(3) [1877] 3 Cal. 696=1 C. L. R. 577.

(4) [1898] 25 Cal. 896 (F.B.).

(5) [1905] 32 Cal. 51=31 I. A. 149=8 C. W. N. 895 (P.C.).

(6) [1882] 8 Cal. 960.

(2) A. I. R. 1927 P. C. 102=8 Lah. 573=54 I. A. 178 (P.C.).



seems to me to introduce from the English law of easements an element which is both unnecessary and confusing. For the present purpose we are troubled by no rule that a permanent tenancy must have been created by a written instrument nor are we concerned to find a lawful origin for acts which would otherwise have been unlawful. The continuance of an old tenancy is equally lawful whether the tenancy be permanent or precarious. The doctrine of lost grant when examined in the case of *Angus v. Dalton* (7), was found to bristle with difficulties and in any case it is necessarily based upon an arbitrary period which the law of England puts at twenty years.

The references to the principle of lost grant are however only an incident in the judgment in *Abdul Hakim's* case (1). The cases which illustrate the facts from which and the principles on which an inference as to a permanent tenancy can properly be made are very carefully analyzed by Chakravarty, J., in a clear and highly useful statement of the law.

On second appeal and in the lower appellate Court the absence of permanent masonry structures upon the land of these suits has been explained by the circumstance that the defendant is a labourer and that people of his position would not generally expect to reside in buildings of such character. This consideration is sufficient to show that the absence of permanent structures is not to be regarded as evidence negating the permanency of the tenancy. If, therefore, in the other circumstances there is sufficient evidence from which an inference of permanency can be drawn no difficulty would arise. But the mere circumstance that the tenant and his family have for a very long time been allowed to continue residing in the same place without any variation in the rate of rent is a circumstance which by itself is an insufficient foundation for holding that the tenant's right was permanent in its origin.

In *Abdul Hakim's* case (1) Chakravarti, J., as a result of his analysis of previous decisions considered that the absence of permanent pucca buildings on the land would ordinarily be fatal to a claim for permanency. What I think he meant by this statement was that unless permanent pucca buildings existed on the land the tenant would not as a rule be able to

point to anything more than matters which can be explained by the reluctance of a landlord to eject a reasonable tenant i. e., to point to any other element showing that the tenant's long occupation at a uniform rate of rent is unequivocally referable to a permanent right.

In my opinion it cannot be laid down that the existence of permanent structures is the only unequivocal or unambiguous fact for the purpose of an inference in favour of the tenant. In this respect I think that the case law has broadened somewhat since *Prosonna Coomaree's* case (3) was decided. In *Secretary of State v. Luchmeswar Singh* (8) at p. 23, Lord Hobhouse said :

"All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of those things, there would be strength in that argument."

The rent in that case had come to be far below the value of the land. In the case of *Naba Kumari v. Behari Lal* (9), Sir Arthur Wilson delivering the judgment of the Judicial Committee referred to the circumstances that

"the rent was almost a nominal one and had never been enhanced though the value of the holding as measured by the sale price had greatly increased.

Again in *Bireswar v. Troilakya Dasi* (10) the land was situated in the Howrah Municipality and the rent remained unchanged for 65 years though the value of the land had increased abnormally. An inference of permanency was drawn mainly upon this consideration.

The effect of successions cannot in my opinion be rated very high. No reasonable landlord in a case like the present would be minded to eject the family from its homestead merely because the father or the grandfather had died. Assuming that prior to the Transfer of Property Act a tenancy which was not permanent would not be heritable, still these successions are in themselves poor evidence that the tenancy is being treated as a tenancy heritable as matter of right. The effect of such evidence is in no way comparable to the effect of a recognition by a landlord of a tenant's claim to transfer the original tenancy to an assignee.

(8) [1889] 16 Cal. 223=16 I. A. 6=5 Sar. 275 (P.C.).

(9) [1907] 34 Cal. 902=6 C. L. J. 122=11 C. W. N. 865 (P.C.).

(10) [1926] 30 C. W. N. 709.

(7) 4 Q. B. D. 162=6 A. C. 750.



The rent in the present cases has remained unchanged, according to the plaintiffs' admission, for 60 and 80 years respectively. It is in evidence that the land of these suits has been occupied not merely by the defendant's family for their own residence, but of late years at least by sub-tenants who have occupied mud-walled huts paying rent to the defendant therefor. But it is difficult to be sure whether for two cottas of land in this village a rent of 13 annas 9 pies or 1 rupee 6 annas 3 pies is a reasonable or economic rent, or should be regarded as a very low rent. None of the Courts below appear to have proceeded upon this consideration. I notice that the defendant in his evidence gave as a reason for which his father had been wont to say that he had a permanent right that the defendant talked to him of the low rent of the land. This seems to be the only evidence that the rent was in fact low and we cannot say whether the economic or rack-rent would be likely to have tempted the landlord to raise the rent on threat of ejectment. It is no doubt possible to call a mud-walled hut a substantial structure but the existence of such huts adds nothing to the fact that the tenancy was for residential purposes. It is not such a structure as the tenant could not without imprudence raise upon the land in the absence of a permanent right nor such as gives notice to the landlord that the tenant claims permanent right. It will not suffice to say that these tenants were labourers and that mud-walled huts were something of a luxury for them.

I am sorry that the defendant's possession should be disturbed but I should be still more sorry to administer the law in such a way as to cause landlords to raise tenants' rents or to eject tenants merely to preserve their rights as landlords. This consequence will certainly ensue unless the Courts hold very firmly to the principle that it is not the business of the plaintiff to explain the possession, it is the business of the defendant to show that it leads to the inference of a permanent tenancy, *Secretary of State v. Maharajah Luchmeswar Singh* (8).

On the whole it appears to me that these appeals should be allowed and the suits decreed. No costs in any of the Courts.

**Mukerji, J.**—I am entirely of the same opinion. At one time during the

arguments I was strongly inclined to the view that the defendant's possession of the homestead extending over a hundred years or more with payment of the same rent for sixty years, if not more, should not be disturbed, and that the concurrent opinion of three Courts such as there has been in this case, that the tenancy was a permanent one should not be dissented from. On considering the matter further and in the light of the authorities, bearing upon it, I can see no escape from the conclusion that the appeal should be allowed and the plaintiff's suit should be decreed.

Direct proof of the contract which was the origin of the tenancy not being available, the question is what is the correct inference to be drawn from the circumstances proved in the case. The onus of proving permanency being unquestionably on the defendants, the question, properly formulated, is whether the defendants have succeeded in proving circumstances which go to raise in their favour a "presumption" or perhaps more correctly an inference of permanency. Whether the defendant has succeeded in discharging this burden is to be judged by the well-recognized rule of circumstantial evidence that such evidence should not merely point to the inference that is to be drawn, but that the evidence must be of such a nature that it can possibly lead to no other inference. Were this inference an inference of fact only an error in drawing the inference in view of the definition of "proof" as given in S. 3, Evidence Act, would in a case where it cannot be said that there is no material in support of it be at best a question of sufficiency of proof, and consequently a question which may not be gone into in second appeal. In any event, were this the position, I should be extremely reluctant to interfere with the affirmance which my learned brother Mitter, J., has lent to an inference of this nature which the first two Courts have concurrently drawn in defendant's favour.

The decision of the Judicial Committee in the case of *Dhannmal v. Moti Sagar* (2), however, makes it plain that the question is a legal inference from proved facts and not itself a question of fact, and as my Lord the Chief Justice has said in his judgment that decision must be accepted and applied. We have, therefore, in this appeal to draw our own inference from the proved circumstances.



Applying to the case the rule of circumstantial evidence to which I have already referred I find that the only facts proved are that the tenancy was for residential purposes, that possession has extended for over a hundred years with constant instances of inheritance and succession and that there has been payment of uniform rent for sixty years or more, or in other words that there is no proof that the rent varied at any time. Presence of permanent masonry structures would have been a circumstance in the chain in defendant's favour, but their absence, though not necessarily against him, is obviously of no use to him. Instances of transfer would have assisted the defendant, but they are entirely absent. All that has been proved, therefore, is long possession on the part of the tenant together with abstention on the part of the landlord to enhance the rent. Abstention to enhance the rent, to lead to an inference, should be accompanied by circumstances making it unlikely to be due to mere inaction on the part of the landlord: but no such circumstances have been proved. What has been proved, in my judgment is not unequivocally referable to the permanency of the holding and permanency, therefore, is not the correct inference to be drawn.

D.B./R.K.

*Appeals allowed.*

### A. I. R. 1929 Calcutta 42

RANKIN, C. J., AND BUCKLAND, J.

*Bhupendra Nath Bhose and another—*  
Defendants—Appellants.

v.

*Goonendra Nath Bhose—Plaintiff—*  
Respondent.

Appeal No. 73 of 1926, Decided on 11th  
February 1927.

(a) Limitation Act, Art. 49—Article 49 applies in a case where the ordinary possession of the defendant is lawful but it becomes unlawful by reason of certain facts.

Article 49 is the ordinary article to apply in a case where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts. The common case is the case where the demand is made by the plaintiff, the plaintiff having a right to determine the possession of the defendants: 21 Cal. 157 (P.C.), Dist.

Plaintiff and his stepbrothers formed a joint Hindu family. Plaintiff's mother and father died in 1905 and 1909 respectively. The mother left certain valuable ornaments which continued to be in the joint family even after the death of the plaintiff's father. During all

the time plaintiff was living with the stepbrothers. Plaintiff attained majority in 1910. Stepbrothers never claimed the ornaments as their own though they were in their possession. In 1920 there was a partition and in September 1920 the plaintiff brought the suit to recover those ornaments. It was contended that the suit was time-barred.

*Held:* that Art. 49 applied and the suit was not time-barred, as the time began to run against him in 1920 when he claimed that stepbrothers should make over the ornaments to him. [P 46 C 1]

(b) Limitation Act, Art. 49—Policy explained.

It is no part of the policy of the Limitation Act to make people determine the lawful possession of others who are looking after their property or who have their property on deposit. The policy of the Limitation Act is that when once that arrangement is stopped the suit should be brought within a limited time. [P 46 C 1]

**Rankin, C. J.**—In this case the plaintiff, Goonendra brought a suit against two defendants originally his stepbrothers Bhupendra and Jnanendra. Janendra has since died pending the suit; but I will omit for the sake of simplicity the complications caused by that event. The plaintiff's case is that his father Woopendra Nath Bhose was married twice, that by his first wife he had two sons, namely, the defendants, and that, after the death of his first wife, he married one Sushila Sundari Dassi and by her he had two children the elder of the two being a daughter and the younger being the plaintiff. It seems that in the year 1905 Woopendra practically retired from business and his business affairs were managed by Bhupendra and Jnanendra. In the same year, Sushila Sundari died. Woopendra survived her by some four years till 1909 and, in 1910, the plaintiff attained majority. These are the broadest facts of the family history with which we are concerned.

The plaintiff's case is that when his mother Sushila Sundari died in 1905 she died possessed of a good many valuable personal ornaments of which certain descriptions have been given in the course of the evidence. These ornaments, according to the plaintiff, were acquired by his mother in such a way as to be her ajautuka stridhan and the plaintiff undertakes to show that they were ajautuka stridhan because otherwise, if they were jautuka stridhan, they would belong not to the plaintiff but to his sister Srimati Saroj Basini Dassi. That is the first point in the case. The defen-



dants, in addition to putting the plaintiff to proof of the existence of the ornaments and the jewellery and of the fact that they were acquired so as to become Susila Sundari's ajautuka stridhan, deny altogether that any such property came at any time to their hands. The learned Judge had said that they put forward four different inconsistent cases and he has disbelieved the defendants and has believed the plaintiff.

It becomes necessary in this case to state as matters of simple fact what the plaintiff's evidence establishes because a great difficulty has arisen in this case from the fact that legal interpretations have been somewhat rashly put upon facts without sufficiently considering the distinction between the facts themselves and the legal results of certain facts. I am quite satisfied that the evidence adduced by the plaintiff entitled the learned Judge to hold, and that he meant to hold the following facts: First of all, the learned Judge had believed the evidence (which is the only evidence upon the point) given by Kusum Kumari Dassi as regards the way in which the plaintiff's mother came to be possessed of the articles in question and as to the fact that these articles came to the hands of the defendants. The lady explains that Sushila Sundari obtained the articles in question in two ways: first, she says they were presents given by the witness herself Kusum Kumari before Susila's marriage to Woopendra and, secondly, she says they were presents which Susila got from Woopendra after the marriage. Now, as to that when the Hindu Law is examined, it turns out that the difference between ajautuka and jautuka stridhan is a matter which requires some little consideration. Jautuka stridhan is not entirely confined, it would appear, to presents given actually before the nuptial fire. But the limits within which such presents become jautuka stridhan are somewhat narrow. Kusum Kumari, the grandmother, having given her evidence in the manner I have described for the plaintiff is in no way cross-examined with a view to show that the particular facts to which she is speaking bring the case on a careful examination to a case of jautuka stridhan. Her evidence is left exactly as she gives it a broad statement—gift from herself before the marriage, gift from her husband

after the marriage. In my opinion, it either was not in the contemplation of the defendants at the time of the hearing to contest seriously the nature of this stridhan or else they felt themselves wholly unable to cope with this lady and cross-examine her so as to throw doubt upon the evidence which she gave. It has to be remembered that the defendant's case is, that no such ornaments ever came to their hands. So far as I know, they do not admit anywhere that to their own knowledge any such property was in existence at any time. Indeed, their case suffers seriously from the attempt which the defendants made to show that to the best of their knowledge this lady who married a man of some considerable wealth and position had no ornaments at all. In my opinion, therefore, the learned Judge's finding that this was ajautuka stridhan should not be disturbed. The only reason why his finding requires to be considered at all is that, in giving his reasons for supposing that the ornaments possessed by this lady were of substantial value, he does say in his judgment that Woopendra would be unlikely to give his bride cheap or insignificant presents. It does not seem to me that the learned Judge's attention there was being directed to the exact legal distinction in Hindu Law which divides jautuka stridhan and ajautuka stridhan and the fact that he uses the word "bride" does not lead me to suppose that he has come to the conclusion after considering the matter that these presents were given at the exact time of the marriage. In any event, looking to the uncontradicted and simple evidence given in the course of the case, it appears to me that the plaintiff has made out his title by making out that this is property which would come to him and would not go to his sister. I need not say that, in no event, would it come to the defendants.

Now, it is necessary to go again over certain facts in this case in order to deal with the only other contention which has been raised before the Court by Mr. Langford James on behalf of the defendants-appellants namely, the contention that the plaintiff's case is governed by Art. 120, Sch. 1, Lim. Act of 1908 and that, under Art. 120, the plaintiff's case is time-barred because, as I understand the argument, his suit might and could have been brought in 1910 when the



plaintiff came of age, and six years from that date would be 1916, whereas the plaint was not filed till September 1920. Here, again, I would try to keep to the facts as distinct from a more or less unsuccessful attempt to interpret the facts.

The facts are that before 1905 when Susila Sundari died the ornaments in question, according to the plaintiff's evidence, were kept in her own room and that after she died they were kept in an iron-safe in her husband's room. What else was kept in the iron-safe we do not know. What other purpose the iron-safe was used for we do not know. We are told that Bhupendra one of the defendants kept the key; but it is quite true, as Mr. James points out that however much the management of the family affairs might be left by the father to the plaintiff's stepbrothers, the mere existence of the ornaments in the safe would not have involved any management at all. The facts are that they went on in the safe in the father's room and defendant 1 has the key. When Woopendra died in 1909, the facts are that the plaintiff had not yet come of age, that his stepbrothers were considerably older than he was, and that naturally enough they not only took probate of the father's will but carried on the family concerns as they would have done in ninety-nine cases out of hundred in Hindu families of this particular type. The ornaments were in the safe and they went on in the safe. It appears that when the family had occasion to use them they were used. They were used later on at the time of the plaintiff's marriage. Some other relatives seem to have used them on occasions. There is no reason why they should not be used when suitable occasions arose. There is no suggestion in the plaintiff's evidence or in the defendant's evidence that any claim was made by the elder brothers that these ornaments belonged to them. The nature of the ornaments makes it very improbable that there was much doubt as to their not belonging to the stepbrothers. What happened is what one would expect so long as the family was living jointly and without trouble. Of course, in the end, trouble did come. It seems that, in 1919 the finances of the defendants being in an unsatisfactory state, there was a question of selling two of the ornaments. It seems that the plaintiff's consent was

asked, the two ornaments were valued for the purpose of sale and the plaintiff in the end refused his assent and they were not sold. There was a partition in 1920 and it is in September 1920 that the plaintiff brings his suit. Those being the facts, the matter begins, as most plaints in this Court do, by getting them thoroughly muddled with the pleadings. There were two attempts to fasten these facts with various legal categories in order to put the plaintiff's case straight for the purposes of the Limitation Act and the real difficulty in applying the law to the facts consists entirely in the circumstances that instead of saying that when Woopendra died the defendants took possession of whatever was in the house and that the family went amicably on as before, the plaint says this :

"The management of the estate and affairs of the said Woopendra Nath Bhose was under the control of the defendants and with the knowledge and concurrence of their father they took possession of the said ornaments and jewellery for and on behalf of and as trustees for the plaintiff and continued to hold the same as such till his death."

That is the travesty of what happened before Woopendra's death. The travesty of what happened after his death is this. The plaint goes on to say:

"Upon the death of the said Woopendra Nath Bhose, the defendants as executors and trustees appointed under his will took possession of the estate left by him as such executors and trustees including the plaintiff's share therein and the said jewellery and ornaments continued to be in their possession, care and control as such executors and trustees and are still in their possession and control."

The learned Judge has, it is true, found not merely the fact that these defendants being the elder brothers took possession of the house with the iron-safe and whatever were the contents of the iron-safe; but he also says that they took possession as executors and trustees and Mr. Langford James very properly points out that if this has to be regarded accurately then the plaintiff would have a right to bring his suit the moment he attained majority. If these brothers of his were holding the property as executors of Woopendra, then, of course, they were setting up a hostile title to the plaintiff because according to the plaintiff's case Woopendra was never the owner of these goods at all after Susila. As a matter of verbal criticism, I entirely agree that, if the correct finding is that these people were claiming to hold the property as



property which was Woopendra's and not the plaintiff's and which, therefore, had come down to them, they were holding it under a title which was hostile to the plaintiff and the plaintiff would have six years from 1910 in which he would be obliged to bring his suit. It is necessary, therefore, for us to examine the evidence for ourselves and see whether the real facts found do warrant any such conclusion. It is not the effect of the plaintiff's evidence or of any evidence in this case that these defendants ever claimed that these ornaments were ornaments belonging to their father's estate or in which they had a joint interest with the plaintiff as part of their father's estate. As I have already observed, the nature of the ornaments makes it extremely unlikely that these stepbrothers would set up any right to the ornaments of a lady who was not their mother at all. There is nothing in the conduct of Woopendra to suggest that he suffered under any impression that the ornaments devolved on him. What has happened is entirely natural and consistent with the plaintiff's case. The ornaments remained after the father's death in the safe when the elder brothers had to carry on the family concerns and the infant lived with them no question of dispute arising between them.

Plaintiff's case is that they were always recognized as belonging to him because everybody knew that they were the ornaments of his mother. In these circumstances, the last thing that is true is to say that they were held by the defendants as executors of Woopendra's estate. So far as I am concerned, I entirely dissent from any such finding because the evidence satisfies me to the contrary. In my opinion, the position is, as the plaintiff's evidence shows, that these goods being there in the safe, the family went on, the elder brothers having no doubt a general direction and control of the family affairs being responsible as natural guardian of the plaintiff and looking after the plaintiff's property. There is no reason to think that any claim or controversy arose until long after the plaintiff attained majority. In the meantime, he was living in amity as a member of a joint Hindu household at the old house. The question is whether, in these circumstances, Art. 49 or Art. 120, Lim. Act, applies and whether, if Art. 120 applies, the suit is time-barred. In my opinion,

whichever article applies the suit is no time-barred but on the facts which I have endeavoured to state, I think the article applicable is Art. 49. I will deal, first, with the question of the article applicable. Art. 49 has to be read with Art. 48 and having disposed in Art. 48 of all cases of claim for specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the same, Art. 49 deals with cases of claim for other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same; and it says that the time is to be three years from the date when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful. Art. 49 is the ordinary article to apply in a case where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts. The common case is the case where the demand is made by the plaintiff, the plaintiff having a right to determine the possession of the defendants. Now, it is said that that article is inapplicable because of the decision of the Privy Council in the case of *Mahomed Riasat Ali v. Hasin Banu* (1) and it is a little important to see what the Privy Council actually held in that case. That was a case where a Mahomedan died leaving a widow and a brother. In the *wajib-ul-arz* of the place where he had his immovable property there was a statement of the local custom governing such people and the local custom evidenced by that record and by certain other records was that the widow would succeed to the whole of her husband's estate for a life-interest. The man died and his brother went into possession of his effects on the basis that there was no such custom and that the property devolved on him and the suit was brought to establish the widow's right under that custom, first of all, to the immovable property and then to the cash and other things that the man died possessed of. A controversy arose as regards the moveables whether the claim against the brothers was a claim under Art. 49 or under Art. 120; and it is with reference to a case like that that their Lordships said:

"This latter article", that is Art. 49 "does not appear to be applicable to a suit to estab-

(1) [1894] 21 Cal. 157=2; I. A. 155=6 Sar. 374 (P. C.).



lish a right to inherit the property of a deceased person."

The case there was that the widow was claiming to use Art. 49 by saying "if I establish my right under the custom then you, the defendant, are a person who has wrongfully taken my property."

Their Lordships of the Privy Council say that that is not the way to look at a suit to establish a right to succeed to the property of a deceased. In my judgment, that is not this case at all. The plaintiff's case is not that the defendants wrongfully took his property. His case is that the defendants were in rightful possession of the property, in rightful possession so long as he was a minor, in rightful possession so long as he was living with them and let them look after it, but in wrongful possession of it since 1919 or 1920 when he claimed that they should make over the property to him; and I am in no way satisfied that there is any valid reason for holding that the plaintiff's claim in this case should be excluded from Art. 49.

The next question is, however, whether the same principle would not apply under the terms of Art. 120. I think they would. If one asks oneself why the plaintiff should bring a suit in 1911 soon after he attained majority against his stepbrothers and what his cause of action in such a suit would be, I think that question, too must be answered against the present appellants. It is quite true that the plaintiff had a right to determine the lawful possession of his elder brothers who were living jointly with him. He had the right to do that. But it is no part of the policy of the Limitation Act to make people determine the lawful possession of others who are looking after their property or who have their property on deposit. The policy of the Limitation Act is that when once that arrangement is stopped the suit should be brought within a limited time. So far as I know, without making a demand upon the brothers for this property, on the facts which the plaintiff's case discloses, the plaintiff would not have had a cause of action against his stepbrothers but had first of all to determine their possession, to do something which would render their possession unlawful and then to bring his suit. In my judgment, under Art. 120 just as under Art. 49, the plaintiff in this case has brought his suit within time. It cannot be too strenuously

emphasized that everything depends upon the exact facts in a case like this. If it had been the defendant's case at any stage that they had the property, that they knew it came from a different origin, that they claimed that it had belonged to their father or that two-thirds of it belonged to them, then no doubt none of the reasons which I have endeavoured to apply to the facts of this case would have been at all applicable.

Upon the facts of this case, it seems to me that the judgment of the learned Judge should be upheld and this appeal should be dismissed with costs.

A cross-objection is argued in this case on behalf of the plaintiff to the effect, first that the learned Judge on the evidence of Hrishikesh ought to have found that the value of the jewellery proved to have been received by the plaintiff's mother from her husband was more than Rs. 10,000 and also that the learned Judge has forgotten to take any account of the ornaments said to be 107 tolas in weight which the lady is said to have got from Kusum Kumari. It appears to my mind as regards the first point that the learned Judge was not satisfied having regard to the nature of the articles in question, that he could safely go by the valuation of the witness Hrishikesh Roy, and, being apparently dissatisfied with that evidence in some respect, he has really reminded himself of the duty of the Court which is not to give damages for a single penny more than what is quite certainly proved. The learned Judge has, in so doing certainly discounted the figure given by the jeweller very heavily. He was dealing with articles with reference to which it is very difficult to form a precise opinion and I do not think it would be right on the part of this Court to interfere with his figure seeing that he was entitled to put a conservative figure upon the matter.

As regards the 107 tolas in weight of jewellery which is described by Kusum Kumari, there again the plaintiff is in the unfortunate position that no evidence whatever has been given of the value of these articles. It may be that, if some evidence had been given of the value, it would have been our duty to interfere. But it is very difficult to say that, on this evidence, the learned Judge was obliged to allow the plaintiff any particular figure. The ornaments may have



been of standard gold or something containing a great deal of alloy in them or they may have been merely worth the actual weight of the gold they contain or may have been worth more. It is difficult indeed for the Court left as it is without the opinion of a single witness as to the minimum value of such articles to say that the learned Judge was obliged to put any additional figure upon them and that he was wrong to ignore these articles. I think it may be due to the fact that there was no material upon which he could assess the amount. I do not think that in this case it is right and proper that there should be an enquiry as to the value of these ornaments. In these circumstances, the only thing we can do although I quite agree that the plaintiff has probably got less than the value of the articles is to dismiss this cross-objection with costs.

**Buckland, J.**—I agree.

N.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 47

SUHRAWARDY AND GARLICK, JJ.

*Kailash Sundari Dasi and others—*  
Defendants—Appellants.

v.

*Midnapur Zemindary Co. Ltd.*—  
Plaintiffs—Respondents.

Appeals Nos. 2561 to 2575 of 1925,  
Decided on 20th April 1928, from appellate decrees of Dist. Judge, Zillah Nadia,  
D/- 20th August 1925.

(a) **Bengal Tenancy Act, S. 109-A (3)**—  
Special Judge finding out original rent payable by tenant and then proceeding to settle fair rent under S. 105 with S. 30—Decision is not decision settling rent pure and simple and appeal lies.

Where what the Special Judge had done was to find out what the original rent payable by the tenant was and then he proceeded to settle fair and equitable rent under S. 105 read with S. 30, Ben. Ten. Act:

*Held:* that the decision of the Special Judge in these cases is not what may be said to be a decision settling a rent pure and simple. He had done something more than that; that is, he had found what the real rent payable by the tenants was and a second appeal would lie.

[P 48 C 2]

(b) **Bengal Tenancy Act, S. 105**—Settling rent means deciding something previously unsettled—No rent fixed in Record-of-Rights or rent mentioned therein accepted as correct—Increase or abatement demanded—Decision in such cases would be decision settling rent.

"Settling rent" has a technical meaning.

Ordinarily "settle" would mean decide something which was previously unsettled. Where there was no rent fixed in the Record-of-Rights or where the rent mentioned in the Record-of-Rights is accepted as correct and increase or abatement is demanded thereupon on one of the grounds mentioned in the Act, the decision of the Settlement Officer in such and similar cases would be a decision settling rent. "Settling a rent" must be distinguished from settling a dispute relating to rent: 31 Cal. 380, *Foll.* [P 48 C 2]

(c) **Bengal Tenancy Act, S. 105**—"Existing rent," meaning explained.

The existing rent is the rent which the tenant is liable to pay under contract with the landlord. [P 49 C 1]

(d) **Bengal Tenancy Act, S. 105**—Revenue Officer can enquire as to existing rent.

Under S. 105 the Revenue Officer is entitled in order to settle fair and equitable rent to enquire as to existing rent and to determine all questions that may arise under S. 105-A or S. 105: 44 Cal. 783, *Foll.* [P 49 C 1]

(e) **Bengal Tenancy Act, S. 105 (4)**—All circumstances must be taken into consideration in settling fair and equitable rent.

In proceedings for settling fair and equitable rent it is not enough to find that there has been an increase in the price of staple food crops but it is also necessary to find that the rent settled by the Court is fair and equitable taking all circumstances into consideration. [P 49 C 2]

*Bijan Kumar Mukherji for Baranishibashi Mukherji and Hari Prasanna Mukherji*—for Appellants.

*Sarat Chandra Basak and Probodh Kumar Das*—for Respondents.

**Suhrawardy, J.**—These appeals on behalf of the tenants arise out of proceedings under S. 105, Ben. Ten. Act, for settlement of fair and equitable rents under S. 30, Ben. Ten. Act, on the ground of rise in the price of staple food crops. The defence of the defendants was based upon many grounds with which we are not now concerned. The main ground on which these appeals have been pressed is with reference to the rate of rent on which enhancement has been allowed by the Court below under S. 30, Ben. Ten. Act. The plaintiffs' case is that the real rent payable by the tenants of the mouzah was at the rate of Re. 1 per bigha; but in consideration of the defendants cultivating indigo it was reduced to 10 annas per bigha. They accordingly claimed enhancement of rent under S. 30 on Re. 1 per bigha. The tenants said that they were liable to pay rent only at the rate of 10 annas per bigha and the enhancement, if any, should be allowed on that rent.



The Assistant Settlement Officer was of opinion that the rent on which enhancement should be allowed ought to be the rent entered in the settlement records and paid by the tenants at the time when that record was prepared, namely, 10 annas per bigha. The learned Special Judge on appeal by the plaintiffs has held that the actual rent for which the tenants are liable is at the rate of Re. 1 a bigha and he has allowed enhancement upon that rent.

It appears that this mouzah at one time belonged to one Mr. Hills. The rate of rent at that time was 5 annas odd per bigha. Mr. Hills attempted to enhance the rent of the tenants and for that purpose brought suits against some of the leading tenants. Those suits were in the nature of test suits. They were carried up to the High Court and Mr. Hills got a decree in this Court at Re. 1 per bigha. Since then there have been several jama-bandis, one in 1293 B. S., and another in 1309—which were accepted by the tenants and they show that the rent was Re. 1 a bigha but that remission or allowance was made of 7 annas in the rupee and latterly 6 annas in the rupee in view of the willingness of the tenants to cultivate indigo for the landlords. This remission is described in the landlords' papers as mahakup or temporary remission of rent. The tenants ceased to cultivate indigo from 1305 and hence the plaintiffs claimed that they were entitled to realize the full rent from the defendants and enhancement should be calculated upon that rate. The lower appellate Court has accepted the plaintiffs' contention and held that the tenants are liable to pay rent at the rate of Re. 1 per bigha and allowed enhancement at the rate of 2 annas 6 pies in the rupee on that rate. The tenants have appealed and the ground pressed on their behalf will appear from the discussion of the points raised in the cases.

On behalf of the respondents a preliminary objection is taken that no appeals lie in these cases under S. 109-A, Ben. Ten. Act. S. 109-A makes all decisions of the Special Judge subject to appeal to this Court except those "settling a rent." Now the question to be considered is whether the decision in these cases is one which can be called settling a rent. What the Special Judge has done is to find out what the original rent payable by the tenant was and then he has proceeded to

settle fair and equitable rent under S. 105 read with S. 30, Ben. Ten. Act. In my opinion the decision of the Special Judge in these cases is not what may be said to be a decision settling a rent pure and simple. He has done something more than that; that is, he has found what the real rent payable by the tenants is. "Settling a rent" has been given, as will appear from an examination of the several sections of the Act, a technical meaning. Ordinarily "settle" would mean decide something which was previously unsettled. Where there was no rent fixed in the Record-of-Rights or where the rent mentioned in the Record-of-Rights is accepted as correct and increase or abatement is demanded thereupon on one of the grounds mentioned in the Act, the decision of the Settlement Officer in such and similar cases would be a decision settling a rent. In the present cases the Special Judge has found what the actual rent payable by the tenants is. That is not exactly settling a rent. That cannot be settling a rent in the sense in which the words are used in S. 105, Ben. Ten. Act. "Settling a rent" must be distinguished from settling a dispute relating to rent. In *Ramani Pershad Narain Singh v. Adaiya Gossain* (1), the learned Judges were called upon to assign a meaning to the expression "a decision settling a rent" and they observed:

"The words 'a decision settling a rent' do not, in our opinion mean and include any decision upon the question what is or what ought to be the rent. They mean only a decision settling a rent in the sense of settling a fair and equitable rent in place of the existing rent and the words do not include a decision determining what the existing rent is."

The decision of the Special Judge in these cases therefore is not a decision settling a rent as it purports to be. In this view it must be held that second appeals lie to this Court and the preliminary objection ought to be overruled.

The real question that calls for determination is on what rent the enhancement under S. 30 should be allowed. The Assistant Settlement Officer was of opinion that it should be allowed upon the existing rent by which he means the rent which the tenants are at present paying. The learned Special Judge is of opinion that the rent which the tenants are liable to pay should be the existing rent i. e. rent which the tenant is liable to



pay. I have considered this matter carefully and in my opinion the contention of the landlord should be accepted. Under S. 105 (4), Ben. Ten. Act, the Revenue Officer shall presume, until the contrary is proved, that the "existing" rent is fair and equitable. Under S. 32 (b) the rent enhanced under S. 30 shall bear to the "previous" rent the same proportion etc.

Now the expression "existing rent" in 105 and the expression "previous rent" in S. 32 seem to have been used in the same sense or they may be taken to have been used in the same sense. The existing rent is the rent which the tenant is liable to pay under contract with the landlord. It is possible that the landlord for some reason or other may not have realized the full amount of rent. It is also possible that the landlord may not have realized any rent at all. In the latter case it is hardly reasonable to say that by existing rent is meant no rent. But it is argued that by existing rent should be understood the rent entered in the Record-of-Rights and the Revenue Officer has no jurisdiction under S. 105 to adopt any other rent as the existing rent. This argument is in my opinion unsound. Under S. 105 the Revenue Officer is entitled to enquire as to the existing rent as it is one of the questions which he is entitled to investigate under S. 105-A (f). The word "conditions" may include that on some considerations the landlord allowed remission to the tenant from the amount of rent which the tenants had rendered themselves bound to pay under the contract of tenancy. Even if that is not so, it is certainly a question which can be determined under S. 106. And it is clear that under S. 105, the Revenue Officer is entitled in order to settle fair and equitable rent to determine all questions that may arise under S. 105-A or S. 106. *Nawab Bahadur of Murshidabad v. Ahmed Hossain* (2). In *Aktowli v. Tarak Nath Ghose* (3), the learned Judges overruled the contention that a proceeding under S. 105 can be instituted only when there is no rent payable by the tenants to the landlord: that is when no rent has been fixed by agreement of parties. They

were of opinion that S. 105 was applicable not only when no rent had been fixed but also when rent had been fixed by agreement of parties. I do not find any difficulty in holding that the Revenue Officer in the present cases had jurisdiction to enquire into the rent payable by the tenants under agreement with the landlords. In my judgment the existing rent or the previous rent means the actual rent which the tenants are liable to pay under an agreement with the landlord.

The learned Special Judge, however, has not considered all the points that require consideration in the present case. He has nowhere said, as he is required to do under S. 105 (4) or under S. 35, Ben. Ten. Act, that the rent he has fixed is in the circumstances fair and equitable. In proceedings for settling fair and equitable rent it is not enough to find that there has been an increase in the price of staple food crops but it is also necessary to find that the rent settled by the Court is fair and equitable taking all circumstances into consideration. In these cases the Assistant Settlement Officer has observed that the existing rents paid by the tenants are already higher than the rates in the neighbouring mouzas. In some cases the learned Assistant Settlement Officer holds that the rents paid by these tenants are double the rates prevailing in the neighbouring mouzas. In some cases the tenants say that the rents paid by them are too high considering the nature of the lands held by them in the beels. The Special Judge when raising the rent now paid by the tenants from 10-annas per bigha to Re. 1 per bigha is required more than in ordinary cases to enquire whether the rent fixed by him which comes to about double the rent now paid by the tenants is fair and equitable and whether the Court shall in these cases decree any enhancement which may be unfair or inequitable. These cases therefore must go back to the learned Judge for consideration of all the circumstances in these cases and for finding if these cases are proper cases in which enhancement should be allowed under S. 30 even though there has been a rise in the price of staple food crops. I may mention that the present proceedings were not for the purpose of correction of an entry in the Record-of-Rights relating to rent. The plaintiff's claim is to enhance

(2) [1917] 44 Cal. 783=25 C. L. J. 556=35 I. C. 695=21 C. W. N. 1004.

(3) [1912] 16 C. L. J. 328=17 I. C. 266=17 C. W. N. 774.



the rent under S. 30 on the existing rent. If the Court therefore holds that in the circumstances of these cases the plaintiffs are not entitled to claim any enhancement on the ground that it would not be fair and equitable, the plaintiffs' application should be dismissed. If on the other hand the Court holds that the plaintiffs are entitled to some enhancement the Court of appeal below would determine what enhancement should be allowed as fair and equitable and on what rent.

As the cases are going back for a consideration of these points it seems to me to be fair that another question on which the two lower Courts have differed be reconsidered. The documents upon which the learned Special Judge has relied for his finding that the landlord granted mahakup of 6-annas or 7-annas in the rupee on condition of the tenants growing indigo and that the tenants agreed to such arrangement are the jamabandis of 1293 and 1309. With regard to the jamabandi of 1293, the first Court accepted it presumably on the ground that it is more than 30 years old. But with regard to the jamabandi of 1309 that Court says that there is no evidence to prove that the signatures upon those papers were those of the defendants or their predecessors. The learned Subordinate Judge says that the jamabandis of 1293 and 1305 were signed by the tenant defendants; but he has given no reason nor has he discussed the evidence to show that the observation on those documents made by the trial Court was not justified. The learned Judge therefore will consider the question as to whether the defendants in these cases are bound by any agreement with the landlord to pay the full rent when demanded from them. As regards the other issues raised they must be taken to have been finally settled by the decision of the Court below.

The result is that the decrees of the Special Judge are set aside and the cases sent back to that officer for a rehearing of the appeal on the points indicated above on the evidence on the record. Costs will be at the discretion of the lower appellate Court. We assess the hearing fee in this Court at one gold mohur.

**Garlick, J.**—I agree.

D.B./R.K.

*Decree set aside.*

**\* \* A. I. R. 1929 Calcutta 50**

**B. B. GHOSE AND CAMMIADÉ, JJ.**

*Mahendra Nath Srimani*—Plaintiff—Appellant.

v.

*Kailash Nath Das and others*—Defendants—Respondents.

Appeal No. 173 of 1925, Decided on 1st December 1927, from original decree of 2nd Sub-Judge, Alipur, D/- 6th August 1925.

**\* (a) Landlord and Tenant—Covenant for renewal on expiry of lease—Lease expiring when lessor would already have ceased to have interest in certain share of property—Covenant for renewal with regard to that share cannot be said to be contract which in its inception was binding on land—Covenant is personal and enforceable only if lessor acquired fresh interest in that share—T. P. Act, S. 40.**

Where a covenant for renewal of the entire lease was intended to come into operation after the expiry of the term of that lease, before which, however, the lessor would have ceased to have any interest in a certain share,

*Held:* that it cannot be said that the covenant of renewal with regard to that share was a contract which in its inception was binding on the land. The covenant with regard to that share must, therefore, be considered to be a mere personal covenant which could be enforced against the lessor if he had got a fresh interest in that share, and not one which can be said to run with the land. [P 54 C 1]

**\* (b) Hindu Law—Guardian—Mother cannot by contracting as guardian bind infant son's interest subsisting in property or which he might acquire subsequently in the property.**

A Hindu mother acting as guardian for her infant son, cannot possibly bind any interest which the son might acquire in certain property. Even if the infant has any subsisting interest in the property, the mother as guardian cannot enter into any contract on behalf of the infant which would be binding on him: 39 Cal. 1232 (P.C.), *Rel. on.* [P 54 C 1]

**(c) Contract Act, S. 196—Void contract.**

A void contract cannot be made good by ratification. [P 54 C 1]

**\* \* (d) Landlord and Tenant—Covenant for renewal of lease does not operate as present demise but is only a contract enforceable by specific performance—It does not form part of demise but is separate contract—Ratification of lease does not amount to ratification of such covenant.**

The covenant for renewal does not operate as a present demise but is a mere contract, which can only be given effect to in case of refusal to perform it by the lessor, or by enforcing specific performance of the contract by the lessee. These covenants do not form part of the demise, and as the contract of the lease and the covenant for renewal are two separate contracts, the ratification of the lease does not necessarily amount to a ratification of the co-



tenant for renewal: *Raffety v. Schofield*, (1897) 1 Ch. 937; *Sherwood v. Tucker*, (1924) 2 Ch. 440; *Hand v. Hall*, 2 Ex. D. 353; 17 Cal. 548; and *A.I.R. 1922 Cal. 514*; *Rel.on.* [P 54 C 2, P 55 C 1]

**\* (e) Landlord and Tenant—Right for renewal is only privilege granted to lessee—Renewal can only be of contract as made—If position of parties changes, renewal cannot be enforced.**

The right of renewal is a privilege granted to the lessee, [*Bastin v. Bidwell*, (1881) 18 Ch. D. 238 and *Finch v. Underwood*, (1876) 2 Ch. D. 310, *Ref.*], and therefore, the renewal can only be of the contract as made. For example, if the contract is made with tenants, one of them cannot enforce the contract, or where the position of the parties changes, the renewal cannot be enforced: *Finch v. Underwood*, (1876) 2 Ch. D. 310 and *Hollies Stores Ltd. v. Timmis*, (1921) 2 Ch. 202, *Ref.* [P 55 C 1]

**(f) Landlord and Tenant—Contract to renew lease—Taking of rent by lessor's transferee during term of lease, only precludes him from disputing lessee's right of possession but does not bind him to renew lease.**

Where there is a contract to renew the lease, taking of the rent by the lessor's transferee during the term of the lease means that the lessor's transferee was precluded from disputing the lessee's right to remain in possession by virtue of the lease. But that cannot import the other condition that he was bound to renew the lease after the term had expired. [P 55 C 2]

**(g) Hindu law—Widow—Covenant by widow for renewing lease to take effect after her death is not binding on reversioners (Obiter).**

Alienations by a widow in certain circumstances may be binding upon the reversioners, but it is difficult to say that a covenant for renewing a lease to take effect after the death of the widow would be so binding under any circumstances. [P 56 C 1]

**(h) Contract—Liability—Contract to make grant in future does not necessarily stand on same footing as alienation.**

A covenant for renewal does not operate as a present demise but is only a contract, and a contract to make a grant in future does not necessarily stand on the same footing as an alienation. [P 56 C 1]

**\* (i) Contract — Construction — Covenant for renewing lease—Lessor to fix rent—Lessee if entitled to renewal is bound to pay rent demanded by lessor.**

Where there is a contract to renew a lease with the condition that the lessor is to fix the rent at pleasure the lessees if entitled to renewal of the lease, are bound to pay the rent demanded by the lessor, however unreasonable that might be. [P 56 C 2]

**\* (j) Specific Relief Act, S. 15—Contract for renewal of lease at rent to be fixed by lessor—Lessee not prepared to pay rent for entire leasehold, as demised by lease, for the small portion of land as to which only contract was enforceable—Court cannot make new contract by splitting demised premises and apportion rent.**

Where the whole of the contract for renewal

of a lease at rent to be fixed by lessor could not be performed and the lessees were not prepared to pay rent, for the entire leasehold, as demised by the lease, to the lessor; for a small portion of the land as to which contract was enforceable.

*Held*: that the Court cannot make a new contract for the parties by splitting up the demised premises and apportion the rent payable for that portion only. [P 56 C 2]

*Benode Mitter, Bejoy Kumar Bhattacharjee and Narayan Chandra Kar*—for Appellant.

*Basak and Satindra Nath Mukerji*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge, 2nd Court, 24 Parganas, dated 6th August 1925. The appeal arises out of a suit for ejectment and for mesne profits or, in the alternative, if the Court holds that the plaintiff is bound to grant a lease to the defendants, then for fixing the rent at the rate of Rs. 25 per cottah per mensem. The Subordinate Judge has dismissed the claim for ejectment and for mesne profits but has directed that the plaintiff is bound to grant a lease to the defendants in terms of the contract, I shall relate presently, at the rent of Rs. 5 per cotta per mensem.

The facts of the case giving rise to this litigation are as follows: The property in suit along with other properties belonged to one Jadab Krishna Singha. He died in the year 1867 leaving his mother Padmamani, two widows Lakshmipriya and Fulkumari and a daughter Prohabati, him surviving. After his death, Fulkumari brought a suit for partition which ended in a compromise. Under the compromise, Padmamani Lakshmipriya and Fulkumari each got one-third of the estate left by Jadab Krishna. Lakshmipriya died in 1878 and, therefore, Fulkumari got two-thirds of the estate left by Jadab Krishna as the successor of Lakshmipriya's interest. There was subsequently a suit by certain creditors against Fulkumari who obtained a decree in the Munsif's Court and put her interest to sale. It was purchased by one Krishna Prosad on 28th February 1883. On 16th July 1888, Prohabati purchased the two-thirds share from Krishna Prosad and she thus became entitled to the two-thirds share in the estate having purchased the widow's interest of Fulkumari in it. On 26th May 1895, Padmamani granted a lease of her one-third share to Prabhabati for 21 years. The lease was to terminate in May 1916.



On 11th July 1902 Prabhavati granted a lease to the predecessors of the defendants of the disputed property and its contiguous portion for a period of 20 years. The lease was to commence from 17th March 1902 and it was to terminate on 17th March 1922. Prabhavati had three sons at the time: Ajay, Achal and Ashoke. Ajay and Achal had attained majority but Ashoke was a minor. In the lease Ajay and Achal joined their mother although they could possibly have no interest in the property under the law and Prabhavati purported to execute it as guardian for Ashoke. It should be stated here that Prabhavati's husband was alive and at that time he was the natural guardian of the minor Ashoke. In the lease there was a stipulation that the major lessors would procure confirmation of the lease from Ashoke on his attaining majority and there was an indemnity clause if they failed to do so. Although nothing turns upon that, it should be stated that no deed of confirmation, as stipulated, was executed or registered by Ashoke on his attaining majority. In this lease there was a clause for renewal for 10 years after the expiry of the term at the option of the lessees. It is stated at the place where the demise has been made for 20 years down to 17th March 1922, that at the option of the lessee the lease would continue for a further term of ten years to be determinable nevertheless under certain circumstances which it is unnecessary to mention. At the end of the document there is the stipulation which should be given in extenso:

"Provided also and it is hereby agreed that if the lessees shall be desirous of taking a new lease of the premises hereby demised after the expiration of the said term of 20 years hereby granted the lessor and all other necessary parties if any will make and execute to the lessees at their costs a new and effectual lease of all and singular the said premises hereby granted or demised for a term of ten years to commence from and after the expiration of the term hereby granted at and under the like rents and dues but in case of the said business of the lessees being at the time in a flourishing condition and the said demised premises having increased in value at and under the rents and dues to be fixed by the lessor on reference to aforesaid circumstances and subject to the like covenants and provisions as are herein contained etc."

In the year 1909 there was further trouble among the ladies which was settled by the three ladies i. e., Padmamani, Fulkumari and Prabhavati, surrendering their estates in favour of the

three reversionary heirs of Jadab Krishna viz., Ajay, Achal and Ashoke on certain conditions as to receipt of maintenance by Padmamani and Fulkumari. These three grandsons of Jadab Krishna in their turn executed a document in favour of their father and mother giving them the right to enjoy the usufruct of all the properties they had thus obtained during their lifetime. The husband of Prabhavati died in the year 1912. Prabhavati herself died on 11th April 1916. In the meantime, Padmamani died in the year 1913. Fulkumari is still alive. On 15th September 1917 the three brothers effected a partition of their properties including the property which had been leased by Prabhavati to the defendant's predecessors. The division of these properties was made by metes and bounds. They were divided into three plots and after partition, plot A fell to the share of Ashoke, plot B to the share of Ajay and plot C to the share of Achal. The areas of these three plots are different, apparently having regard to their value. After the partition, the rent payable by the defendants' predecessors which was Rs. 220, was divided. Ashoke was to get Rs. 82, Ajay another sum of Rs. 82, and Achal Rs. 56 per month; and all these three brothers separately realized their rent in that share. The present plaintiff then purchased plot A from Ashoke by a deed dated 20th October 1917. Then there was a dispute between the plaintiff and the predecessors of the defendants and the plaintiff brought a suit for ejectment. That was settled by the defendants' predecessors purchasing a half-share of the property which the plaintiff had purchased from Ashoke by a deed dated 1st August 1921, the purchase price being at the rate of Rs. 3000 per cotta.

Since then, the defendants had been paying rent at the rate of Rs. 41 to the plaintiff. The present suit, as I have already stated, was brought mainly for ejectment on 5th June 1923. The plaintiff alleges that after the expiry of the term of the lease granted by Prabhavati, which term expired on 17th March 1922, the defendants have no right to remain on the land and if they desire to remain on the land, they are bound to pay rent at the rate of Rs. 25 per cotta. The allegation of the defendants shortly stated is that the plaintiff has no title to the property in question; secondly, that they are



entitled to remain on the land in the exercise of their option to get a renewal of the lease according to the terms contained in the lease dated 11th July 1902 and the rent payable by them for the portion of the property now in the plaintiff's possession must be at the rate per cotta at which the rate of rent should be worked out according to the original lease with reference to the whole area, which appears to be Rs. 1-1-0 per cotta. Several issues were framed in the Court below. The principal question for decision was covered by issues, 5, 6 and 8 and the controversy before us was mainly with regard to these. They are as follows:

" 5th : Is the claim for renewal of the lease valid and binding on the plaintiff and is the defendant entitled to have the lease renewed ? If so, on what terms ?

6th: Was the lease in question confirmed and ratified by the plaintiff's vendor ?

8th : Has the position of the defendants been changed by their purchase ? "

All these issues were decided against the plaintiff by the Subordinate Judge. With regard to issue 10 which runs thus: What will be the fair rent of the property ? the Subordinate Judge decided that the fair rent would be Rs. 5 per cotta per mensem. It is argued on behalf of the plaintiff that the Subordinate Judge is wrong in deciding issues 5, 6 and 8 against the plaintiff and that he is entitled to claim ejectment after the expiry of the lease. With regard to issue 10 the plaintiff's contention is that if he is considered to be bound to renew the lease, it should be at the rate demanded by him, that is to say, Rs. 25 per cotta per month or, at any rate, Rs. 12 per cotta, as that would be the fair rent according to the value of the property which was purchased by the defendants themselves at the rate of Rs. 3000 per cotta. He, however, contends that it is not left to the Court to decide what should be the fair rent of the property, as under the agreement contained in the lease it was the lessor who was entitled to fix the rent as he thought proper and the Court has no authority to interfere with the rent fixed by the lessor. The defendants have also filed a cross-objection with regard to the rate of rent fixed by the Court and their objection is that the rent should be at the rate Re. 1-1 per cotta which should be calcu-

lated from the original rent fixed at Rs. 220 for the entire area.

There cannot be any question that the plaintiff would be entitled to ejectment unless the defendants could show that they are entitled to enforce the covenant for renewal as against the plaintiff. The principal question, therefore, is whether the covenant for renewal contained in the lease of July 1902 is enforceable as against the plaintiff. The Subordinate Judge has apparently proceeded upon the view that Prabhavati had a Hindu widow's estate as daughter of Jadab when she granted the lease in favour of the defendants' predecessors. He has found that Ashoke after attaining majority had ratified the lease by receiving rent from the defendants for a number of years. Ashoke is, therefore, bound by all the terms of the lease and also by the covenant for renewal, as the learned Judge was of opinion that it would be inequitable to hold otherwise. He held that

"the renewal clause is as much an important part of the lease as the other clauses, and it must be taken that Ashoke ratified the entire contract with the covenant for renewal and not without it."

In that view, he held that the plaintiff as assignee of Ashoke is bound by the covenant for renewal. He has also held that the letters of the plaintiff in reply to the demand for renewal made on behalf of the defendants show that the plaintiff was willing to be bound by the renewal clause and these letters prove a clear admission of the plaintiff as to the contract for renewal being enforceable as against him. I need not recite the other reasons given by the Subordinate Judge in his judgment for holding against the plaintiff as I am going to deal with the arguments addressed to us by the parties and as the learned advocate for the respondents repeated the very arguments which had been adopted by the Subordinate Judge. The first question for consideration is, is the covenant for renewal a part of the lease or, in other words, is it a part of the demise ? If that is so, then it follows that the plaintiff must fail according to the reasoning of the Subordinate Judge. In order to decide this question, it is necessary to find what was the right of Prabhavati in the property in question when she gave the lease. She had not got a Hindu widow's estate in the property. She was in possession as purchaser of the interest of Fulkumari



who had a Hindu widow's estate. This interest was to last during the lifetime of Fulkumari, that is, with regard to two-thirds of the property. With regard to the remaining one-third, she held under a lease from Padmamani which was to come to an end in May 1916. The covenant for renewal of the entire lease after 17th March 1922 was intended to come into operation after the expiry of the term of that lease when Prabhabati would have no interest in that one-third share. Can it be said that the covenant of renewal with regard to this one-third share was a contract which in its inception was binding on the land? I think not. The covenant with regard to that share must, therefore, be considered to be a mere personal covenant which could be enforced against her if she had got a fresh lease herself and not one which can be said to run with the land. Again, if Prabhabati had executed the lease in the capacity of a qualified owner having a Hindu widow's estate (which she had not at that time) then her sons had no interest in the property at the time and Prabhabati, acting as guardian for the infant son, could not possibly bind any interest which the son might acquire after the death of the ladies. Even if the infant had any subsisting interest in the property, Prabhabati as guardian could not enter into any contract on behalf of the infant which would be binding on him: see the case of *Sarwarjan v. Fakruddin Mahomed* (1). This proposition is not contested by the learned advocate for the respondents. The contract, therefore, is altogether void so far as Ashoke is concerned and being a void contract, it cannot be said to be effective by ratification as a void contract cannot be made good by ratification. It is further to be borne in mind that Prabhabati was not the natural guardian of Ashoke but his father would be so. The Subordinate Judge seems, therefore, to be under an error when he held that Ashoke was bound by the contract for renewal of the lease, as he had ratified the lease by acceptance of rent.

Then, again, assuming that the covenant by Prabhabati could be binding on Ashoke by ratification, the question arises as to whether by ratification of the lease itself, it can be said that the covenant

for renewal has been ratified. In order to hold that, it must be found that the covenant for renewal is a part of the demise. It is not disputed on behalf of the respondents that the covenant for renewal is a mere contract, which can only be given effect to in case of refusal to perform it by the lessor, by enforcing specific performance of the contract by the lessee. That these covenants do not form part of the demise has been laid down in some English cases. An option of purchase is analogous to the right of renewal. It has been held that it is a covenant quite apart from the demise, although arising by reason of the demise and flowing from it: See the case of *Raffety v. Schofield* (2). In *Sherwood v. Tucker* (3) p. 445, Pollock, M. R. observed that:

"a distinction is to be drawn between the demise and the contract under which the option to purchase was given. They are essentially different."

It has been argued on behalf of the respondents that an option of purchase and an option for renewal are quite different and *Woodall v. Clifton* (4) is relied on. The difference, however, is an anomaly in the English law as pointed out by Romer, L. J. at p. 279 of the report and we are not here concerned with the anomalous distinction between the two. It is again urged, relying on an old English case, that a covenant for renewal creates a lien. That does not mean that any present interest is created in the land by such a covenant. I may here refer to the case of *Hand v. Hall* (5) where Lord Cairns, L. C. speaking of a lease and a covenant for renewal contained in it observes:

"Whereas there is not anything to be done by the tenant in the first part of the agreement to create a demise, in the second part something has to be done by him before that part takes effect, and until that is done it is impossible to tell whether a tenancy shall come into force or not. I think, therefore, that it is absolutely necessary to divide the contract into two parts. I think the agreement is an actual demise, with a stipulation superadded that if at his option the tenant gives the landlord a notice of his intention to remain, he shall have a renewal of his tenancy for three years and a half."

(2) [1897] 1 Ch. 937=36 L. J. Ch. 448=45 W. R. 460=76 L. T. 648.

(3) [1924] 2 Ch. 440.

(4) [1905] 2 Ch. 257=74 L. J. Ch. 555=21 T. L. R. 581=54 W. R. 7=93 L. T. 257.

(5) 2 Ex. D 353.

(1) [1912] 39 Cal. 1232=13 I. C. 331=33 I. A. 1 (P. C.).



It has also been held in this Court that a covenant for renewal does not operate as a present demise but remains only a contract. *Boyd v. Kreig* (6), *Basanta Charan v. Rajani Mohan* (7). As the contract of the lease and the covenant for renewal are two separate contracts, in my opinion, the ratification of the lease does not necessarily amount to a ratification of the covenant for renewal. The ground, therefore, upon which the Subordinate Judge held that Ashoke was bound by the covenant for renewal as he had ratified the lease by acceptance of rent does not appear to be at all sound.

There is another difficulty in the way of the defendants in enforcing the term of the renewal and it is that the contract, as it was made in the lease of 1902, cannot be sought to be enforced as it was made nor is it sought to be enforced in its entirety. It has been held that the right of renewal is a privilege granted to the lessee: See the cases of *Bastin v. Bidwell* (8) per Kay, J., *Finch v. Underwood* (9) per James, L. J. and, therefore the renewal can only be of the contract as made. For example, if the contract is made with two tenants, one of them cannot enforce the contract: see *Finch v. Underwood* (9). In *Hollies Stores Ltd. v. Timmis* (10) the covenant for renewal was made on condition that there should be three guarantors named for the payment of the rent. One of the named guarantors died during the currency of the lease and the tenant sought to exercise the option of renewal either by substituting another guarantor for the deceased guarantor or by putting in the entire rent for the whole period of the renewal. The Court refused the claim for renewal on the ground that the contract should be performed as it was made and as that cannot be done even if there was no reasonable ground for the landlord to refuse specific performance, the Court would not enforce it. In the present case, the contract for renewal as made is incapable of performance. As I have already observed, there was a division of the property among the three brothers. Subsequently, the defendants purchased one-half of the interest which originally belonged to one of the brothers.

The defendants had acquiesced in the partition by agreeing to pay rent separately to each of them according to the different shares which, the brothers thought, were their just shares. The position, therefore, of the parties not being the same as it was when the contract was entered into, even assuming that Prabhavati's contract would be binding on Ashoke, Ashoke's assignee may very well say that:

"the contract which the defendants now seek to enforce is quite a different contract from what was entered into and I am, therefore, not bound to carry it out."

The learned advocate for the respondents, however, argues that when Asoke took rent from the defendants, he must be considered to have been aware of the covenant in the lease and knowing the terms of the lease as well as the covenant he never repudiated the covenant for renewal and it must, therefore, be held that Ashoke tacitly entered into a fresh contract for renewal of the lease. This argument seems to me to be too far-fetched. In order to bind a person on the allegation that he entered into a contract for doing a certain thing, there must be definite evidence that he did actually enter into a contract and I am, therefore, unable to accept this contention. It is, again, urged that the plaintiff himself did the very same thing, that is, took rent from the defendants for his share. The answer is, that the taking of the rent during the term of the lease means that the plaintiff was precluded from disputing the defendants' right to remain in possession by virtue of the lease. But that cannot import the other condition that he was bound to renew the lease after the term had expired. Here I may state another contention on behalf of the respondents and it is that the defendants in their correspondence accept the terms of the lease including the right of renewal. Special reference is made to Ex. D (1) a letter the plaintiff's solicitor wrote in reply to the letter of the solicitor for the defendants asking for renewal of the lease. The plaintiff said that he was willing to renew the lease if rent was paid at the rate of Rs. 25 per cotta per month. That does not mean that he was willing to renew the lease on any other terms. The letter must be read as a whole in order to understand the attitude of the plaintiff. It, therefore, does not seem to

(6) [1890] 17 Cal. 548.

(7) A. I. R. 1922 Cal. 514=49 Cal. 928.

(8) [1881] 18 Ch. D. 238=44 L. T. 742.

(9) [1876] 2 Ch. D 310=45 L. J. Ch. 522=24 W. R. 657=34 L. T. 779.

(10) [1921] 2 Ch. 202.



me that the plaintiff can be said in any way to have entered into a fresh contract for the purpose of renewing the lease which was granted by Prabhabati.

There is another difficulty in the way of the plaintiff as to the right which Ashoke had obtained. Prabhabati, as I have already stated, was in possession as a purchaser of Fulkumari's estate. In 1909, all the three ladies surrendered their qualified interest in favour of the grandsons of Jadab Krishna. The effect of such surrender is that the grandsons took the estate as it was at the time of their grandfather, Jadab Krishna Singha, and they might very well urge that they are not bound by covenant made by Prabhabati, although by reason of the fact that they had accepted rent from the defendants, they could not dispute the defendants' right to remain on the land till March 1922. In the view I take, it is not necessary for me to discuss the question as to the right of a qualified owner like a Hindu widow to grant a lease for a term of years with a clause for renewal at the option of the lessee, particularly as to what would be the effect of such a covenant after the death of the widow. It seems to me that it is at least doubtful that a Hindu widow can enter into such a covenant so as to bind the reversioner. Alienations by a widow in certain circumstances may be binding upon the reversioners; but it is difficult to say that a covenant for renewing a lease to take effect after the death of the widow would be so binding under any circumstances. It need only be added that a covenant for renewal does not operate as a present demise but is only a contract, and a contract to make a grant in future does not necessarily stand on the same footing as an alienation. On these grounds, in my judgment, the Subordinate Judge is wrong in holding that the defendants are entitled to enforce the right of renewal of the lease according to the agreement entered into by Prabhabati in 1902.

Another question was argued on behalf of the respondents and it was that although the whole of the contract cannot be performed under S. 15, Specific Relief Act, the defendants may be allowed to enforce the contract with regard to the part of the property now in the possession of the plaintiff. This section, in my judgment, does not entitle the defendants to ask for specific performance of the

agreement with regard to the small portion of the property which now remains in the possession of the plaintiff on payment of a proportionate part of the rent. The defendants are not prepared to pay rent for the entire lease hold as demised by the lease of 1902 to the plaintiff for this small portion of the land and I do not think that we can make a new contract for the parties by splitting up the demised premises and apportion the rent payable for that portion only. As the defendants, in my judgment, are not entitled to enforce specific performance of the covenant for renewal, they have no right to remain on the land and the plaintiff would be entitled to a decree for ejectment.

I should, however, express my opinion with regard to another point which was urged by the learned advocate for the appellant and it is that the Court was left no discretion by the terms of the covenant to fix a fair rent even if the defendants are held to be entitled to enforce the contract. That portion of the covenant has already been recited. It is not that the tenants would be bound to pay a fair and reasonable rent in which case the Court might have assessed the rent. Here the discretion is entirely in the lessor and the lessor may fix any rent that he pleases. It is, however, contended by the learned advocate for the respondents that the lessor was bound to fix the rent by taking into consideration the fact whether the business of the lessee was in a flourishing condition or not and whether the value of the premises had increased. With regard to the increase of the value of the premises, there is no dispute; but it is stated that the condition of the business of the lessee was not flourishing. That is a matter of opinion only and if the plaintiff thought that the business of the lessee was in a flourishing condition he might then fix such rent as he pleased. The Subordinate Judge himself does not accept the story that the business of the defendants was not in a flourishing condition. In my opinion, if the defendants want to stay on the land and if I had thought that they were entitled to a decree for renewal of the lease, I should have held that they were bound to pay the rent demanded by the lessor, however unreasonable that might be. At any rate, as the plaintiff has asked for as a last resort, the rent would be calculated at the rate



of Rs. 12 per month on the price of the property which was paid by the defendants for the half-share originally belonging to Ashoke. This disposes of the cross-objection of the defendants which was with regard to the rate of rent. This appeal must, therefore, be decreed. The plaintiff's prayer for khas possession should be allowed and he is also entitled to claim mesne profits for the property from after the date of the expiry of the lease of 1902, that is, 17th March 1922, till the date of recovery of possession. Under O. 20, R. 12, Civil P. C., the Court will hold an enquiry as to such mesne profits which have accrued from 18th March 1922 till the date of delivery of possession or such other time as provided in the rule and the Court below will pass a final decree for mesne profits in accordance with the result of such enquiry. The plaintiff appellant is entitled to the costs of both Courts. The cross-objection is dismissed without costs.

**Cammiade, J.**—I agree.

D.B./R.K.

*Appeal allowed.*

### \* A. I. R. 1929 Calcutta 57

CUMING AND LORT-WILLIAMS, JJ.

*Rebati Mohan Chakrabarti and another*  
—Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 715 of 1927 Decided on 24th April 1928, from judgment of Sess. Judge, Mymensingh.

(a) Criminal P. C., S. 282—Judge can discharge juror for misconduct and either add new juror or discharge jury and empanel fresh jury.

The Code makes no provision for dealing with a jury or jurors guilty of misconduct. The Judge has an inherent power to discharge a jury for misconduct: [*A. I. R. 1923 Cal. 724, Foll.*] So where a juror-misconducts himself he should be discharged and either a new juror added or the whole jury discharged and a fresh jury empanelled. Such juror may be taken from the persons present in the Court-room. [P 58 C 2]

\* (b) Criminal P. C., S. 172—Judge can refer to police diaries even after verdict of jury.

If the Judge could refer to the diaries before the verdict of the jury he could obviously refer to them after the verdict as the trial does not end with the verdict. [P 58 C 2]

\* (c) Criminal P. C., S. 298—Judge has

to determine whether evidence does corroborate approver as to complicity of accused.

*Per Cuming J.*—It is doubtful whether the Judge has to determine whether there is any evidence that does corroborate the story of the approver so far as the complicity of the accused is concerned, that being a question of facts: 19 C. W. N. 653 and *Ryder v. Wombwell*, 4 Ex. 32, *Discussed and Doubtful*. [P 59 C 1]

(d) Practice—Codified law cannot be modified by rules of practice made to meet-changing conditions—Every small modification must be by legislation—Interpretation of statutes.

When law has been codified, it cannot be modified gradually from day to day as the changing circumstances of a community, require, by rules of practice made to meet these imperceptibly changing conditions. Any modification, however small, must be made by the legislature, when a suitable opportunity arrives. [P 60 C 1]

(e) Criminal P. C., Ss. 298 and 299—Jury should find facts upon evidence before them and be guided by law applicable which Judge should explain to them.

In a trial by jury it is the function of the jury to find the facts upon the evidence laid before them and for that purpose to be guided by the law which is applicable, and it is in all cases the duty of the Judge to point out to them that law: 21 W. R. 69 Cr., *Foll.*

[P 60 C 1]

(f) Criminal P. C., Ss. 298 and 299—Question as to what amounts to or does not amount to evidence is question of law to be decided by Judge.

The law of evidence is part of the general law. The question as to what is, or is not evidence, that is to say, what amounts or does not amount in law to evidence is a question of law to be decided by the Judge as is the question whether there is any evidence in law to go to the jury. [P 60 C 2]

(g) Evidence Act, S. 114, Ill (b)—Corroboration in material particulars connecting each accused with offence is required and not in every material particular.

It is not all evidence corroborating the accomplice's story, which comes within the rule requiring corroboration. The corroboration indicated in S. 114, Ill-(b), is corroboration in material particulars and these particulars must be such as to connect or identify each of the accused with the offence: [*R. v. Baskerville*, (1916) 2 K. B. 658.] It is not necessary that the accomplice should be corroborated in every material particular. [P 60 C 2]

(h) Evidence Act, S. 133 — Confirmation only on truth of history told by accomplice without identifying persons is no corroboration.

A man who has been guilty of a crime himself will always be able to relate the facts of the case and if the confirmation be only on the truth of that history, without identifying the persons, that is no corroboration at all: *R. v. Farler*, 8 C. and P. 106 and *R. v. Elahi Bux*, B. L. R. Sup. Vol. 459 (F.B.), *Foll.*

[P 60 C 2]



(i) Criminal P. C., Ss. 298 and 299—Judge must not tell jury that certain witness does corroborate accomplice, that being for jury to decide.

*Per Lord-Williams, J.*—The Judge must not tell the jury that such or such witness does in fact corroborate the accomplice. That is the function of the jury and depends upon whether they believe the witness or not. [P 61 C 1]

\*(j) Criminal P. C., S. 298—Omission to direct jury's attention to portions corroborating evidence in law is non-direction but it is misdirection if Judge points out portions as fulfilling requirement though in fact they do not.

Though an omission to direct the attention of the jury to those portions of the corroborative evidence which amount to corroborative evidence in law would only be a non-direction, it is a misdirection if the Judge points out to the jury certain portions of the evidence as fulfilling the requirements already stated, when in fact they do not do so: 29 Cal. 782, *Foll.* [P 61 C 1]

*Debendra Narayan Bhattacharji and Nares Ch. Sen Gupta*—for Appellants.

*Khundkar*—for the Crown.

**Cuming, J.**—This is an appeal by two persons Rebati Mohan Chakravarti alias Rebati Thakur and Jabbar Sheik alias Abdul Jabbar. These two persons were tried by the learned Sessions Judge of Mymensingh sitting with a jury on a charge of dacoity under S. 395, I. P. C., and also under S. 397. The jury unanimously found the two appellants not guilty under S. 397 and they unanimously found both the appellants guilty under S. 395. The learned Sessions Judge agreeing with this verdict has sentenced them both to four years' rigorous imprisonment and further to a fine of Rs. 50 each in default to suffer further imprisonment for six months.

The dacoity in question took place in the house of one Mathur Modak on the night of 10th December 1926. The dacoits used guns and some three persons were wounded in the course of the dacoity and cash and ornaments were looted.

The two appellants both pleaded not guilty. The first point raised by the appellants relates to the constitution of the jury. What happened was this. The jury was empanelled and sworn and a foreman appointed. Meanwhile another case was being tried. It was then found when the present case was called on that the foreman of the jury has been seen talking with the Court Inspector. This allegation being substantiated the Judge quite properly discharged him, took another gentleman who was present,

empanelled him and proceeded with the case. 'I may say at once that the objection is a technical one for it is not suggested that the accused was in any way prejudiced by what happened. He contended that the only course open to the Judge was to discharge the whole jury and empanel a new one. The Code strange to say makes no provision for dealing with a jury or jurors guilty of misconduct. The only section dealing with the discharge of a jury is S. 282, Criminal P. C., which provides what was to be done in the case of illness of a juror. It has, however, been held that the Judge has an inherent power to discharge a jury for misconduct. *Rahim Sheik v. Emperor* (1) a decision to which I was myself a party.

It seems to me that the present case should be dealt with on an analogy with S. 282, Criminal P. C. and that where a juror misconducts himself he should be discharged and either a new juror added or the whole jury discharged and a fresh jury empanelled. If the learned Judge decided that he should empanel a new jury how is the new juror to be chosen. S. 282 must I think contemplate the application of S. 276 (secondly) and that such juror may be taken from the persons present in the Court-room there being none of the summoned jurors present. That is what was done in the present case and so far as I can see there is no objection to it. There is no substance therefore in this contention.

The next point taken is equally technical. After the verdict was given the Judge stated that he would look at the police diaries before deciding whether he would refer the case under S. 307. Having done so he accepted the verdict of the jury and convicted the accused.

Under S. 172, Criminal P. C. the Court may send for the police diaries and use them not as evidence in the case but to aid it in such enquiry or trial. It is contended that the trial was finished with the verdict of the jury and that after that the Judge could not refer to the diaries. If, however, he could refer to the diaries before the verdict, he could obviously refer to them after the verdict.

Neither is the trial ended with the verdict of the jury for the Judge still has to decide whether he will accept it or refer the case and if referred the trial is co

(1) A. I. R. 1928 Cal. 724=50 Cal. 872.



tinued in the High Court. By using the diaries for the purpose of determining if he would refer the case the Judge is using them for the purpose of the trial. This point has no substance whatever.

The next point raised is one of misdirection. In this case there was an approver and the appellants contend that there is no evidence to corroborate the approver as to the part taken by the present appellants in the dacoity and that the Judge should have told the jury so. The prosecution no doubt have produced evidence which they allege corroborates the story of the approver as to the complicity of the present appellant in the dacoity.

The appellants contend, however, that the evidence does not raise any inference whatever as to the complicity of the present appellants in the dacoity. The appellants now contend that the Judge must determine whether a particular piece of evidence does or does not corroborate the story of the approver as to the complicity of the accused persons and then tell the jury that such and such evidence does corroborate the approver with regard to the complicity of the accused.

It has been held that it is the duty of the Judge to determine whether any evidence has been given on which the jury can properly find the question for the party on whom the onus of proof lies. [See *Emperor v. Upendra Nath Das*, (2), See also *Ryder v. Wombwell* (3).]

From this no doubt the principle may be deduced that it is for the Judge to determine whether there is any evidence that does corroborate the story of the approver so far as the complicity of the present appellants is concerned.

In *Ryder v. Wombwell* (3) this has been described as a preliminary question which is one of law for the Judge to decide.

Speaking for myself I have the greatest difficulty in understanding how the question whether one fact is corroborated by another fact can be anything but a question of fact itself.

The approver states as a fact that a certain person went with him to commit a dacoity. Whether this approver and this person went to commit a dacoity is

a question of fact. That the approver makes the statement in Court is a fact. That another person saw the approver and the said person at a certain place is a fact. It is this fact that is sought to be used to corroborate either the statement of the approver which is itself a fact that the person went with him to commit a dacoity or it may said to corroborate the fact that the approver and the said person went to commit a dacoity. In either case it is a fact which is used to corroborate another fact. In any view of the case both are statements of fact and a statement of fact is itself a fact. Whether one fact corroborates another would seem to be a question of fact. However the principle that such a question is one of law has apparently been adopted by our Courts and I am obliged to follow it. In the present case there was evidence that might I think be held to corroborate the approver's statement as to the complicity of these two appellants. There is the statement of Ainuddin Jamadar that on the day of the occurrence he saw Rehabali and Jabbar with the approver Oli at Pauli Ghat. The Ghat is about 3 miles from the place of occurrence and some 6 or 7 miles from the appellant's house. The jury might be justified in holding that this fact did corroborate the story of the approver as to the complicity of the two appellants in the dacoity.

It cannot therefore be said that there was no evidence to go to the jury which would corroborate the evidence of the approver as to the complicity of these appellants in the dacoity.

In my opinion the appellants have failed to prove anything which could be construed as a misdirection or a point of law which the Judge has wrongly decided. The appeal must therefore be dismissed.

**Lort-Williams, J.**—I agree generally with the conclusions at which my learned brother has arrived and I have nothing to add on the two first points. With regard to the third point, the law in this country affecting the evidence of accomplices is contained in Ss. 133 and 114 Ill. (b), Evidence Act. These two sections read together coincide with the rule formerly observed in England and laid down in India prior to the passing of the Act. In England the permission given by law to the jury to presume that an accom-

(2) [1914] 19 C. W. N. 653=30 I. C. 113=21 C. L. J. 377 (F.B.).

(3) [1868] 4 Ex. 32=38 L. J. Ex. 8=17 W. R. 167=19 L. T. 491.



plince's evidence is unworthy of credit, has in practice, owing to growing experience of the unreliability of such evidence, gradually become a duty to treat it as such, except in very exceptional cases. And this rule of practice has been followed so universally that it has become almost a rule of law—and according to Taylor on Evidence, other authors deserve all the reverence of law—in accordance with this rule English Judges have directed juries and any omission so to do, would be a ground for setting aside the conviction. In India, I find that a similar procedure has been adopted. It has been laid down in *Re : Proceedings dated 20th March 1868* (4), and in a number of other cases, that the proper course for a Judge is to inform the jury that there is no rule in law prohibiting the conviction of an offender upon the uncorroborated evidence of an accomplice but that as a rule of practice it is considered unsafe to convict upon such evidence and then to point out circumstances, if any, in the particular case, for relying upon the evidence, and the omission so to caution the jury was in *Queen-Empress v. Arumuga* (5) held to be a misdirection requiring the reversal of the verdict, and in many other cases has been held to be an error in law justifying such reversal.

This seems to me in effect to amount to a direction in accordance with the present English practice, viz., that the jury ought to draw the presumption that an accomplice's evidence is unworthy of credit, unless there are some exceptional circumstances in the case which rebut that presumption. But this does not seem to me to be in accordance with S. 114 Ill. (b), Evidence Act, and when law has been codified, it cannot be modified gradually from day to day as the changing circumstances of a community require by rules of practice made to meet those imperceptibly changing conditions. Any modification, however small, must be made by the legislature, when a suitable opportunity arrives.

In a trial by jury it is the function of the jury to find the facts upon the evidence laid before them and for that purpose to be guided by the law which is applicable, and it is in all cases the duty of the Judge to point out to them that

law. Phear, J., *Queen v. Sadhu Mundul* (6). The law of evidence is part of the general law. The question as to what is or is not evidence, that is to say what amounts or does not amount in law to evidence is a question of law, to be decided by the Judge, as is the question whether there is any evidence in law to go to the jury.

Similarly the question as to what is or is not, what amounts or does not amount to corroborative evidence in law is a question of law to be decided by the Judge. It is not all evidence corroborating the accomplice's story, which comes within the rule requiring corroboration. The corroboration indicated in S. 114, Ill. (b), is corroboration in material particulars and these particulars must be such as to connect or identify each of the accused with the offence. This part of the law of evidence has been the subject of a very large number of Indian decisions, and the English cases have been reviewed in *R. V. Baskerville*, (7) The heading of that case is as follows:

"Where on the trial of an accused person evidence is given against him by an accomplice, the corroboration, which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused."

In other words, the corroboration must be in some material particular implicating the accused. As was said in *R. v. Farler* (8) and *R. v. Elahi Bux* (9), and other cases, a man who has been guilty of a crime himself will always be able to relate the facts of the case and if the confirmation be only on the truth of that history, without identifying the persons, that is no corroboration at all. Consequently, just "as it is the duty of the Judge to direct the jury" as to what portions of the evidence amount to evidence in accordance with law, and to lay before them such evidence only and to direct them to reject any evidence which may have been given, but which does not amount to evidence in accordance with law, similarly it is the duty of the Judge to direct the attention of the jury to those

(6) [1874] 21 W. R. 69 Cr.

(7) [1916] 2 K. B. 658=86 L. J. K. B. 28=60 S. J. 696=25 Cox. C. C. 524=80 J. P. 446=115 L. T. 453.

(8) 8 C. & P. 106.

(9) [1866] 5 W. R. Cr. 80=B. L. R. Sup. Vol. 459 (F.B).

(4) [1868] 4 Mad. H. C. R. App. 7.

(5) [1889] 12 Mad. 196.



portions of the evidence confirming or corroborating the accomplice's story which do or do not fulfil the requirements to which I have already referred. There are several Indian decisions on this point including one in Ratanlal's Reports at p. 840. But the Judge must not tell the jury that such or such witness does in fact corroborate the accused. That is the function of the jury and depends upon whether they believe the witness or not. And though an omission to direct the attention of the jury to those portions of the corroborative evidence which amount to corroborative evidence in law would only be a non-direction—it is a misdirection if the Judge points out to the jury certain portions of the evidence as fulfilling the requirements already stated, when in fact they do not do so. On this question there is a case which is directly in point viz., *Jamiruddi Masalli v. Emperor* (10) decided by Prinsep, J., and Stephen, J., the head-note of which reads as follows :

"A sessions Judge in laying the evidence of an approver before the jury stated in his charge : 'If you think that the approver's story is worthy of credit in itself, you have to consider whether it has been corroborated on material points,' and then, after describing what in his opinion were 'the points of corroboration,' told the jury that 'the above are the points on which the evidence has been corroborated, and that corroboration is full and complete, if you believe it.' 'You have to consider these points and decide, whether the approver has been corroborated in material points, and, if you find that to be so, then you have in his story sufficient evidence to connect all three accused with the crime,' Held, that this was not a proper way to place the case before the jury."

The Sessions Judge should have told the jury that, although the law permitted them to convict on the uncorroborated evidence of an accomplice, it was not the practice of our Courts, which have consistently held that it was not safe or proper to convict on such evidence without some corroboration sufficient to connect each of the accused with the offence committed. With this caution the Sessions Judge should have laid before the jury the evidence corroborating the statement of the accomplice. The nature of the corroborative evidence must be confirmatory of some of the leading story of the approver as against the particular prisoner.

(10) [1902] 29 Cal. 782=6 C. W. N. 553.

This is exactly what the learned Judge has done in the present case and what he must not do. He says on p. 12 of my copy of his charge:

"I shall now state the facts in which the approver has been corroborated." "The statements of Oli which have been corroborated are stated below,"

and he proceeds to lay before the jury much that does not amount to corroborative evidence of the kind required by law viz., evidence implicating the accused. I need only give one instance out of many. The learned Judge in item 5 on p. 13 sets out Oli's statement as follows :

"Near Narinda they sat on the river bank, took pan and cigarette and got ready for the dacoity."

(Oli is referring here to himself and the other accused persons including the two appellants). Then the learned Judge sets out the "evidence in corroboration" as follows :

"The investigating Sub-Inspector says that he found a Kowta on the river bank some powder was lying on the ground. Danu Talukdar (P. W. 18) says that on the night of the dacoity he went to see his paddy field when he saw 15 or 16 men seated on the bank of the river."

It is clear that neither of these pieces of evidence implicate any of the accused and certainly not either of the appellants. They do not amount therefore to corroborative evidence in the sense to which I have already referred. Moreover this method of directing the jury is apt to mislead them as to the corroborative evidence existing against each individual prisoner, and to suggest that evidence which exists against some is evidence against all.

For these reasons in my opinion the Judge has to this extent misdirected the jury.

In other respects, however, his charge is satisfactory though to my mind overloaded with detail and repetition which is apt to confuse a jury. Moreover he has to a large extent discounted the misdirection to which I have alluded, by correctly directing the jury on the same points in other parts of his lengthy charge, and as in fact there was sufficient corroborative evidence in law against the two appellants—that is to say, evidence corroborating the accomplice in some material particulars implicating the accused and as it must be remembered that it is not



necessary that the accomplice should be corroborated in every material particular, I do not consider the misdirection so serious as to necessitate setting aside the conviction. I agree therefore that this appeal should be dismissed.

D.B./R.K.

*Appeal dismissed.*

**\* A. I. R. 1929 Calcutta 62**

C. C. GHOSE AND GREGORY, JJ.

*Government of Bengal—Appellant.*

v.

*Nasar Darzi and others—Accused—Respondents.*

Government Appeal No. 8 of 1927 and Criminal Revn. Case No. 1189 of 1927, Decided on 23rd May 1928 against an order of Additional Sessions Judge, Dacca, D/- 3rd September 1927.

**\* Criminal P. C., S. 297—Charge to jury—Intermediate verdicts are not recognized.**

Five persons were accused under S. 302 and 148 and 149, Penal Code; the prosecution alleged that the offence had taken place before dark. The Judge asked the jury to give an intermediate verdict on the question whether the offence was committed before or after dark and on the jury holding that the offence was committed after dark the accused were acquitted.

*Held*: that there was no proper summing up to the jury and that, therefore, the verdict ought not to be allowed to stand. The law does not recognize intermediate verdicts of jurors and the procedure adopted by the Judge was in contravention of the specific provisions of the law relating to charges to the jury and to the ascertainment of their verdict. [P 63 C 1]

*Khondkar—for Appellant.*

*Suresh Chunder Talukdar and Mohandara Kumar Ghosh—for Respondents.*

**Judgment.**—This is an appeal by the Local Government against an order of the Additional Sessions Judge of Dacca dated 3rd September 1927, acquitting the accused who are five in number of charges under Ss. 148 and 302 read with 149, I. P. C. From what is stated below it will be seen that this is a most extraordinary case and it requires the interference of this Court.

The accused were tried before Mr. Waight, the Additional Sessions Judge of Dacca and a jury of charges under the sections referred to above.

The case for the prosecution briefly stated was as follows:

“That on 20th Chaitra last corresponding to 3rd April 1927 at about half an

hour before sunset one Naibali was returning home from a *hat* accompanied by P. W. 3 Nazamali, P. W. 4. Reazali, P. W. 5. Mahi and P. W. 7. Jinnat; that when they arrived at a spot south of the house of the accused Nasar and Ansar, Naibali was attacked by these persons who were armed with lathis and a spear and also by the accused Gyasuddin and Khawajuddin and by one Shamsuddin who were armed with daos; that Naibali fled south-wards across a field but was intercepted and seized by the accused Kitabdi, that the five assailants aforesaid came up and surrounded him and that Shamsuddin aforesaid struck him on the neck with a dao killing him instantaneously; that thereafter Gyasuddin, Khawasuddin, Kitabdi and Shamsuddin fled towards the south while Nasar and Ansar ran towards their house, that Reazali and Mohiuddin (P. W's. 4 and 5) attempted to seize those two accused but were struck with lathis and sustained severe injuries, that in support of its case, the prosecution examined 16 witnesses of whom P. W's. 1, 3, 4, 5, 7, 8, 11, 12, and 14 testified to having seen the occurrence and to having recognized all the assailants.”

The prosecution contended and contends that the evidence on the record, both direct and circumstantial, supported the conclusion that the offence was committed before the darkness fell. It is further contended that there was evidence to the effect that the accused were well-known to the eye-witnesses and that at the time of the occurrence two of the accused named Nasar and Khawajuddin were heard calling out. It is also contended that the evidence disclosed the fact that the accused persons had reasons arising out of litigation for feeling inimically disposed towards the accused. The accused called no evidence on their behalf but contended that the murder had been committed after dark by persons who had not been recognized and that the accused had been implicated on mere suspicion. The learned Additional Sessions Judge without summing up the entire case and without charging the jury on all the issues involved drew their attention to the evidence relating to the time of the occurrence and directed them as follows:

“If you believe that the evidence upon the record indicates that the occurrence took place after darkness had fallen, that belief would necessarily involve the complete failure of the prosecution story and your complete disbelief



in that story. I shall, therefore, ask you to retire to consider that one point, namely, whether you find the occurrence took place as alleged by the defence after darkness had fallen. If you find that fact to be established you will be obliged to return an immediate verdict of "Not guilty" against all the accused. On the other hand, if you are satisfied that the occurrence took place as alleged by the prosecution, during day-light, I shall proceed to charge you upon the circumstances of the occurrence. Gentlemen, you will please retire to consider your verdict upon the point which I have placed before you."

Then the jury returned after deliberation; the following communications passed between the Judge and the jury:

"Are you unanimous?" "Yes." "Do you find it proved whether the murder occurred after darkness or before? We believe it to have been committed after darkness. In that case I must direct you to return a verdict of not guilty against all the accused persons. We find all the accused persons not guilty."

It appears that after the verdict of the jury had been returned the learned Judge, although he disagreed with the view that the occurrence took place after darkness, accepted the verdict and by his order dated 3rd September acquitted the accused. The learned Judge in the sessions statement which was sent into this Court observes with reference to this case as follows:

"The jury were directed to return an intermediate verdict on the point whether the occurrence took place after darkness or before. They unanimously found that the occurrence took place after darkness and hence they were directed to return a verdict of "Not guilty" against all the accused which they did."

The contentions put forward by the learned Deputy Legal Remembrancer before us are two in number: firstly, that there was in this case no proper summing up to the jury and that, therefore, the verdict ought not to be allowed to stand; and, secondly, that the law does not recognize intermediate verdicts of jurors and that the procedure adopted by the learned Additional Sessions Judge is in contravention of the specific provisions of the law relating to charges to the jury and to the ascertainment of their verdict.

We are satisfied on an examination of the record that these contentions are well-founded and must be given effect to. It seems that the learned Judge adopted a short cut which he was not entitled under the law to so adopt. The result has been that the whole trial has been imperfect or, to use the words of Mr. Taluqdar who appears for the accused, highly irregular. That being so, it is our bounden duty to interfere and to direct that the verdict of

the jury in this case must be set aside and that the matter should go back to Mr. Bartley, the Sessions Judge of Dacca in order that he may re-try the case against the accused in accordance with law. The accused will be re-arrested and placed before.

**Mr. Bartley for orders**—No separate orders are needed with reference to the connected revision case.

M.N./R.K.

*Re-trial ordered.*

## A. I. R. 1929 Calcutta 63

COSTELLO, J.

*Rameswar Prosad Kessur Prosad*—Applicant.

v.

*Ramapada Ghose & Sons* — Opposite Party.

Civil Suit No. 679 of 1925, Decided on 17th February 1928.

(a) **Calcutta High Court Rules and Circulars (Original Side), Chap. 10, R. 30, Sub-Cl. (c)—Notice.**

Absence of notice justifies setting aside the ex-parte decree. [P 64 C 1]

(b) **Presidency Small Cause Courts Act (15 of 1882), S. 22—The determining factor is the amount recovered and not the amount claimed.**

It is the amount recovered and not the amount claimed which is the dominating and deciding factor for the purpose of determining whether or not a suit is cognizable by the Small Cause Court: *A. I. R. 1924 Cal. 405 Diss. from: Cal. Suit No. 1657 of 1922 and Cal. Suit No. 537 of 1925, Foll.* [P 65 C 1]

(c) **Presidency Small Cause Courts Act (15 of 1882), S. 22—Claim and counter-claim would justify costs on amounts decreed to either party — In substantial commercial cases, costs are in discretion of Court.**

The Presidency Small Cause Court is not a tribunal intended or designed for the determination of substantial commercial cases. It is the duty of the Court to deal with the question of costs in a matter of this kind after a careful examination of the issues which were raised between the parties particularly for the purpose of ascertaining whether there was any undue exaggeration or inflation of the claim on the part of the plaintiff in the suit and whether it was a suitable matter to be tried in the High Court rather than in the Small Cause Court. [P 67 C 1]

Claim and counter-claim would justify costs on amounts decreed to either party. [P 66 C 1]

**Judgment.**—This is an application to set aside an ex-parte decree made by me on 28th November 1927 on the ground that such decree was obtained improperly and to some extent fraudulently by the



plaintiffs in the suit so far as the latter allegation is concerned, it was not seriously or at any rate very strenuously pressed by Mr. Ghosh on behalf of the defendants, who are the applicants in this matter. The only allegation with regard to that seems to have been that in the course of a somewhat provocative correspondence between the attorneys to the parties, the attorney for the plaintiff concealed the fact that he was intending to apply for the decree in question. The main ground upon which the application is founded is that no notice was given under R. 30, Chap. 10 of the Rules of this Court. That rule provides that certain suits and matters should be placed in the special peremptory lists for the Courts to which they are assigned, and amongst such suits and matters are those defined in sub-Cl. (c) as being

"suits which stand for confirmation or further consideration upon the report of an officer or other Referee, and testamentary and intestate matters for argument on caveat where grounds in support of the caveat have been filed, on the requisition in writing of the attorney for any party or any party active in person, of which notice in writing shall be given by the party applying to the other party or parties."

It is conceded that in the present instance, notice in writing was not given by the party applying, that is to say, the plaintiffs in the suit, and the defendants in fact had no notice that an application was being made for the suit to be put into the special peremptory list for confirmation of the report of the Assistant Referee, who had been appointed by a decree dated 23rd June 1926 to take an account of the dealings and transactions between the parties.

The suit was originally brought for the recovery of the sum of Rs. 3451-6-3, and the Assistant Referee in his report, with the consent of the parties, stated that there was due by the defendants to the plaintiffs the sum of Rs. 664-8-0. Now, having regard to the fact that no notice was given by the plaintiffs to the defendants as required by R. 30, Chap. 10, it was quite clear that the decree had been irregularly obtained. Therefore, on the face of it, the defendants were entitled to have it set aside. But on the last occasion it was agreed by the parties that this application should be treated rather as an application for the re-hearing of the consideration of the report of the Assistant Referee, so that if it appeared that despite the irregularity arising from the

want of notice, the decree was a proper one in the circumstances of the case, the decree should not actually be set aside but should stand as originally made. If, on the other hand, the circumstances warranted a variation of the decree, then such variation should be made accordingly.

The real point of substance in the application is the question of whether or not the decree should hold good in so far as it ordered the defendants to pay to the plaintiffs the costs of the suit and of the reference upon the footing of Scale No. 2. It was argued by Mr. Ghosh on behalf of the defendants that the matter is one to which S. 22, Presidency Small Cause Court Act applies, and that therefore seeing that the plaintiffs in fact were found entitled to recover the sum of Rs. 664-8-0 only, which is a sum less than Rs. 1000, the plaintiffs were not entitled to any costs at all by reason of the fact that the suit might have been brought in the Presidency Small Cause Court. It was not disputed by Mr. Roy on behalf of the plaintiffs that the criterion to be applied for the purpose of ascertaining whether S. 22 applies or not is not the amount which a plaintiff claims but the amount which he in fact recovers and upon this point I desire to affirm the decision which I gave in the case of *Misrilal v. Mackintosh Burn Ltd.* (1). In the course of that suit it became necessary for me to express an opinion as to whether or not the "cognizability" of a suit to which S. 22 applied depended on the amount claimed or on the amount actually recovered. In the course of the judgment which I gave in that case I said this:

"It is pointed out to me by counsel for the plaintiff that there is a decision of Page, J., which is reported in *Chandmull Kangoria v. Debichand* (2), in which case Page, J., said in the course of his judgment that the law and practice in British India, in his opinion, were in favour of the view that the question whether a cause fell within the ambit of the jurisdiction of the Small Cause Court depended not on the amount or value actually recoverable or ascertained at the trial but on the amount or value which was claimed by the plaintiff and set out in the plaint, and the learned Judge took the view that the provisions of the English County Court Acts differ so materially from those contained in the statute relevant to the issues raised in the case then before him, that he did not think it necessary to refer to the decisions thereunder."

(1) Suit No. 537 of 1925, Decided on 31st March 1927.

(2) A. I. R. 1924 Cal. 405=51 Cal. 62.



I said at the time that it was clear that Page, J., in his judgment in the case of *Chandmull Kangoria v. Debichand* (2) was of opinion that the question whether or not a suit was cognizable in the Small Cause Court depends not on the amount ultimately recovered but on the amount originally claimed. I referred to that decision of my learned brother on the previous occasion and with very great respect to him I still cannot agree with his view as to the meaning of S. 22. I prefer to follow the decision of Buckland, J., in Suit No. 1657 of 1922 which unfortunately was not reported but is referred to by Page, J., in *Chandmull Kangoria v. Debichand* (2).

I pointed out in the case of *Misrilal v. Mackintosh Burn Ltd.* (1) that there is a case in the Bombay High Court (*Sridhan Gopi Nath v. Goberdhone Das*) in which Sir Lawrence Jenkins, C. J., and Russell, J., took a view contrary to that of Page, J. The learned Judges clearly state that the real criterion as to whether or not a case was cognizable by a Small Cause Court was not the amount originally claimed but the true amount or value; the subject-matter of the action is ultimately ascertained after investigation at a trial. The learned Judges in the Bombay case pointed out that such a conclusion was in accordance with the decision of the Court of appeal in England on a cognate point in the case of *Solomon v. Mulliner & The Motor Carriage Supply Co. Ltd.* (3). I desire to say quite definitely that in my view, the real meaning of S. 22, Presidency Small Cause Courts Act, is analogous to that of the corresponding section in the English County Courts Act of 1918, that is to say, S. 11 of that Act, and that is the amount recovered and not the amount claimed which is to be the dominating and deciding factor for the purpose of determining whether or not a suit is cognizable by the Small Cause Court.

Mr. Roy contended that even accepting that view of the law, this present suit nevertheless was not a suit cognizable by the Small Cause Court by reason of the fact that, in effect—in substance though not in form—the plaintiffs were claiming an account, and he referred me to a case in *Kailash Chandra Mandal v. Kira-*

*nendu Ghose* (4) where Mukerji, J., and Caspersz, J., decided that whether a suit is one for accounts within the meaning of Art. 31, Sch. 2, Provincial Small Cause Court Act (Act 9 of 1887) must depend on the relation in which the parties stand with each other, and the nature of the investigation required to afford relief to the plaintiff, and that if in order to grant relief to the plaintiff it is necessary to take accounts, the suit is one for accounts within the meaning of that article, even though the plaintiff may have chosen to put a definite money value upon his claim. Now that article and that Act of course have no application here. Apparently there is no definite authority, indeed no authority at all for maintaining that a suit for an account cannot be heard and determined in the Presidency Small Cause Court. That is to say, the precise form of the plaint in the present suit is immaterial. Actually the plaintiffs claim a specific sum, namely, Rs. 3451-6-3 but it is obvious from the nature of the suit that the question of whether that sum was or was not due to the plaintiffs could only be determined by the taking of an account between the parties, having regard to the nature of the defence which was set up in the written statement.

The facts, put very briefly are these: The parties had had business relations, and by a contract dated 21st January 1922 the plaintiffs had sold a quantity of Australian wheat to the defendants, that is to say, 300 tons of Australian wheat at the rate of Rs. 6-12 per maund on the condition that payment of the price should be made in advance. The defendants actually advanced to the plaintiffs by two sums a total sum of Rs. 56,200 and the plaintiffs delivered a certain quantity of wheat to the defendants, and they further paid to the defendants a sum of Rs. 16,000 upon the footing that the defendants had owed the plaintiffs that amount. The defendants by their written statement set up two other contracts also for the supply of wheat by the plaintiffs to the defendants and in a statement of accounts annexed to their written statement they showed that various other payments had been made with a view to adjusting the accounts between the parties. In that state of affairs it was said by the plaintiffs, as I have already stated, that there was due to them upon an adjustment

(3) [1901] 1 K. B. 76=70 L. J. K. B. 165=83.  
L. T. 493=17 T. L. R. 87=49 W. R. 864.

(4) [1916] 24 O. L. J. 187=10 I. O. 883.



of accounts the sum of Rs. 3451-6-3. The defendants on the other hand set up that upon any taking of an account it would be found that nothing was due by them to the plaintiffs, but that on the contrary the plaintiffs were still owing money to the defendants upon the basis that the defendants had paid more to the plaintiffs than was warranted by the amount of wheat which had been actually delivered.

Mr. Roy invited me to treat the matter as being one of a claim on the one hand and a sort of counter-claim on the other. He did that admittedly in an endeavour to bring the case within the decision which I had given in the case of *Misrilal v. Mackintosh Burn Ltd.* (1) (vide supra) and in order to put himself in the position of being able to contend that the plaintiffs were entitled to the costs of their claim, and that the defendants in their turn would be entitled to the costs of their counter-claim if in fact any sum had been awarded to them. He further said that upon a right view of the report of the Assistant Referee, what the Official Referee had decided in effect was that Rs. 664 was due to the plaintiffs and nothing was due to the defendants. Having reached that stage it was I think difficult for Mr. Roy to thereupon contend that upon that footing the case was taken out of the operation of S. 22, Presidency Small Cause Courts Act, because in fact the total sum awarded to the plaintiff was this sum of Rs. 664 which is clearly less than Rs. 1,000, the sum referred to in that section. Be that as it may, in any event, I should not have been disposed to treat this case upon the same footing as the case of *Misrilal v. Mackintosh Burn Ltd.* (1). In that case there was set up by the defendants what under the extension to the Code of Civil Procedure is called an equitable set-off and there was a claim for damages which, in my view, to all intents and purposes (at any rate when it came to a question of costs) was in effect a counter-claim properly so-called.

There was, however, nothing of the kind in the present instance. The plaintiffs were alleging that a definite sum of Rs. 3,451-6-3 was due to them from the defendants. The defendants, on the other hand, said that no such sum was due, and that if anything, the balance of account was the other way round, clearly, in order to ascertain what, if any, was the sum

due to the plaintiffs, it was necessary that an account should be taken. That was the only method of arriving at the amount to which the plaintiffs were entitled, and the Assistant Referee, apparently with the acquiescence of the parties, arrived at the figure of Rs. 664. I think therefore that it is entirely upon the basis of that figure that a decision as to costs ought to be made, especially having regard to the fact that I have not before me, neither in the report nor anywhere else, nor have I any means of ascertaining, without retrying the whole suit over again, what was the figure which represented the sum due from the defendants to the plaintiffs and what, if any, was the figure representing the sum due from the plaintiffs to the defendants, so that upon a balance the sum of Rs. 664 was due by the defendants to the plaintiffs. For ought I know to the contrary, the Assistant Referee or the counsel to the parties may have come to the conclusion that the defendants owed the plaintiffs Rs. 664 and that the plaintiffs owed the defendants nothing at all. On the other hand, the Assistant Referee or the counsel to the parties may have decided that the plaintiffs owed the defendants such a sum as having another sum subtracted from it would leave a balance of Rs. 664 in favour of the plaintiffs. I have no means whatever of ascertaining how this figure was arrived at. I can therefore only accept the report of the Official Referee as it stands and treat the matter as being one of a suit in which after trial of the issues between the parties it was determined that the defendants owed the plaintiffs the sum of Rs. 664.

That being so, the other question is whether there is anything in the suit to take the matter out of the operation of the substantive part of S. 22, Presidency Small Cause Courts Act, once it is conceded and it is not contended from the bar for the purposes of this case [if it had not been conceded, I should have decided the matter consistently with my previous decision in *Misrilal v. Mackintosh Burn Ltd.* (1)] that it is the amount recovered and not the amount claimed which is the determining factor. Once that is conceded, it is manifest that on the face of it (prima facie this suit falls within S. 22) that as the plaintiffs are entitled to recover from the defendants the sum of Rs. 664 and no more; by reason of the



provisions of S. 22, they will not be entitled to any costs at all. The main part of the section says that if a suit which is cognizable by the Small Cause Court is instituted in the High Court, and if in such suit the plaintiff obtains, in the case of a suit founded on contract, a decree for any matter of an amount or value less than one thousand rupees, no costs will be allowed to the plaintiff; and if in any such suit the plaintiff does not obtain a decree, the defendant shall be entitled to his costs as between attorney and client.

I am unable to follow the reasoning of my learned brother Page, J., in the case in *Chandmull Kangoria v. Debi Chand* (2), to which I have already referred, where he says at page 9 that "ample safeguards are provided to meet such a contingency," that is to say, the contingency of the plaintiff placing a fictitious value on his claim so as to be at liberty to determine the tribunal by which the suit is to be tried. I cannot see that there are any safeguards of any kind whatsoever in the event of the plaintiff in a suit of this kind over estimating the value of the amount to which he is entitled, because the real amount can only be ascertained after the taking of some elaborate accounts. It is for that reason, amongst others, that I think it is right, generally speaking, under the provisions of this section that if a plaintiff does not in the ultimate result recover Rs. 1,000 he should not be entitled to his costs. But in the present suit I think the matter is different and S. 22, Presidency Small Causes Courts Act contains an addendum which is in the nature of a proviso. It seems obvious that the Presidency Small Causes Court is not a tribunal intended or designed for the determination of substantial commercial cases, and I think it is the duty of the Court to deal with the question of costs in a matter of this kind, after a careful examination of the issues which were raised between the parties, particularly for the purpose of ascertaining whether there was any under exaggeration or inflation of the claim on the part of the plaintiff in the suit, and whether it was a suitable matter to be tried in the High Court rather than in the Small Cause Court.

Now, as far as I can see, in the present case, there was a bona fide dispute between two business firms as to the amount

which was owed by the one to the other, and in default of an agreement between the parties the amount could only be ascertained by the taking of accounts, the doing of which might have developed into a lengthy and possibly a difficult matter. It happens that in the present case the parties were sufficiently well-advised to avoid the expense of a protracted trial before the learned Assistant Referee, and they or their counsel or both came to an agreement as to what the amount due by the defendants to the plaintiffs should be. Some sort of suggestion was thrown out in the course of the hearing that it was intended by this agreement or apparent agreement that the question of costs had also been taken into consideration in arriving at the sum of Rs. 664. I see no reason at all for saying that there was any such idea or intention in the minds of either of the parties to the suit. All that was done when the matter was before the Assistant Referee was for the amount claimed to be ascertained or rather to be agreed.

Looking at the matter as a whole, I think that this is a case where I might properly exercise the discretion conferred upon the Court by the last clause of S. 22 and, therefore, while coming to the conclusion that this was a case cognizable by the Small Cause Court and although the plaintiffs were not entitled to a decree for an amount of more than Rs. 1,000, I think I might reasonably say that it was a suit which should be brought in the High Court. That being so, I see no reason why the decree which has already been made should be disturbed. But on the other hand it is clear that the defendants were justified in bringing this matter before the Court, having regard to the manner in which the decree was obtained, and I accordingly give them the costs of this application, and I further direct that the plaintiffs are not to have any costs in connexion with any matters arising subsequent to the report of the Assistant Referee. The defendants are to have costs as between party and party up to the time that the agreement was arrived at and the Referee made his report, including those in connexion with the filing of the report.

A.L./R.K.

Order accordingly.



## \* \* A. I. R. 1929 Calcutta 68

RANKIN, C. J.

*Debendra Nath Roy and others*—Petitioners.

v.

*Kartic Prasad Das*—Opposite Party.

Civil Rule No. 1319 of 1927, Decided on 1st February 1928, from order of Addl. Dist. Judge, Berhampore, D/- 6th June 1927.

\* \* Limitation Act, S. 4—Consideration of S. 4. is not to be introduced in wording of Limitation Act, Ss. 19 and 20.

It is quite unworkable and really impossible to suppose that the effect of a payment or the effect of an acknowledgment should depend upon the day on which somebody who never brought a suit at all could have brought it. If one was to introduce into the wording of Ss. 19 and 20, the consideration that is brought into force by S. 4, the Lim. Law would become extremely unworkable. [P 68 C 2]

Where interest was paid after the expiration of the period limited for payment on the bond but during the period of the civil Court vacation and where no suit was instituted on the day that the Court reopened,

*Held*: that a fresh period of limitation could not be computed, as interest had not been paid before expiration of the prescribed period: 26 Bom. 782, Foll.: 15 Bom. L. R. 348, Diss. from.: A. I. R. 1927 All. 114, Dist. [P 69 C 1]

*Durga Chandra Mitra*—for Petitioners.*Bijan Kumar Mukerji*—for Opposite Party.

**Judgment.**—In my opinion this rule must be discharged. It appears that the suit was on a bond. The due date of the bond was in October 1918, and no payment of interest was made within three years. Rs. 101 was paid some 12 days after the expiration of three years from the date limited for payment. The date on which Rs. 101 was paid was 31st October and that at that time it is said that the Court was closed, the plaintiff being in a position that he would be in time to sue if he brought his suit on the reopening day. He did not bring any suit on the reopening day, but in the meantime he took this payment of Rs. 101 and the question now arises whether that payment of interest has saved limitation under S. 20, Lim. Act.

It is suggested and it may quite well be true—that but for the payment of the Rs. 101 the plaintiff would have brought a suit on the reopening day; but when one comes to consider this matter one must do it according to the strict principles which govern limitation. It is quite

obvious that the plaintiff could, if he liked, have refused to take Rs. 101, have brought his suit and then settled it by a separate agreement or he might have made a separate agreement without bringing his suit at all. All sorts of different things the plaintiff could have done to keep himself right. I am only concerned with the question whether by taking Rs. 101 for interest at that time, after three years had expired, he did save limitation. Upon that it seems to me that on the face of the Limitation Act there can be no doubt at all.

If one looks at S. 3, one finds that it provides that:

“subject to the provisions contained in Ss. 4 to 25 inclusive, every suit instituted after the period of limitation prescribed therefor by the first schedule shall be dismissed.”

It does not say that every suit instituted after that period shall be dismissed, but that subject to certain provisions every suit instituted after that period shall be dismissed. When one comes to S. 20, one finds that it provides:

“where interest on a debt is, before the expiration of the prescribed period, paid as such, a fresh period of limitation shall be computed from the time when the payment was made”.

The reference there is “before the expiration of the prescribed period”. That clearly means the period prescribed in the first schedule. It is said that if one reads S. 4 together with S. 3, one finds that the prescribed period is extended; but that is not so. S. 4 is a provision to say that where the period of limitation prescribed expires on a day when the Court is closed the suit may be instituted on the day that the Court reopens, that is to say, it may be instituted notwithstanding that the period of limitation prescribed has expired.

Having dealt with the matter on the language of the Act, I would, also, like to point out that it is quite unworkable and really impossible to suppose that the effect of a payment or the effect of an acknowledgment should depend upon the day on which somebody who never brought a suit at all could have brought it. In this case there never was a suit. In many cases if there is a payment of interest or an acknowledgment, ex hypothesi there will be no suit. There are more Courts than one sometimes in which suits can be brought. If one was to introduce into the wording of Ss. 19 and 20, the consideration that is brought into force by S. 4, the Lim. Law would become extremely unworkable.



Now, dealing with this matter from the point of view of authority, it is conceded very properly by the learned vakil who appears for the petitioner that the Bombay High Court in the case of *Bai Hemkore v. Masamalli* (1), has decided against him. That was a decision of Sir Lawrence Jenkins and Aston, J., and I would only say that I agree with what the learned Judges there laid down. In the same way we have the case of *Sheo Partab Singh v. Tajammul Husain* (2), where the learned Judges were dealing with a special question arising under S. 31, Lim. Act, and they had cited to them the *Bombay* case to which I have referred. What is said by the learned Chief Justice is this :

"In our view that case can be distinguished. S. 4 does not prescribe any special period of limitation for any kind of suit. It only lays down that when the prescribed period of limitation expires on a day when the Court is closed then the suit may be instituted on the day when the Court reopens. We are in full agreement with the view taken by the Bombay High Court in the ruling mentioned".

He goes on to distinguish the special case of S. 31. S. 31 is not one of the sections which is referred to in S. 3 and it is a very special section. It is a section which gives to certain people in the United Provinces a longer period of limitation for certain suits by reason of the fact that the High Court having jurisdiction had been previously of the opinion (which the Privy Council has overruled) that the plaintiff in certain kinds of mortgage suits had 60 years within which to bring his suit. That section was really intended for a limited class of people to amend the schedule to the Limitation Act and substitute for them a longer period than the period which the schedule really mentions. The only authority in favour of the contention now put forward is the opinion of Mr. Beaman, J., in the case of *Visram Vasudeo v. Tabaji Balaji* (3) and I have no hesitation in saying that I disagree entirely with the view taken by that learned Judge. He seems to me to have misinterpreted the Limitation Act, because he says :

"So that it appears to me very hard to say that the acknowledgment was not made before the expiration of the period prescribed by limitation, for that really means the period within which a plaintiff may file his suit".

If the learned Judge had only observed

that the question there was not "the period prescribed by limitation" but the period prescribed by the schedule, he would have avoided falling into this error. I have no doubt that the decision of Sir Lawrence Jenkins to which Mr. Beaman, J., referred is right. In these circumstances this Rule must be discharged with costs.

S.L./R.K.

*Rule discharged.*

### \* A. I. R. 1929 Calcutta 69

RANKIN, C. J. AND C. C. GHOSE, J.

*Subhas Chandra Bose*—Plaintiff—Appellant.

v.

*R. Knight & Sons and another*—Defendants—Respondents.

Appeal No. 16 of 1927, Decided on 30th January 1928.

\* (a) Tort—Defamation — Plaintiff arrested under Regulation 3 of 1818—Governor in his speech explaining who were arrested under the Regulation and why—One leading article of "Statesman" purporting to comment on Governor's speech—Writer stating that plaintiff was "directing brain of terrorist organization"—No evidence on record proving this allegation—Statement in the article was defamatory—It was statement of fact and not mere comment and, therefore, plea of fair comment was not maintainable—Plea of privilege also would not protect the writer.

A libellous statement of fact is not a comment or criticism on anything. If the words complained of are justified as comment and the words also contain the allegations of fact, the defendant is required to prove that such allegations of fact are true and it is not sufficient for him to plead that he bona fide believed them to be true. In other words, the distinction between comment and allegations of fact must always be borne in mind in determining whether the plea of fair comment can be sustained. In order to give room to the plea of fair comment, the facts must be briefly stated and if the facts upon which the comment purports to be made do not exist, the fundamentum of the plea fails. [P 76 C 1, 2]

Plaintiff Subhas Chandra Bose was arrested and lodged in jail in 1924 under the provisions of an ordinance promulgated by the Governor-General to supplement the ordinary Criminal Law in Bengal and under Regulation 3 of 1818. Lord Lytton, the then Governor of Bengal, made a speech explaining the necessity of the ordinance and the arrest of persons under its provisions. The "Statesman" in its leading article, while, referring to this speech of the Governor and to the arrest of Subhas Chandra Bose, wrote : "It is no doubt disconcerting for Mr. Das that his right-hand man (meaning thereby the plaintiff) has been arrested. But if the directing brain of the

(1) [1902] 26 Bom. 782=4 Bom. L. R. 608.

(2) A. I. R. 1927 All. 114=49 All 67.

(3) [1913] 15 Bom. L. R. 348=19 I. C. 820.



terrorist organization was also the right-hand man of Mr. Das and of the Swarajist party, so much the worse for the Swarajist Party." There was no evidence on record proving that the plaintiff was guilty of acts such as were imputed to him by the article.

*Held*: that the passage in the leading article meant and was understood to mean that the plaintiff was a member of a terrorist organization. The words are not merely comment or criticism of the speech of the Governor, but they distinctly allege and make a statement of fact that the plaintiff was guilty of heinous crimes, and are therefore highly defamatory. The writer was not entitled to state as he did that the plaintiff was the directing brain of the terrorist organization. As the defendant did not prove the truth of his allegations, he would not be protected by the plea of fair comment. It was no defence for him merely to plead that he honestly believed in his accusations or that he had certain amount of reason for making it, or that he was concerned to support a policy of Government. The plea of privilege also would not be available to the defendant because he was not merely reporting or commenting upon the Governor's speech but has made his own allegations of fact against the plaintiff: *Hunt v. Star Newspaper Co.* (1908); 2 K. B. 309 and *Mangena v. Wright*, (1909); 2 K. B. 958, *Dist.*: 35 Cal. 495; 37 Cal. 760; and *A. I. R.* 1914 P. C. 116; *Rel. on.* [P 72 C 2, P 73 C 2]

**\* (b) Tort—Defamation — Newspaper has no special privilege in commenting upon matter of public interest.**

*Per C. C. Ghose, J.*—A newspaper has no privilege beyond any other member of the community in commenting on any matter of public interest and no privilege whatsoever attaches to his position: *A. I. R.* 1914 P. C. 116, *Foll.* [P 76 C 1]

**Rankin, C. J.**—The plaintiff Subhas Chandra Bose sues the defendants who are the proprietors and editor of the Statesman newspaper for damages for libel contained in their issue of 26th November 1924. The words complained of are part of a leading article of which the main subject matter is a speech made by the Earl of Lytton when Governor of Bengal at Maldah on the 24th of that month. This speech had been published in extenso in the issue of the 25th and no complaint is made on that publication.

In the previous month, namely on 25th October 1924, the Governor-General under S. 72, Government of India Act, made and promulgated an ordinance to supplement the ordinary Criminal Law in Bengal. This among other provisions gave power to the Local Government in certain circumstances to arrest persons whom it believed to be guilty of certain crimes and to commit them to jail or to intern them without trial. Under this ordinance and under the provisions of

Regulation 3 of 1818 a considerable number of persons including the plaintiff were on 25th October 1924, arrested and lodged in jail. The ordinance was accompanied by a statement by the Governor-General of the reasons which had moved him to make the ordinance and on the same day there was published a resolution of the Government of Bengal explaining the reasons which had led the Governor-in-Council to ask the Governor-General to promulgate the ordinance.

The speech made by Lord Lytton at Maldah on 24th November 1924 contained this statement:

"But men who defy the law, who live and act outside the law, who menace the liberty of those live within it, who take upon themselves to decide without process of law who shall live and who shall die, these men have no right to the protection of law—they are out-laws, they are a danger to the State and their liberty is forfeited. It is against such men and such men alone, that the special powers, which my Government have asked for and have obtained are being directed. Every single man, who has been arrested under Regulation 3 of 1818 or under the new Ordinance, is a member of a terrorist organization that seeks to attain its objects by violence and intimidation, that proposes, if not checked, to carry out more murders. Every man, too, who has been arrested is being detained, not on the isolated statements of a single informer but on evidence from many different sources unknown to each other, spread over many months, which has to satisfy the Government of Bengal, as well as two independent Judges, and in the case of the Regulation 3 prisoners, the Government of India and the Viceroy himself—probably the best trained lawyer in India—that he is not merely a member of, but an active participator in this terrorist conspiracy."

The leading article of 26th November which is complained of discloses that the circumstances that the plaintiff and certain others of the arrested men were prominent members of a political party called the Swaraj Party had given rise to the contention that the ordinance and Regulation were being directed against that party and its members. In other words that the person arrested or some of them were imprisoned not because Government was desirous to stamp out a terrorist conspiracy but because it wished to strike at the Swaraj Party and to get rid in that way of legitimate opposition of a peaceful and political character. A main purpose of Lord Lytton's speech at Maldah as appears therefrom had been to repudiate this suggestion by establishing first the fact that a far-reaching conspiracy to commit crimes was at work in Bengal and secondly that the special



powers of Government had been exercised carefully and solely with a view to cope with it.

The article complained of commenced with a reference to the Maldah speech and after certain personal references to a Mr. Gandhi proceeds to deal with two statements which it imputes to him. The first is the statement that

"if it is not a fact that the ordinance is directed against the Swarajists then the Government ought by this time to have contradicted the complaint."

The second is the statement that "if it can be proved that the ordinance is not aimed at the Swarajists I have no objection to making amends."

Upon the first statement the writer contends that Government has contradicted the complaint and that part of the argument appears to be finished. Upon the second statement the writer contends that Mr. Gandhi produces no proof that the Government's object is to break up the Swaraj party though he claims to have been shown such evidence and the writer infers that the so-called evidence must be ridiculously weak. On the other hand argues the writer, Lord Lytton in his Maldah speech produces proofs — proofs, as I understand the writer that the ordinance is not aimed at the Swarajists. Then comes the passage complained of :

"We who live in Bengal have before our eyes the evidence of a foul and far-reaching conspiracy. We have seen men murdered, shops wrecked, rails removed, bombs and imported weapons found. The Government have evidence collected not from a single informer but carefully traced and checked over a long period from totally different approaches, which has satisfied them and satisfied a former Lord Chief Justice of England that every single man arrested is a member of a terrorist organization. Mr. Subhas Chandra Bose, Chief Executive officer of Calcutta, was arrested under Regn. 3 and, therefore, the evidence regarding his complicity has had to pass the trained legal scrutiny of the Viceroy. It is no doubt disconcerting for Mr. Das that his right-hand man has been arrested. But if the directing brain of the terrorist organization was also the right hand man of Mr. Das and of the Swarajist party, so much the worse for the Swarajist party. This duplication of roles is unfortunate, but the Swarajists would be well-advised to insist less strongly on the point."

Save for the last three sentences which contribute a certain amount of argument the passage complained of is a summary or paraphrase of passages in Lord Lytton's speech. But it is introduced in the middle of the writer's own polemic against Mr. Gandhi and it is clearly introduced as his own statement of fact

from which in turn grows an argument of his own against Mr. Das.

It is reasonably clear to me that the general intention of the passage is to show from Lord Lytton's speech that the ordinance is not aimed at the swarajists and that Government is using its special powers not dishonestly and in order to put down political opposition but honestly and in order to put down crime.

Now the defendants do not justify and though they have pleaded privilege there is nothing in the plea: *Channing Arnold v. Emperor* (1). There are therefore two questions for decision—first whether the article is defamatory of the plaintiff and secondly whether it is fair comment on a matter of public interest.

There can be no doubt, and indeed it is not disputed in this Court, that the subject-matter of the article is a matter of public interest and concern. By this, it seems desirable to say, I do not mean that a great many newspapers and their readers or other members of the public were taking interest in the matter, but that it was a matter which by its nature affected the public weal and touched upon public business so that any individual citizen had a right to express himself in fair and proper comment or criticism.

Certain elaborate particulars were delivered under the plea of fair comment at a late stage of the case. These seem if harmless to have been unnecessary. A number of irrelevant documents were also put in under this plea but not much reference was made to them at the trial as we learn from the judgment.

I have stated what I regard as the general intention of the words complained of but it is not enough to have regard merely to the general intention. It may happen, and some times does, that a writer in the course of argument which is quite legitimate makes statements of fact of a libellous character either out of zeal or of inadvertance or for other reasons. In the present case the plaintiff's complaint is that in the article the writer asserts that the plaintiff is a member of a terrorist organization. It is for the Court in the first place to rule whether or not as a matter of law the article is capable of this construction, and as I understand the judgment of the learned Judge he has rightly directed himself in the af-

(1) A. I. R. 1914 P. C. 116=41 Cal. 1023=41 I. A. 149 (P.C.).



firmative. The next question is a question of fact for a jury and the learned Judge in deciding it was sitting as a jury.

The article does not say in so many words that the plaintiff is a member of a terrorist organization but it is for the jury to say whether it means this, that is, whether the ordinary man of the kind likely to read the article would understand it in this sense. As we are dealing with a newspaper which has a wide circulation in India it is I think wrong to postulate as the learned Judge seems to have done that the ordinary reader is for this purpose to be taken to have had a knowledge of the contents of the Gazette and the numerous other papers produced at the hearing. He would no doubt have some knowledge of the broad facts as to these sensational arrests. But if the *prima facie* meaning of this article to an ordinary man would be that the plaintiff was a member of a terrorist organization it is almost idle to say that this meaning can be cut down by a reference to what had been said in official publications or in their newspaper.

On this point it appears to me that a jury would have to choose between two lines of argument. On the one hand it might be emphasized that the writer makes no pretence to have seen the evidence which Government has collected, that he is only concerned to make good the point that in the matter of these arrests Government is not acting carelessly or recklessly, without inquiry or without being faced with a real emergency; that he must not readily be taken to go beyond this point and to contribute an assertion of his own about the guilt or innocence of the plaintiff. On this view the article would not mean that the plaintiff was a terrorist but merely that the competent officers of Government dealing with the matter had caused him to be arrested because they had been led to that conclusion, and not because he belonged to the Swaraj party. Upon the other hand, a jury having in mind the ordinary reader a person of no exceptional subtlety would be bound to notice that the evidence referred to in the article is described in impressive language as collected not from a single informer but carefully traced and checked over a long period from totally different approaches; and that it is specially emphasized in the plaintiffs' case that the decision to arrest him was

taken as a result of trained legal scrutiny by a former Lord Chief Justice of England. They would I think be entitled to remember in arriving at the meaning of this leading article or the Maldah speech that in that speech itself there was no ambiguity upon this matter;

"Every single man, who has been arrested under Reg. 3 of 1818 or under the new ordinance, is a member of a terrorist organization that seeks to attain its objects by violence and intimidation, that proposes, if not checked, to carry out more murders."

They would doubtless notice that even when the writer is paraphrasing Lord Lytton he is making the statements on his own account. "We who live in Bengal have before our eyes." "We have seen" "Government have evidence." It passes from argument to statement and from statement to argument. It adds the touch about the "directing brain." It does not say. "If as Lord Lytton thinks." It does not even say "if the right-hand man of Mr. Das is the directing brain." It says "if the directing brain of the terrorist organization was also the right-hand man of Mr. Das."

What then is the opinion on this question arrived at by the learned Judge? His view is this:

"This language as to persons arrested under Reg. 3 of 1818 is almost identical with that of Lord Lytton's speech. He does not in so many words say that the plaintiff was a member of terrorist organization but he points the way to the reader to make the deduction for himself from the materials cited, which brings him to his point."

and again. Had the author of this article written:

"Lord Lytton at Maldah said that every single man who had been arrested under Reg. 3 of 1818 or under the new ordinance is a member of a terrorist organization. Subhas Chandra Bose was arrested under Reg. 3 of 1818. Therefore from the speech of Lord Lytton one may conclude that Subhas Chandra Bose is a member of a terrorist organization" his legal position would, I conceive, have been as unassailable as his reasoning.

In my judgment that is a finding that the words in question meant, and were understood to mean, that the plaintiff was a member of a terrorist organization. Whether this is fair comment or not is a further question. If this was the view of the learned Judge after careful consideration it would be difficult indeed to say that the ordinary reader would have seen a distinction which has escaped the learned Judge and would have taken the argument of the writer to fall short of meaning that the plaintiff was a terrorist. If the intention was to point the way to



the reader to make a deduction for himself this is only what the law calls innuendo and it is no service to a defendant to say that he only pointed the way but did not carry the reader to the destination. Apart, however, from anything which has been said by the learned Judge my opinion as a juror on this is against the defendants. If the writer desired to state short of saying in so many words that the plaintiff was a member of a terrorist organization, and if he had no intention to convey to his readers any opinion upon the plaintiff's guilt or innocence, he was in duty bound to take much greater care than he has done. The ordinary reader would regard his argument as this:

"Subhas Chandra Bose was not arrested because he was a Swarajist; he was arrested because he was a terrorist; that he is a terrorist we know from Lord Lytton's speech and from the fact that there is a good evidence against him which has convinced a lawyer scarcely likely to make a mistake."

I do not think that the writer has taken any care at all to show to his reader that there is a third or middle view or to direct him to it—the view namely that whether the decision in any particular case be right or wrong it was a decision taken in order to put down crime as distinct from political opposition.

If then the meaning of the article is that the plaintiff was a member of a terrorist organization the question arises whether it is fair comment. It is clearly a statement that the plaintiff is guilty of a crime of the most heinous character and if the plaintiff coming into Court with a view to clear his character is to be told that because the matter is one of public interest and concern any member of the public is entitled to assert the plaintiff's guilt provided he couples it with statements of fact which though short of proof afford him a basis for a not unreasonable opinion, the consequences would seem to be serious. To say that nothing can be comment which is an inference of fact or which injuriously affects a person's character would indeed be to put the matter too broadly. [*Hunt v. Star newspaper Co.* (2).] But this is not a case in which, after describing the plaintiffs' conduct with substantial accuracy, the writer has gone on to express an opinion about that conduct, whether it was biassed or malicious or incompetent or negligent. It is not even a case

in which it is proved by the evidence called before the Court that the plaintiff has been guilty of particular acts and where the writer has merely contributed an opinion that the acts set out with substantial correctness amount or do not amount to an offence against the law. In this case the writer has argued the question whether there is or is not sufficient reason to believe that the plaintiff, of whose acts he has, and professes to have, no particulars, is guilty of conspiracy to murder. If the conclusion recommended to his readers be that the plaintiff is guilty of this charge, he is in the position of a person who has publicly charged another with a crime, and, apart from a defence of privilege, he must either justify or pay. It is no defence whatever to say that he honestly believed in his accusation, or that he had a certain amount of reason for making it; or that Lord Lytton had said it before; or that he was concerned to support a policy of Government. To draw in general language a distinction between fact and comment is a difficult task. But in this case the distinction would be obliterated altogether were we to hold that such a charge was comment and not a statement of fact. It is sufficient for me on this point to refer to two cases decided in this Court and binding upon us — *Barrow v. Hem Chandra Lahiri* (3) and *the Englishman Ltd., v. Lajpat Rai* (4).

It was contended before us by Mr. Langford James on behalf of the defendants that while it is true as a general proposition that under a plea of fair comment a defendant has to show that his comment has been made upon a basis of facts proved to be true, there is an important reservation which is, in a case of the present kind, to be made with regard to this doctrine. It is said that if the defendant is commenting upon the statement of another person which statement he is entitled to comment on, he need not prove that statement to be true and that this reservation applies with particular force when that other person's statement is privileged or is contained in a privileged document. The authority for this proposition is the case of *Mangena v. Wright* (5) where Phillimore, J.

(3) [1908] 35 Cal. 495=12 C. W. N. 490.

(4) [1910] 37 Cal. 760 = 6 I. C. 81 = 14 C. W. N. 713.

(5) [1909] 2 K. B. 958=78 L. J. K. B. 879 = 25 T. L. R. 534=53 S. J. 485=100 L. T. 960.

(2) [1908] 2 K. B. 309 = 77 L. J. K. B. 732 = 52 S. J. 376=24 T. L. R. 452=98 L. T. 629.



puts the case of a vote in a Parliament or the judgment of a Judge where by inadvertance or otherwise an individual is wrongly stated to have been guilty of some act of which he is entirely innocent. Accordingly the defendants in the present case contend that they were entitled to comment on Lord Lytton's statement assuming that what he said was true and that without proving any one of the facts alleged by Lord Lytton they can defeat the plaintiff's suit. If the case of *Mangena v. Wright* (5) is the only authority for this doctrine it is not unimportant to notice that the learned Judge whose great authority is now appealed to was dealing with a case in which an extract from a parliamentary paper was published as an extract, and the letter enclosing this extract for publication, referred to the plaintiff's "interesting career" and to the plaintiff as an "unfortunate native" words which were said by the defendants to import no more than that the plaintiff was a mischievous agitator. The learned Judge was proceeding on the footing that a jury might hold that the letter was not a repetition and re-statement of the defamatory statements in the extract. On this view the comment was kept separate from the statements. I observe that this case was cited to the Court in *The Englishman Ltd., v. Lajpat Rai* (4). It was ruled by Harrington J., as follows :

"No doubt the fair and accurate report of a speech made in Parliament is privileged, even though it contains facts defamatory to the plaintiff. But no authority has been cited for the proposition that a person is entitled to republish these defamatory statements not as a report of what has been said in Parliament, but as a statement of his own."

In the present case I agree that the defendants were entitled to refer to the fact that the Viceroy and the Governor had caused the arrest of the plaintiff because they were satisfied that he was a terrorist, but in a matter of so great importance to the plaintiff it was very necessary that they should refrain from conveying to the ordinary reader an opinion of their own which was in effect the reiteration of a charge of criminal conduct. In such a matter a journalist who does not exercise a reasonable degree of care and skill to make plain the limits of his intention may quickly drift into a repetition of the accusation—into a suggestion that it must be true into an

opinion to that effect. If he has done so and if the fair meaning to the ordinary reader, as put by a jury upon his words, is to present the reader with or commend to him a conclusion that the plaintiff has been guilty of a crime, it is in my opinion erroneous to say that he is merely commenting upon the statement of another.

The difficulty in the present case is the question as to the more or less of the meaning of the article. If the intention of the writer was limited in the manner now alleged for the defendants, the expenditure of a few words could have made this clear; and in the absence of a very plain notice to the reader that the guilt of the plaintiff was not being affirmed I think that the words used by the writer in this case carry him over the borderline. If this be so then in my opinion there is little substance in the rest of the defence. I should be sorry indeed to lay down anything new on this subject and I quite appreciate that great officers of State may have, in the course of their duty, to decide and sometimes even to declare that an individual has been guilty of crime. But it is always open to that individual to wait until the accusation is repeated against him by a private person or a newspaper as the opinion or assertion or suggestion of such person or newspaper, and to come into Court to clear his character and to obtain such relief in damages from his accuser as may be appropriate to the circumstances of the case.

The plaintiff here has sued defendants who are well able to defend themselves and little likely to be wanting in a desire to do so. I cannot forbear to say that he has done all that the law permits to vindicate himself.

Upon the question of damages it is I think sufficient to refer once more to the case already cited, *The Englishman Ltd., v. Lajpat Rai* (4); and to say that while the charge against the plaintiff is of the most heinous crime, if not indeed of a series of heinous crimes, the question as between the plaintiff and the defendant in this case has reference solely to the damage done to the plaintiff's reputation by the words published on the 26th November 1924. As the plaintiff had been arrested in circumstances which made it plain to the public that he was arrested as a person guilty of being a member of a terrorist organization and as on the 24th November the Governor



of the Province had roundly stated this to be a fact as further. It is conceded that the report of the speech in this very newspaper upon the previous day is not a publication of which the plaintiff is entitled to complain, the damage which can be taken to be attributable to the words used by the defendants in their issue of the 26th is of necessity reduced to dimensions which for such a libel are exceedingly small. It would be an obvious injustice if the defendants were made to pay for damage to the plaintiff's reputation which was clearly due to acts and statements by other people. The damages though not high must be substantial and there is no question of nominal, still less of contemptuous, damages. I think the figure should be assessed at Rs. 1,000, that the appeal be allowed with costs on the original side and in this Court, and that the judgment should be entered for the plaintiff accordingly.

**C. C. Ghose, J.**—The judgment just delivered by my Lord makes it unnecessary for me to recapitulate the facts of this case and the circumstances under which the article in the "Statesman" newspaper complained of was published, but as we are reversing the judgment of the trial Court, I desire to add a few words.

The portion of the article in which it is alleged the defendants wantonly and maliciously intended to injure and vilify the plaintiff and to bring him into contempt and disgrace is as follows :

"We who live in Bengal have before our eyes the evidence of a foul and far-reaching conspiracy. We have seen men murdered, shops wrecked, rails removed, bombs and imported weapons found. The Government have evidence collected not from a single informer but carefully traced and checked over a long period from totally different approaches which has satisfied them and satisfied a former Lord Chief Justice of England that every single man arrested is a member of a terrorist organization. Mr. Subhas Chandra Bose, Chief Executive Officer of Calcutta (meaning the plaintiff) was arrested under Regn. 3 and, therefore, the evidence regarding his complicity has had to pass the trained legal scrutiny of the Viceoroy. It is no doubt disconcerting for Mr. C. R. Das that his right hand man"

(referring thereby to the plaintiff)

"has been arrested. But if the directing brain of the terrorist organization"

(referring thereby to the plaintiff)

"was also the right hand man of Mr. Das and of the swarajist party, so much the worse

for the swarajist party. The duplication of roles"

(meaning the roles alleged of the plaintiff in the foregoing sentences)

"is unfortunate, but the swarajist would be well-advised to insist less strongly on the point."

The contention of the defendants was that the words complained of did not constitute a libel on the plaintiff. They further added :

"In so far as the words complained of consist of allegations of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon facts which are matters of public interest."

At the trial a large mass of intrinsic matters in support of the plea of fair comment was allowed to be admitted, the learned Judge apparently holding that the defendant in an action for libel is permitted to show what it was he was commenting upon, provided it be a matter of public interest, even though he has to travel outside the scope of the libel for the purpose.

The learned Judge held that the language of the writer as to persons arrested under Regn. 3 of 1818 is almost identical with that of Lord Lytton's speech. He also held that the writer did not in so many words say that the plaintiff was a member of a terrorist organization but he pointed the way to the reader to make the deduction for himself from the materials cited, which brought him to his point, i. e., that with such materials before the world it was useless to proclaim that because a prominent member of the swaraj party had been arrested, therefore, the measures of Government were directed against the swaraj party and not towards the repression of crime and the establishment of law and order.

On appeal before us Sir Binod Mitter for the appellant did not deny that the matters referred to in the offending article were matters of public interest or that the speech of Lord Lytton at Maldah was privileged. He also stated that for the purposes of this case he was preferred to admit that the publication of Lord Lytton's speech in the "Statesman" newspaper on the 25th November 1924 was also privileged. This point was that in circumstances like what happened in this case it was the duty of the person who took the plea of fair



comment to make his comments in such a manner so that they might appear to reasonably minded men as comments and not as statements of fact, and that where the writer accuses another of having committed criminal offences he is required under the law to prove the facts upon which his comment is based. Sir Binod argued that in the present instance the writer has warranted the accuracy of the allegations of fact made by Lord Lytton and that the article went far beyond what can be construed as fair comment upon a matter of public interest, and contained statements of fact highly defamatory of the plaintiff. Sir Binod argued that the writer called the plaintiff the directing brain of the terrorist organization and has vouched for the facts referred to by Lord Lytton in his speech at Maldah and that in these circumstances the plea of fair comment was of no avail to the writer.

Mr. Langford James on behalf of the defendants argued that taking the article as a whole it was clear that the writer thereof had made no assertion of his own about the guilt of the plaintiff and that all that he had done was to paraphrase the speech of Lord Lytton. He further argued that the rule that the defence of fair comment would fail, unless the facts alleged in the document complained of were true, did not apply where one person alleged the facts and another person commented on the same and in support of this he cited the case of *Mangena v. Wright* (5).

A newspaper has no privilege beyond any other member of the community in commenting on any matter of public interest and no privilege whatsoever attaches to his position (Per Lord Shaw in *Channing Arnold v. Emperor* (1)). When the defendant in a case for damages for defamation takes the plea of fair comment, he is not required to justify the comment and it is sufficient for him if he can satisfy the Court that it is "fair" comment. A libellous statement of fact is not a comment or criticism on anything. If the words complained of are justified as comment and the words also contain allegations of fact, the defendant is required to prove that such allegations of fact are true and it is not sufficient for him to plead that he bona fide believed them to be true. In other words, the distinction between comment and allega-

tions of fact must always be borne in mind in determining whether the plea of fair comment can be sustained.

It is necessary for me to refer to the cases which were cited at the Bar but it is well settled that in order to give room for the plea of fair comment the facts must be truly stated and if the facts upon which the comment purports to be made do not exist, the foundation of the plea fails. Where the words which are alleged to be defamatory allege or assume as true facts concerning the plaintiff, which the plaintiff denies, and which either involve a slanderous imputation in themselves, or upon which the comment bases imputations or inferences injurious to the plaintiff, it is settled law that the defence of fair comment fails, unless the comment is truthful in regard to its allegation or assumption of such facts.

These being the guiding principles one must turn to the article complained of and find out whether the words complained of are allegations of fact or expressions of opinion, and if the latter, whether such expressions of opinion are fair comment or not. In this case I do not propose to add the analysis of the article made by my Lord. It will suffice if I say that I have read and re-read the article complained of several times and I have come to the conclusion that the writer has not been as careful as he might have been and has distinctly alleged that the plaintiff has been guilty of previous crimes. The writer was obviously entitled to comment on Lord Lytton's speech and to summarize the same; he was entitled to state that the plaintiff had been arrested under Regn. 3 of 1818 and that the evidence against him had satisfied the executive that he was a person who ought to be detained under the said regulation; but he was not entitled to suggest or to state, as in my opinion he has done, that Subhas Chandra Bose was the directing brain of the terrorist organization in Bengal. A great deal of verbal criticism of the words complained of was presented before us, but in my opinion it is impossible to escape from the conclusion upon a fair reading of the article that the writer has made defamatory statements of fact about the plaintiff about which there is no evidence. It may be that in the eye of the executive the plaintiff did commit acts justifying detention under. Regn. 3



of 1818; but so far as this case is concerned, there is no evidence on record proving that the plaintiff has been guilty of acts such as are imputed to him by the writer in the words complained of. In my view, therefore, on the words complained of there is no room for the conclusion that the writer is protected by the plea of fair comment.

The case of *Mangena v. Wright* (5), referred to above was a peculiar one the facts there were altogether different and the judgment of Phillimore, J. must be read in the light of the facts in that case. The present case is altogether different, bearing in mind the way in which the offending assertions of fact regarding the plaintiff have been introduced.

I agree, therefore, with my Lord in the view taken by him and I am of opinion that this appeal should be allowed and the plaintiff's suit decreed with costs in both Courts. I agree with my Lord in his assessment of the damages sustained by the plaintiff.

S.N./R.K.

*Appeal allowed.*

### \* A. I. R. 1929 Calcutta 77

B. B. GHOSE AND BASU, JJ.

*Kalamjan Bibi and others* — Defendant—Appellants.

v.

*Sahajana Bibi and another*—Plaintiffs and Defendant—Respondents.

Appeal No. 260 of 1926, Decided on 5th June 1928, from decree of Addl. Dist. Judge, Tipperah, D/- 6th November 1925.

\* (a) *Pardanashin lady*—Document executed by—In cases of absolute sale or gift, mere knowledge of absoluteness of transaction is enough.

In the case of absolute sale or gift by a *pardanashin lady*, when the bona fides of the document executed by her are challenged, it is not necessary to prove that the terms of the document were explained to her if it is proved that she knew that it was an absolute conveyance of title by which she was divesting herself of all interest in the property and she ceased to claim any interest in the property after the execution of the document. [P 78 C 1]

(b) Civil P.C., O. 6, R. 4—Fraud—Allegations of forgery.

When it is alleged that a certain document was not executed, it may amount to an allegation of forgery but it excludes the idea that the document was executed by fraud. [P 78 C 1]

*Sasadhar Roy (Sr.)*—for Appellants.

*Jatindra Mohan Ghose*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the defendants against the judgment and decree of the Additional District Judge of Tipperah reversing the decision of the Subordinate Judge in a suit for partition. The plaintiffs claim as heirs of one Hossanaddin. He left four daughters, two of whom are plaintiffs and two are defendants. Hossanaddin is said to have executed a registered kabala in favour of of his wife of all the lands in dispute. That document was marked Ex. A. After the death of Hossanaddin his widow executed a document Ex. B dated the 29th Assin 1316, by which she transferred all the lands she received from her husband under the document Ex. A in favour of one of her daughters defendant 1. Defendant 1 resided with her husband with Amina Bibi, the widow of Hossanaddin. After the death of Amina Bibi the plaintiffs have brought this suit for partition on the allegation that they are in possession of some of the properties left by their father. They disputed the document Ex. A also. The Subordinate Judge found both the documents to be genuine and bona fide and he held that title passed to defendant 1 under the document Ex. B, and upon that finding he dismissed the suit. On appeal by the plaintiffs the learned Judge has reversed that decision.

One matter should be first stated and it is this, that one of the plaintiffs, Moyna Bibi, gave up her claim to the property by a petition in the Court of appeal. There does not seem to be any reason why the learned Judge did not act upon that petition. The pleader of that plaintiff was certainly responsible for the fact as to whether that petition was filed with the knowledge and consent of Moyna Bibi. Moyna Bibi has been made a respondent here and defendant 1 has claimed the share which would belong to Moyna Bibi even if she is found to have a share, on the basis of the petition. But Moyna Bibi has not appeared in this Court to dispute defendant 1's title. The first thing, therefore, that is necessary to be mentioned is that Moyna Bibi would not be entitled to any share in the property and that share if she has any would go to augment the share of defendant 1. It should also be noticed that another daughter of Hossanaddin who was made a defendant did not claim any share in the property left by her father. She



supports the case of defendant 1. There is then left only one of the plaintiffs Sahajan Bibi, plaintiff 1 who is really the contesting plaintiff.

The learned Judge has reversed the decision of the Subordinate Judge mainly upon the ground that Amina Bibi, the mother of the plaintiffs, was an illiterate pardanashin woman and any one taking a conveyance from such a person was bound to prove affirmatively not only that the transferrer executed the instrument but understood and grasped the full import of what she was doing. The learned Judge held that there was no evidence that there was any explanation of the contents of the instrument having been made to Amina Bibi and, therefore, the defendant 1 has not been able to prove the validity of the document so as to affect the title of the plaintiff by inheritance. The objection does not appear to have been taken distinctly in the trial Court by the plaintiffs that the document was not explained to their mother.

The learned Judge, however, held that when the bona fide of the document was challenged by the plaintiffs the defendant was bound to prove the validity of the document from every possible angle of attack. That may be true in certain cases, but when one considers the case of an absolute gift or an absolute sale by a pardanashin woman it is not always necessary that there should be proof of explanation of the terms of the document. It would be sufficient in many cases to show that the pardanashin woman knew that it was an absolute conveyance of title by which she was divesting herself of all interest in the property. Such documents are quite simple and the mere knowledge of the fact that it was a kobala or gift would be sufficient explanation of the nature of the document. If you add to that the circumstances of possession, then the question of explanation becomes almost a *quæstio*. The learned Judge seems also to have thought that although the transaction does not actually smack of fraud it was an extremely questionable one. Fraud does not seem to have been alleged by the plaintiffs. They only say that no such document was executed. Fraud and forgery are quite different things, and when forgery was alleged, although not in so many terms, it excludes the idea of having a document executed by fraud. There are certain other

elements which the learned Judge failed to take into consideration. The question is whether after the death of their mother the plaintiffs ever came into possession of any portion of the property left by her. Amina Bibi does not seem to have claimed any interest in the property after the execution of Ex. B. If after the death of Amina Bibi defendant 1 alone was in possession of the property for a considerable number of years then the presumption as to the validity of the document would be strengthened a good deal. The learned Judge also failed to take into consideration the fact that there was nothing unnatural in executing the document in favour of defendant 1 who was the only daughter of Amina Bibi who was living with her. The other daughters probably were well off and had been married elsewhere.

It is common knowledge that when people of this class desire to keep a daughter in the house they marry her to a comparatively poor man who would live in the father-in-law's family as a *ghar jamai*. Under these circumstances it is not unnatural that the small property which belonged to Hosanaddin would be given to that daughter alone. These are the elements for consideration in dealing with this case. As these matters have not been considered by the learned Judge we think that the appeal should be allowed, the judgment and decree of the Additional District Judge set aside and the appeal sent back to the lower appellate Court for re-hearing after consideration of all the circumstances stated above. The costs will abide the final result.

**Basu, J.**—I agree.

M.N./R.K.

*Case remanded.*

## A. I. R. 1929 Calcutta 78

PAGE, J.

*Promode Nath Sinha Roy and others—*  
Plaintiffs—Petitioners.

v.

*Harishee Bagdhi* — Defendant—Opposite Party.

Civil Revn. No. 931 of 1927, Decided on 18th January 1928, from order of Sub-Judge, Hooghly, D/- 21st April 1927.

(a) Civil P. C., O. 18, Rr. 5, 8 and 14—In appealable cases, there might be either one or two records of evidence—If one, it should be in Judge's own hand-writing—If written by



some other person at his dictation, it should be supported by memorandum made or caused to be made by Judge.

In cases where an appeal is allowed, there might be either one or two records of the evidence. If there is only one record, it should be made in writing by the Judge's own hand; while, if the evidence is taken down in writing by some person other than the Judge, though, "in the presence and under the personal direction and superintendence of the Judge," the Judge also should make or cause to be made a memorandum as provided by Rr. 8 and 14.

[P 79 C 2]

(b) Civil P. C., O. 18, Rr. 5, 8 and 14—Provisions not complied with when evidence is dictated to typist and typed record revised and signed by Judge—It is not illegality, but mere irregularity.

Where evidence of witnesses was dictated to a typist and the typed copy was revised and signed by the Judge who added at the end of each deposition "dictated by me,"

Held, that the provisions of O. 18, Rr. 5, 8 and 14 were not complied with, but recording the evidence thus is not an illegality but amounts merely to an irregularity: 19 *Mad.* 269 and 46 *Cal.* 979, *Ref.*

[P 80 C 1]

(c) Civil P. C., S. 115—Exercise of revisionary power is discretionary.

Whether the Court will exercise its powers of revision is a matter to be determined in its discretion according to the circumstances of the case under review.

[P 80 C 1]

*Sitaram Banerjee*—for Petitioners.

*Rupendra Kumar Mitter*—for Opposite Party.

**Judgment.**—I have taken time to consider this case because it involves the construction of O. 18, Rr. 5, 8 and 14, Civil P. C., and raises an issue of general interest. The suit was brought by the petitioners to recover Rs. 20, the value of a palm tree which the plaintiffs alleged that the opposite party defendant 1 had wrongfully cut down and sold. The suit was dismissed on the ground that the palm tree had been planted by defendant 1, and that he was entitled to sell it and retain the proceeds. The plaintiffs appealed. They contended that the decree of the trial Court could not stand because there was no legal evidence that the palm tree had been planted by defendant 1, as the evidence of the witnesses had not been recorded in the manner prescribed by O. 18.

The material rules are: (The judgment quoted Rr. 5, 8 and 14 of O. 18, and proceeded). The learned, Subordinate Judge affirmed the decree of the trial Court, and dismissed the appeal. The plaintiffs thereupon obtained the present rule under S. 115, Civil P. C.,

for the purpose of setting aside the decrees passed by the lower Courts. The petitioners contend that, inasmuch as the evidence of the witnesses was not taken down in writing by the Judge himself (R. 5), and the Judge did not make a memorandum (R. 8), or cause a memorandum to be made (R. 14), there was no legal evidence upon which the Court could have founded or passed a decree in favour of the defendants.

On the other hand the opposite parties urge that the evidence of a witness is "taken down in writing by the Judge," as well when it is dictated by him for a typist—which was the course followed in this case—as when he himself records it by means of a pen or a typewriter; in each instance it is the Judge who determines the form, nay more, the very words of the narrative, and it makes no difference whether he uses a pen or a typewriter or a typist, for each is but the instrument that he employs to effect his purpose.

Now, in these days when the use of the stenograph and the typewriter is more popular and widespread than it was in the past, it may well be that the construction which the opposite parties urged the Court to put upon O. 18, is to be commended as being reasonable and in accordance with modern ideas. That however, is a matter for the legislature with which the Court has no concern, for, in my opinion, the provisions of O. 18, cannot bear such a construction, and it does not represent the true meaning and effect of the rules under discussion.

As I read O. 18 the intention of the legislature was to provide that the Judge should be made responsible for the taking and recording of evidence. Accordingly, it was enacted, as I construe Rr. 5, 8 and 14, that in cases where an appeal is allowed there might be either one or two records of the evidence duly made according to law: that if there was only one record it should be made in writing by the Judge's own hand; while, if the evidence was taken down in writing by some person other than the Judge, though:

"in the presence and under the personal direction and superintendence of the Judge," that the Judge also should make or cause to be made a memorandum as provided by Rr. 8 and 14.

The fallacy, I think, that underlies the construction which the opposite parties



urge upon the Court is that the shorthand writer or the typist who takes down the evidence at the dictation of the Judge is not a mere instrument like the pen or the typing machine, that needs must re-act to the touch of the Judge, but a human being with a will and intelligence of his own, and fallible as all men are.

The legislature by enacting O. 18 intended and provided that evidence should, either be taken down in writing by the Judge's own hand, or should be supported by the sanction of a memorandum under Rr. 8 or 14.

In the present case the evidence of the witnesses was dictated to a typist by the Judge, and a copy of the typed record was revised and signed by the Judge, who added at the end of each deposition the words :

"dictated by me to avoid eye strain."

"Shashi Jiban Sen,"

"Munsif."

But there was only one record of the evidence, and that was not taken down in writing by the Judge himself, and no memorandum was made or caused to be made by the Judge. The provisions of O. 18, Rr. 5, 8 and 14, therefore, were not complied with. In my opinion, however, the recording of the evidence in the manner followed in the present case was not an illegality that rendered the decree based upon it null and void, but amounted merely to an irregularity : *Fort Gloster Jute Manufacturing Co. v. Chandra Kumar Das* (1), *Queen Empress v. Gopal Goundan* (2).

Now, whether, the Court will exercise its powers of revision under S. 115, is a matter to be determined in its discretion according to the circumstances of the case under review. Rules and regulations are made to assist and not to hinder the administration of justice, and if the Court were to set aside the decrees under review, in my opinion, in so doing it would not be promoting the ends of justice, but would work hardship and injustice to the opposite parties. It is not pretended that the evidence upon which the decrees in the present case were based was not accurately and fairly recorded, or that any objection was raised in the trial Court to the relevance or the admissibility of the evidence, or to the mode in which it was recorded. Further, it is to be observed

that if the Court were to accept the petitioner's contention, and to hold that the evidence as recorded was not legal evidence and must be treated as though it never had been given, the plaintiffs, so to say, would be "hoist with their own petard," for the evidence of all the witnesses, whether called for the plaintiffs or for the defendants, was recorded in precisely the same manner, and if there was no legal evidence before the Court, the plaintiffs' case *ex necessitate rei* must fail, for no evidence would be forthcoming to prove the plaintiffs' claim. For these reasons I am not disposed to accede to the petition, and the Rule will be discharged with costs.

S.L./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 80

C. C. GHOSE AND JACK, JJ.

*Moti Lal Biswas*—Accused-Appellant  
v.

*Emperor*—Opposite Party.

Criminal Appeal No. 140 of 1928, Decided on 27th July 1928, from judgment of Ch. Presy Mag., Calcutta.

**Presidency Towns Insolvency Act, Ss. 27 and 36—Insolvent's depositions under S. 36 are not admissible but record of his examination under S. 27 is admissible in criminal proceedings under S. 104.**

Depositions under S. 36 cannot be admitted in evidence, but the record of insolvent's examination under S. 27 is evidence which can be taken into consideration against him in proceedings under S. 104 of the Act, as criminal proceedings in the Presidency Magistrate's Court are, under S. 103, proceedings under the Act : 12 Cox. Cr. Cases 32 and 174, *Rel. on.*

[P 82 C 2]

*Narendra Kumar Basu, Satindra Nath Mukherji and Jitendra Mohan Banerji*—for Appellant.

*B. L. Mitter*—for the Crown.

*Probodh Chandra Chatterji and Bibhuti Bhushan Guha*—for Creditors.

**C. C. Ghose, J.**—The appellant before us Motilal Biswas has been convicted by the learned Chief Presidency Magistrate under S. 103, Presidency Towns Insolvency Act, and has been sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1,000 in respect of each of the three counts, the substantive sentences being directed to run concurrently. So far as the question of the imposition of the fines is concerned, that

(1) [1919] 46 Cal. 979=51 I. C. 405=29 C. L. J. 438.

(2) [1896] 19 Mad. 269=6 M. L. J. 134.



portion of the order is clearly wrong and must be set aside, because it will appear from a reference to S. 103 of the Act that there is no provision made for the imposition of any fine. That being so, as indicated above, the portion of the Magistrate's order imposing a fine of Rs. 1,000 in respect of each count must be set aside.

It appears that the appellant before us formerly, that is, prior to 1329 B. S. carried on business in the name of Bepin Chandra Motilal. He was a partner in the firm, the other partner being his brother Bepin Chandra. The two brothers quarrelled and separated and the accused started a new business in the name of Motilal Monindranath Biswas, Monindranath Biswas being the name of his minor son. That business was in scented oils, patent medicines, biscuits and stationery, and it is said that the firm had no business of any description whatsoever in galvanized screws. Apparently the appellant did not do well in his business and it appears that he experienced considerable difficulties in meeting the claims of his creditors. It is said that his creditors assembled one evening in front of the place of his business and continued to press him for payment of their dues. The creditors were not paid and on the following day the appellant closed his doors. He then went to the Court of the District Judge of Faridpur and applied for relief under the Provincial Insolvency Act. Certain creditors in Calcutta coming to know of these proceedings in Faridpur applied to the learned Judge on the original side exercising the insolvency jurisdiction of this Court for transfer of the proceedings to this Court. It appears that the learned Judge on the original side being satisfied that this was a case which ought to be transferred to this Court made the order applied for and accordingly transferred the proceedings to this Court.

Thereafter there was an order made for the public examination of the insolvent under the provisions of S. 27, Presidency Towns Insolvency Act. The record of that examination has been tendered in evidence in this case and is Ex. 5. Subsequently it appears that the insolvent was also examined under S. 36 of the Act, the record of that subsequent examination being Ex. 6.

After the public examination of the  
1929 C/11 & 12

insolvent had been concluded, certain creditors, who are described as B. N. Pal and B. K. Pal made an application to the learned Judge in insolvency for the framing of certain charges under the provision of S. 103, Presidency Towns Insolvency Act, it being alleged against the insolvent that he had been guilty of offences under the Insolvency Act. It appears that at first the learned Judge was of opinion that no definite case had been made out against the insolvent. He therefore dismissed the application with liberty to the creditors to put in a fresh application for a similar order, if they were so advised, within one month from the date of the learned Judge's previous order. Such a fresh application being made to the learned Judge, the latter by his order dated 12th July 1927 directed, in terms of S. 104, Presidency Towns Insolvency Act as amended by Act 9 of 1926, that a complaint should be made to the Chief Presidency Magistrate, Calcutta, in respect of three matters which had been brought to his notice. Thereupon the enquiry under S. 104, Presidency Towns Insolvency Act, as amended by Act 9 of 1926, was held before the Magistrate. A number of witnesses were called to give evidence against the accused and it is said that they made out a prima facie case against the accused that he had been guilty of certain offences under the Insolvency Act, to wit, keeping false documents and books of account and making false entries therein.

The charges against the accused framed in the Chief Presidency Magistrate's Court were these : (1) keeping a false roker book and showing a false debit entry therein in the name of Kasinath Mandal of Sibganj for a sum of Rs. 429-6-0 ; (2) keeping a false roker book and showing a false entry therein in the name of Kunja Behari Saha for Rs. 1,402-8-0, and (3) keeping a false challan book showing a false debit entry therein in the name of Kanhaiya Lal Routh Mull for Rs. 3,340. (The judgment then stated the evidence and proceeded). The learned Chief Presidency Magistrate went into the matter at some length. He had the oral evidence of these witnesses before him. He had the books of the appellant before him and he came to the conclusion that the persons or the firms who were referred to by the accused in the entries in question were fictitious and had no existence what-



soever. He further came to the conclusion that having regard to the way in which the appellant had kept his books of account there was abundant evidence for coming to the conclusion that those books had been kept in a fraudulent manner and that the entries in question were false. Upon these findings he convicted and sentenced the accused as indicated above.

This appeal being an appeal from a judgment of the Chief Presidency Magistrate has been argued at considerable length both on law and on facts. The learned advocate appearing for the appellant has argued in the first place that the Magistrate had no jurisdiction whatsoever to try this case because, at the date when the proceedings in insolvency were initiated, Act 9 of 1926 had not come into force at all and that the procedure for the trial of the appellant, assuming that he was guilty of offences under the Insolvency Act, should have been under the old S. 104, that is, under the section as it stood before its amendment by Act 9 of 1926, and, in support of this contention, has drawn our attention to a large number of cases in which the position is canvassed as to whether Acts passed by the Houses of Parliament or by the legislature in this country have or have not a retrospective effect. The cases to which our attention has been drawn have in our opinion really no bearing whatsoever on the precise question that we have got to determine in the present case and it would serve no useful purpose if we were to go at length through the long catena of cases to which our attention has been drawn. Now, this amendment by the Act of 1926 is really an amendment affecting procedure, and it is apparent from a perusal of the dates in this case that, on 12th July 1927 when the learned Judge preferred a complaint before the Chief Presidency Magistrate, Act 9 of 1926 had come into operation and, therefore, the only section which could be brought into play was S. 104 as it was amended by Act 9 of 1926. The complaint itself is one under S. 104 as amended, and that being so the Magistrate was the proper person who could hold the enquiry on the complaint of the learned Judge exercising the insolvency jurisdiction of this Court. We think that there is no substance whatsoever in the point which has been taken and that it must be negatived.

It is next argued that the record of the depositions under S. 36, Presidency Towns Insolvency Act, could not be admitted in evidence in this case. It appears to us that the contention, so far as it goes, is sound and must be given effect to; and in coming to a conclusion as regards the guilt or otherwise of the appellant before us we have eliminated from our consideration entirely the record of the deposition under S. 36 of the Act. But while we have eliminated from our consideration the record of the depositions under S. 36, Presidency Towns Insolvency Act, we have taken into consideration the record of his examination under S. 27, Presidency Towns Insolvency Act, that being evidence which, according to the terms of the section itself, can be taken into consideration against the accused in proceedings held under the Act. It is, however, argued that although the record of an insolvent's deposition under S. 27, Presidency Towns Insolvency Act, can be taken into consideration in proceedings against an accused under the Insolvency Act, that record cannot be admitted in evidence in criminal proceedings against the accused. Now, the present proceeding is a proceeding under S. 103, Presidency Towns Insolvency Act, and, that being so, it is a proceeding under the Act. The question has been considered in England and it has been held in several cases that an insolvent's answers to questions put in public examination under the Bankruptcy Act can be used against the insolvent in a subsequent criminal proceeding: see in this connexion the cases reported in 12 *Cox's Criminal Law cases*, pp. 32 and 174. That being so, we see no reason whatsoever why the record of the deposition of the appellant under S. 27, Presidency Towns Insolvency Act, could not have been taken into consideration by the Magistrate in this case.

It is next argued that the charges are bad as the second charge could only be understood if two entries and not merely one entry were taken into consideration and, therefore it is said the charges although three in number, were really four in substance, and that that being so the trial is vitiated. Now, what are the charges against the accused? The charges really are: keeping a false roker or making a false roker book and making false entries therein and also keeping a false challan book and making false entries therein.



The references to the figures showing the moneys paid out by the appellant are merely illustrative and we do not think that any real prejudice of any description was or could have been caused to the appellant by reason of the charges being framed in the manner in which they were framed.

It is next argued that there is no evidence to connect in any way the terminal dates mentioned in the charges themselves within which period it was suggested the entries in question were made. In the charges definite indications are given as to the dates of the entries themselves. Therefore, assuming for argument's sake that there was any confusion about the terminal dates, we are of opinion that no prejudice was or could have been caused to the accused, seeing that he was fully aware in respect of what entries the charges were being investigated against him.

It is also argued that the question of galvanized screws which was taken into consideration by the Magistrate in this case in investigating the charges against the accused should not have been taken into consideration at all because the learned Judge who made the complaint had himself in a prior proceeding come to the conclusion that the explanation of the accused so far as purchases of galvanized screws were concerned was satisfactory and, in support of this contention, we have been referred to an order made by the learned Judge in the insolvency jurisdiction of this Court dated 14th June 1927. So far as this point is concerned, it does not really come into this proceeding at all. The complaint was made not under the order of 14th June 1927, but under the order of 12th July 1927, and we must exclude from our consideration, in investigating the present case against the accused any question which might arise on a construction of the order of 14th June 1927.

These are, as far as we can make out, all the points of law which have been canvassed before us. On the facts, it has been argued that the evidence shows that there is room for doubt as to whether the accused was really guilty. It is argued that the fact that three witnesses, viz., Nos. 4, 5 and 7 were called to prove that they were not the persons with whom the appellant had dealings does not exclude or negative any theory of there being other

persons of the name of the persons or firms referred to in the charges in the places mentioned against their names who had done business with the appellant. As far as we can understand the evidence, the prosecution brought forward before the Magistrate evidence of a satisfactory character showing that the accused had committed the offences charged against him. It was the accused's business to rebut the case made by the prosecution. There is no question of the Magistrate having gone wrong in having placed the onus on the accused. The Magistrate has not placed the onus upon the accused. We think on the facts that the case made by the prosecution is such as to induce one to hold that the case is true. That being so, we have come to the conclusion that both on law and on facts this appeal must fail. The appellant, who is on bail, will now surrender to his bail-bond and serve out the remainder of the sentence imposed on him.

**Jack, J.**—I agree.

S.L./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 83

B. B. GHOSE AND BOSE, JJ.

*Macneil & Co.* — Defendant 2—Appellants.

v.

*Saroda Sundari Debi and others* — Respondents.

Appeals Nos. 10 and 102 of 1926, Decided on 14th August 1928, from the original decrees of 2nd Ag. Sub-Judge, Hooghly, D/- 16th September 1925.

(a) Transfer of Property Act, S. 41 — "Reasonable care".

Reasonable care is such care as a person of ordinary prudence would take in the absence of some specific circumstances which would have been the starting point of an enquiry which might be expected to lead to some result: 40 Cal. 378 (P.C.), Dist. [P 86 C 2]

(b) Transfer of Property Act, S. 3—Notice—Constructive—Actual notice of encumbrance or other transaction fixes person with notice of the facts led to by inquiry after charge—Person designedly abstaining from enquiry is fixed with notice.

Cases in which constructive notice has been established resolve themselves into two classes: first, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, encumbered or in some way affected, and the Court has therefore bound him with constructive notice of facts and instruments to a knowledge of which he would



have been led by an enquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice, and secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice: *Jones v. Smith*, (1841) 1 *Hare* 43, *Ref.* [P 86 C 2]

**(c) Cosharer—He cannot deal to other cosharer's prejudice.**

A cosharer in joint property cannot by dealing with such property affect the interest of other cosharers therein. [P 88 C 1]

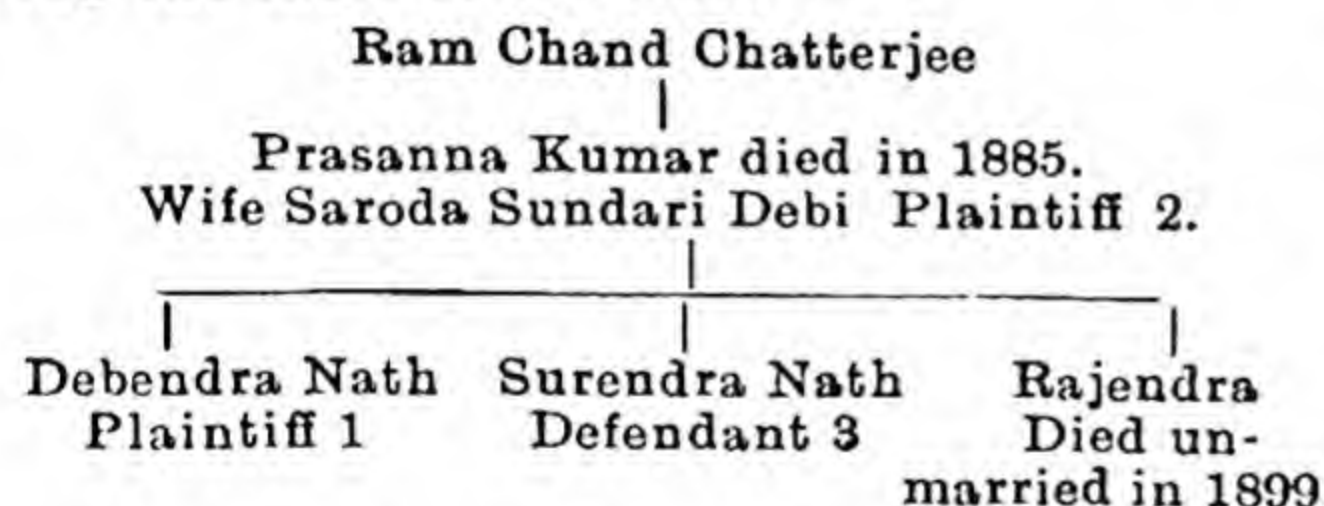
**(d) Partition—Unequal interests.**

There can be partition between parties, the interest of one of whom is subordinate to that of the others: 23 *C. L. J.* 231, *Dist.* [P 88 C 1]

*N. Sircar, Satindra Nath Mukerji and Satis Chandra Munshi*—for Appellants.

*Amarendra Nath Bose and Nanda Gopal Banerji*—for Respondents.

**Bose, J.**—The Appeal No. 10 of 1926 arises out of Title Suit No. 15 of 1923 and the Appeal No. 102 of 1926 arises out of Suit No. 1 of 1924. Both the Suits Nos. 15 of 1923 and 1 of 1924 were tried together by the Subordinate Judge, 2nd Court, Hooghly. The properties in dispute originally belonged to Ram Chand Chatterji. The following short genealogical table will be of use in understanding the facts of the case:



Each of the brothers Debendra, Surendra and Rajendra inherited  $\frac{1}{3}$  share and on the death of Rajendra their mother Saroda Sundari, plaintiff 2 inherited his  $\frac{1}{3}$  share.

Defendant 2 Messrs. Macneil & Co., with a view to construct mills began to acquire lands in the village of Bansberiah and the neighbouring villages. Defendant 1 Babu Pran Krishna Chatterji appears to have been employed by the company for the purpose of helping the company in the acquisition of large quantities of lands. Pran Krishna accordingly proceeded either to purchase or to take permanent leases of lands and then to grant sub-leases to defendant 2 company. Defendant 3, Surendra, helped defendant 1 in all these transactions. Surendra on behalf of himself and his brother Deben-

dra granted mourashi mokurari patta in respect of 16 annas share of the disputed lands (7 plots) in favour of defendant 1 Pran Krishna on 23rd June 1921. Plaintiff 1 Debendra resided at the time at Lucknow where he was in the service of the railway company. Surendra held a general power-of-attorney from the plaintiff 1 Debendra. The management of the properties was left with Surendra who used to pay and realize rents and looked after the properties in a general manner.

Plaintiffs' case is that Surendra had no right to grant permanent lease and that the lease in favour of defendant 1 was a fraudulent and collusive transaction and the rights of the plaintiffs could not be affected by the lease. The subject-matter of the Suit No. 15 of 1923 is plots 2 to 7 of the lease. The area is 19 bighas 4 cattas and 11 chittaks of land. In this suit plaintiffs' prayer is for declaration that they have  $\frac{2}{3}$  rds share and for partition. In Suit No. 1 of 1924 the subject-matter is the plot 1 of the disputed lease. Its area is 2 bighas. Plaintiffs in this suit pray for declaration of right and for confirmation of possession of land.

The defence of defendants 1 and 2 inter alia is that the suits are not bona fide, that defendant 3 Surendra had full authority to grant the permanent lease under the general power-of-attorney executed by plaintiff 1 Debendra, that the plaintiffs and Surendra formed an undivided Hindu joint family of which Surendra was the karta, that the plaintiffs were all along aware of the transactions and have ratified them, that the joint family was benefited by the transaction, that the disputed lease was for a selami of Rs. 650 per bigha and on a rental of Rs. 20 per bigha, that Rs. 13,180 was paid as selami, that the suits have been instituted at the instigation of Surendra, that the suits are not maintainable in the present form and that the suits are barred by estoppel, acquiescence and waiver. I should mention here that defendant 1 has granted a permanent lease in respect of the lands in favour of defendant 2.

The learned Subordinate Judge dismissed the claim of plaintiff 1 Debendra but he decreed the claim of plaintiff 2 Saroda Sundari. He has held that plaintiff 2 has  $\frac{1}{3}$  rd share in the land in Suit No. 15 of 1923 and so he has passed a preliminary decree in this case directing the partition by metes and bounds. In



Suit No. 1 of 1924 he has held that the plaintiff 2 has 1/6th share in the jamai right in the 2 bighas plot. So he has declared plaintiff 2's 1/6th share and confirmed her possession in it. Defendant 2 company prefers this appeal.

The appeal came on for hearing on 25th May 1927 before this Court when the following two issues were framed and sent down to the lower Court for specific findings upon the evidence on the record and upon such further evidence as the parties might adduce.

1. Whether plaintiff 2 is estopped from asserting her right to the property in suit by reason of her conduct or of any statement made by her or of her silence when it was her duty to speak? 2. What is the area of the lands in the possession of the tenants under plaintiff 2 and her cosharers which were purchased by Debendra or Surendra either at a Court sale or by private treaty and whether plaintiff 2 was entitled to khas possession of these lands in any event?

The learned Subordinate Judge after taking further evidence has found that the plaintiff 2 is not estopped by reason of her conduct or of any statement made by her or of her silence; with regard to the second issue his finding is that the total quantity of land in the possession of tenants under plaintiff 2 and her co-sharers which was purchased by Surendra and Debendra is 6 bighas 3 cattas. He is of opinion that these tenants had under-raiyati interest and that after they vacated the lands these reverted to the khas possession of their landlords plaintiff 2, Surendra and Debendra and so plaintiff 2 is entitled to get khas possession of her 1/3rd share in the said 6 bighas and 3 cattas. He also finds that the "Pataria" tank which was surrendered by the tenant and the land held by Punna Das came into the khas possession of plaintiff 2 and her cosharers.

The appellant company has taken objection to the findings of the learned Sub-Judge on the two issues stated above. The first point urged by the learned counsel appearing on behalf of defendant 2 is that defendant 2 was protected in the circumstances of the case by S. 41, T. P. Act. It is in evidence that defendant 1 Pran Krishna Chatterji had great confidence in defendant 3 Surendra—defendant 3 Surendra Nath says in his deposition that he helped defendant 1 P. K. Chatterji in the matter of acquisition of lands in that locality for defendant 2 and that P. K. Chatterji had confidence in him.

There were dealings by defendant 3 at the time in thousands of rupees of defendant 1. The office of defendant 1 was located in the house of defendant 3. Defendant 1 occasionally went there. When the office was opened there the females of Suren's family used to cook the food for defendant 1 and his officers. Suren's daughter had some trouble in her eyes and both Suren and Deben went with her to defendant 1's Calcutta house for treatment on one occasion and remained there. The properties in dispute belonged to Prasanna Kumar Chatterji who died in 1885 leaving the widow plaintiff 2, Surendra, defendant 3, Debendra, plaintiff 1 and Rajendra who died in 1899. On the death of Rajendra plaintiff 2 Saroda Sundari inherited his 1/3rd share. Defendant 1 did not know at the time of the patta that Surendra and Debendra had a brother Rajendra and that the mother inherited the 1/3rd share of Rajendra. Defendant 3 Surendra in the permanent lease granted to defendant 1 stated that he and his brother Debendra had the 16 annas share. Some dakhilas, kabuliats, copies of plaints, decrees and sale certificates were produced before defendant 1 by Suren, defendant 3. The dakhilas were granted by Surendra and Debendra to tenants in respect of some of these lands. Ex. G, registered kabuliati was executed by one Purna Chandra Das in favour of Debendra and Surendra on 24th May 1916 in respect of some of these lands. Ex. J. will show that Debendra and Surendra instituted a suit for recovery of arrears of rent in April 1917 against Umasashi, widow of Purna Chandra Das in respect of lands. Ex. 1 is the decree passed in favour of Surendra and Debendra. Ex. K to Ex. K-2, sale-certificates show that Surendra and Debendra purchased some of the lands at sales held in execution of their decrees.

It will be seen that the rent receipts were granted by the two brothers, the kabuliats were obtained by the two brothers and rent suits in respect of the lands were instituted by the two brothers. The two brothers have been dealing with the properties for many years. The evidence of defendant 3 Suren is that his mother's name was not explicitly disclosed in any dakhila granted by them, that all the settlements were made in the names of himself (Suren) and his brother Deben and not in his mother's name and that Sarat Rajak surrendered his holding in



the names of the two brothers only. All the properties were recorded in the name of Deben in the settlement proceedings in 1907—I have already said that defendant 1 had great confidence in Suren. Reference has been made to the evidence of P. K. Chatterji defendant 1 where he says:

"Suren and my manager usually approved title. They referred to me in cases where they could not understand. I also consulted my pleader and attorney."

This goes to show that in cases of doubts the documents were referred to P. K. Chatterji by Suren and P. K. Chatterji's manager, and that P. K. Chatterji in those cases consulted pleaders and attorneys. In the present case the title-deeds given to defendant 1 did not show any defect in the title of the two brothers Surendra and Debendra.

It has been urged on the side of the respondent that Ex. 9 mortgage-bond executed by defendant 3 in 1911 in favour of his brother-in-law showed that defendant 3 had one-third share, that defendant 3 had a brother Rajendra and that had defendant 1 enquired for incumbrances in the Registry Office he would have discovered the secret title of the mother. Ex. 9 does not relate to any of the properties in dispute. Had defendant 1 inspected the Registry Office he would have found in the index that some other properties had been mortgaged by Suren to his brother-in-law. That would not have led him to an enquiry as to the title of the properties which are the subject-matter of the lease.

"It is a principle of of natural equity, which must be universally applicable that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry, that, if prosecuted, would have led to a discovery of it": *Ramcoomar Kundu v. Macqueen* (1).

S. 41, T. P. Act which was founded on the aforesaid dictum of the Judicial Committee requires the following conditions for its application—(1) that it was by consent, express or implied of the persons claiming title that another person is held out as the ostensible owner of such pro-

perty; (2) that such ostensible owner transfers it for valuable consideration; (3) that the transferee has acted in good faith and has taken reasonable care to ascertain that the transferrer had power to make the transfer.

The expression "reasonable care" in the section has been interpreted as meaning such care as an ordinary man of business or a person of ordinary prudence would take and it is not enough to assert generally that enquiries should be made or that a prudent man should have made further enquiries but some specific circumstances should be pointed out as the starting point of an enquiry which might be expected to lead to some result.

"It is indeed, scarcely possible to declare a priori what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may with sufficient accuracy for my present purpose, and without danger, assert that the cases in which constructive notice has been established, resolve themselves into two classes:—First, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, encumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an enquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and, secondly cases in which the Court has been satisfied from the evidence before it, that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice. The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which in truth related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which the second class of cases proceeds, is not that the party charged had incautiously neglected to make enquiries, but that he had designedly abstained from such enquiries, for the purpose of avoiding knowledge, a purpose which if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the res gesta would suggest to a prudent mind, if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a bona fide purchaser without notice."

This is clearly Sir Edward Sugden's opinion (*Sugden's Vendor and Purchaser*, Ed. 10, Vol. 3, pp. 471, 272), and with that sanction, I have no hesitation in

(1) [1872] 11 B.L.R. 46=I.A. Sup. Vol. 40=18 W.R. 166=3 Sar. 160 (P.C.).



saying it is mine also : see *Jones v. Smith* (2).

In the present case defendant 1 who had great confidence in defendant 3 Surendra was told by him that he and his brother Debendra had 16-annas share. Defendant 1 from the deeds viz., rent receipts, copies of plaints, sale-certificates, kabuliats etc., produced before him by defendant 3 found that the two brothers had 16-annas share in the properties. Surendra no doubt in his deposition states that he told defendant 1 that he had a brother Rajendra. Defendant 1 denies having been informed about it by Debendra. I have already referred to the recital in the permanent lease to the effect that the two brothers had 16-annas share. There is no doubt that Surendra has perjured himself. The learned Subordinate Judge has also disbelieved the story of Surendra. Had the title of plaintiff 2 been disclosed in any manner to defendant 1 then surely he would have taken care to have plaintiff 2 joined in the lease as he was paying very good price for the property. In this connexion, I should state here that the finding of the Subordinate Judge Mr. M. N. Das to the effect that the mother was at Lucknow at the time of the lease is not supported by evidence. In order to come to the finding that the mother was at Lucknow from 1919 up to the date of the lease i. e., June 1921 the learned Subordinate Judge relies upon the evidence of plaintiff's witnesses and upon a post-card Ex. 13 written by Surendra to Debendra on 26th December 1919. The postcard certainly does not show that the mother was at Lucknow in 1921. The learned Subordinate Judge observes :

" it is only defendant's witness, Rajendra Nath Choudhuri who says that Surendra's mother was at the Bansberiah house when Pran Krishna's office was located there. I feel no hesitation in rejecting this statement as unworthy of credit. "

He is not correct there. There is the evidence of defendant 1 Pran Krishna Chatterji that when he opened his office in Suren's Baithakkhana Suren Babu's mother was at the house, that whenever he went to Bansberiah during the continuance of his work, he all along saw Suren Babu's mother in the house from 1919 to 1921, that he called her as mother also and she used to come out

before him and that Suren's mother was aware of all the transactions in dispute at their respective times. There is no reason to disbelieve him as no question was specially put to him in cross-examination with regard to this matter on the side of the plaintiff-respondent.

It is now urged that as defendant 1 knew that Surendra had a mother he ought to have enquired of the mother if she had any share in these properties. Reference has been made by the learned advocate appearing for the respondent to the case *Azima Bibi v. Shamalanand* (3):

" The appellants were female members of a Mahomedan family which had adopted the Hindu religion in matters of worship, and as to which both Courts in India concurrently held that there was no custom proved excluding female members from inheritance which was the case set up by respondent (who was a pleader of some standing). In a suit brought by the latter to enforce a mortgage bond which had been executed only by the male members of the family, in which the appellants were also joined as defendants, the first Court made a decree against the interest of the male defendants only in the property; but the High Court decreed the suit against both the male and female defendants on the ground that, because the female members had not actively interfered in the management of the property, the male defendants must be taken to have represented them in the mortgage transaction. It appeared that in other transactions the male members of the family had dealt with the family property without the active concurrence of the females. Held : by the Judicial Committee (reversing the decision of the High Court), that the evidence did not prove that the male defendants had " represented " the appellants. The latter were *pardashin* ladies, and naturally left the management of the properties to their male relatives. There was nothing to show either that the appellants had misled the respondent by word of conduct to the belief that they had no proprietary interest in the property; and he made no enquiries in the matter from them or from their husband as he might have done if he had any doubt in the matter. The decree of the High Court was therefore erroneous so far as it made the appellants liable, and should have been limited to making liable the only interests in the property of the male defendants, the executants of the mortgage bond. "

In the present case as the property belonged to Hindus defendant 1 had no reason to suspect that the mother could have any share in the property while in the ruling referred to as the property belonged to Mahomedans, daughters would ordinarily get shares in the properties of their fathers. In these

(2) [1841] 1 Hare 48=1 Ph. 244=6 Jur. 8=12 L.J.Ch. 381.

(3) [1913] 40 Cal. 378=17 I. C. 758=17 C. W.N. 121. (P.C.).



circumstances defendant 1 should be considered to be a bona fide purchaser without notice.

It has been urged on the side of plaintiff 2 that the consideration money for the lease has not been paid to defendant 3. (The judgment discussed evidence in this respect and concluded.) It is clear from the evidence both oral and documentary that the selami money for Ex. B lease has been duly paid to defendant 3. I have already said that defendant 1 had no direct notice of the title of plaintiff 2. There was no circumstance which would be calculated to put defendant 1 upon enquiry. I now find that the lease was for valuable consideration. In the circumstances of the case defendant 1 was protected by S. 41, T. P. Act. I therefore hold that defendant 1 and consequently defendant 2 has acquired valid and good title to the 16-annas share of the properties in dispute in the two suits i. e. Suit No. 15 of 1923 and Suit No. 1 of 1924 by virtue of the lease Ex. B.

The next point urged in Appeal No. 10 of 1926 on the side of the appellant is that in case of a decree for partition there should be a partition of all the lands of plaintiffs 1 and 2 and defendants 3. In my opinion there is substance in this contention and all the lands of the brothers and the mother should be brought into the hotchpot. In the first place defendants 1 and 2 are cosharers of the two brothers and their mother. Defendants 1 and 2 obtained permanent lease of the lands and so they have subordinate interest. In the second place there is evidence on the record to show that defendant 3 and the two plaintiffs have other lands. The evidence of plaintiff 1 is that they have 18 bighas of land in Sultangacha, 4 bighas near Charaktola and some properties at Amta. They have also a commodious dwelling house. The general principle no doubt is that a co-sharer in joint property cannot by dealing with such property affect the interest of the other cosharers therein. There can be a partition between parties the interest of one of whom is subordinate to that of the others. In the present case plaintiff 2 is an old lady over 80 years old. On her death the property will go to plaintiff 1 and defendant 3. In these circumstances we are of opinion that all the properties of plaintiff 1 and 2 and defendants 3 should be partitioned so that

if possible the properties in dispute may be allotted to defendant 3 and plaintiff 1. In that case defendant 2 would be recouped out of the share of the lessors. I should mention here that it is not urged on the side of defendant 2 appellant that the suit is not maintainable in its present form inasmuch as all the properties have not been brought into the hotchpot. His contention which is to the effect that all the properties may be included so that as a matter of equitable relief defendant 2 may get these lands from the share of plaintiff 1 and defendant 3 and that plaintiff 2 may get her allotment elsewhere is well-founded. In this connexion I should mention here that the learned counsel appearing for the defendant 2 states that defendant 2 is ready to bear all the costs of such partition. Reference has been made to *Sris Chandra v. Mahima Chandra* (4) on the side of the respondents. It was a suit by a lessee for partition of the lands leased out to him. Defendant 2 no doubt can bring a suit for partition of these properties alone. So the ruling referred to above has no application to the present case.

In view of my finding on the first point i. e. regarding the protection afforded to defendant 2 under S. 41, T. P. Act, we hold that plaintiff 2 is not entitled to succeed in the two suits. The claim of plaintiff 1 has been dismissed in the lower Court and he has not preferred any appeal. So the Appeals Nos. 10 and 102 of 1926 are allowed with costs. The decrees and judgment of the Subordinate Judge are set aside so far as they were in favour of plaintiff 2. The suits are dismissed with costs. In Appeal No. 102 costs one gold mohur.

**B. B. Ghose, J**—I agree.

M.N./R.K.

*Appeals allowed.*

(4) [1915] 23 C. L. J. 231=33 I. C. 17.

### A. I. R. 1929 Calcutta 88

PAGE, J.

*Ram Saran Mandal and others*—Petitioners.

v.

*Radha Raman Mandal* — Opposite Party.

Civil Revu. No. 1071 of 1927, Decided on 12th January 1928, from order of Munsif, Burdwan, D/- 29th June 1925.



**Civil P. C., O. 23, R. 1—Suit dismissed on merits—Plaintiff should not be allowed by withdrawing suit in appeal to start proceedings again because of formal defects in plaint.**

It is not intended or contemplated by O. 23, R. 1 that after a suit has been tried and dismissed on the merits, the plaintiff should be permitted to withdraw in appeal from the suit and to start proceedings all over again against the successful defendants merely because there was also a formal defect in the frame of the suit: 13 M. I. A. 160 and 11 C. L. J. 45, *Rel. on.* [P 89 C 2]

*Bijan Kumar Mukherji* — for Petitioners.

*Bhut Nath Chatterji* — for Opposite Party.

**Judgment.** — This rule was issued under S. 115, Civil P. C., on an application to set aside an order of the learned Subordinate Judge of Burdwan allowing the plaintiff to withdraw a suit. The suit was brought by the plaintiff who is one of sixteen shebais of the deity Damar Jiu, for possession of certain immovable property to which he claimed to be entitled, and of which he alleged that the other shebais in collusion with a tenant of the land had dispossessed him. The land in suit had been purchased by the grandfather of the plaintiff in the name of the deity, but the plaintiff alleged that the land was secular and not debatter property the title to which had passed to him in his personal right. The suit was tried and determined on the merits, and in the event was dismissed upon the ground that the plaintiff had failed to prove his title or that the property was secular property. The learned trial Judge further held that inasmuch as one of the shebais had not been impleaded and the heirs of another (who had died pendente lite) had not been substituted there was a defect of parties, and upon that ground also the suit failed. The plaintiff lodged an appeal and in the course of the hearing before the lower appellate Court the plaintiff applied for permission to withdraw the suit with liberty to bring a fresh suit upon the same cause of action. The learned Subordinate Judge acceded to the plaintiff's prayer and passed an order allowing

"the plaintiff to withdraw the suit with liberty to bring a fresh suit on the same cause of action against the other shebais (i. e., other than the plaintiff) in their character as shebait persons claiming under them as such."

Whether or not, apart from the pres-

ent suit, the plaintiff is at liberty to take further proceedings in this matter against the defendants need not now be considered. The question is whether this Court has jurisdiction to interfere with the order under review, and, if so, whether it ought to exercise its powers under S. 115, Civil P. C., in favour of the petitioners. Now, the object of the legislature in enacting O. 23, R. 1, as I apprehend, was that where a suit must fail by reason of some formal defect or some other "sufficient ground" was proved, the Court should be at liberty, in order that substantial justice might be done, to permit the plaintiff (on such terms, if any, as it thought fit) to withdraw the suit, and to recommence the proceedings in a suit duly framed according to law. But, in my opinion, it was never intended or contemplated that after a suit had been tried and dismissed on the merits the plaintiff should be permitted to start the proceedings all over again against the successful defendants merely because there was also a formal defect in the frame of the suit: *Watson v. Collector of Rajshahye* (1), *Khorda Co. v. Durga Chandra* (2). Otherwise, much hardship and prejudice might accrue to defendants who already had contested the suit, and had succeeded in defeating the plaintiff's claim on the merits.

Now, in this case, as I read the judgment of the learned Subordinate Judge, he was of opinion that so soon as it became apparent that there was a formal defect in the frame of the suit he ought to allow the plaintiff to withdraw the suit with liberty to bring a fresh suit on the same cause of action, without taking into consideration the fact that the suit had been heard and decided against the plaintiff on the merits. In my opinion, in adopting that view the learned Subordinate Judge misdirected himself as to the meaning and effect of O. 23, R. 1, and the order under review cannot stand.

The result is that the rule will be made absolute, and the appeal remitted to the lower appellate Court to be determined according to law. I assess the hearing fee at two gold mohurs.

S.N./R.K.

*Rule made absolute.*

(1) [1869] 13 M. I. A. 160 = 12 W. R. 43 = 2 Suther 269 = 2 Sar. 500 (P. C.).

(2) [1910] 11 C. L. J. 45 = 5 I. C. 187.



**A. I. R. 1929 Calcutta 90**

SUHRAWARDY AND JACK, JJ.

*Chiranjib Sen*—Plaintiff—Appellant.

v.

*Mohendra Nath Biswas and others*—  
Defendants—Respondents.Appeal No. 2208 of 1925, Decided on  
5th June 1928, from appellate decree of  
Sub-Judge, Nadia, D/- 22nd July 1925.(a) **Civil P. C., O. 1, R. 1—Cosharers.**In a suit for assessment of rent, the other  
cosharers are not ordinarily necessary parties.  
[P 90 C 2](b) **Landlord and Tenant — Relationship  
may arise by mere occupation.**The relationship of landlord and tenant does  
not always arise by contract or agreement.  
Such relationship may arise by mere occupa-  
tion of agricultural land. [P 90 C 2](c) **Landlord and Tenant—Rent—Suit for  
—Defendant not claiming right higher than  
tenant—He is liable for rent.**The landlord's right to recover rent must be  
determined on the status of the defendants. If  
the defendants are tenants of the holding and  
do not profess to claim any higher title than  
that of a tenant they are liable to pay rent.  
[P 91 C 1]*Khetra Mohan Ghose and Satis Chan-  
dra Sinha*—for Appellant.*Mritunjoy Chattopadhyaya and Biraj  
Mohan Roy*—for Respondents.

**Judgment.**—This appeal arises out of  
a suit for assessment and recovery of rent.  
It appears that the mahal belongs to the  
plaintiff and many other cosharers one of  
whom is the Raja of Dighapatia. In  
1884 the plaintiff's father brought a suit  
in respect of his share in this mahal  
from which he was dispossessed by the  
Raja and obtained a decree. Since then,  
the finding is, the plaintiff has never re-  
alized any rent in respect of his share in  
the mahal which was found to be annas five  
three eighth pies. In the Record-of-Rights  
the plaintiff was recorded as a cosharer  
with the remark that there was no reali-  
zation of rent in respect of his share.  
This suit the plaintiff has now brought  
for ascertainment of the rent, the defen-  
dants are liable to pay to him. The de-  
fence is that the plaintiff has no right in  
the mahal, that the defendants were in  
adverse possession of the plaintiff's share  
in the mahal, if he had any, that the  
lands which are char lands did not origi-  
nally form part of the mahal but were  
subsequently recovered from the Govern-  
ment by the Raja and other cosharers  
who settled the lands with the defen-  
dants. The trial Court gave a decree to  
the plaintiff on the finding that the plain-  
tiff had the share claimed by him in the

mahal and as the defendants are tenants  
of the mahal they cannot resist the  
plaintiff's claim for rent nor can they set  
up adverse possession against him. The  
appellate Court has dismissed the plain-  
tiff's suit on the ground that the plaintiff  
had failed to prove the relationship of  
landlord and tenant between him and the  
defendants. The learned Subordinate  
Judge says that there is no evidence that  
there was a contract for payment of rent  
between the plaintiff and the defendants.  
With regard to the establishment of the  
relationship of landlord and tenant bet-  
ween the parties by operation of law, the  
learned Subordinate Judge remarks that  
there is no decree of any competent Court.  
Then he goes on to observe that these  
lands are charlands and were not the  
subject-matter of the suit which the  
plaintiff's father had brought against the  
Raja and in which he recovered a decree  
in respect of his fractional share. In  
this view he holds that though the plain-  
tiff has got his name registered under the  
Land Registration Act he is not entitled  
to recover rent from the defendants under  
S. 60, Ben. Ten. Act. The learned Sub-  
ordinate Judge further holds that the  
other cosharers of the plaintiff were neces-  
sary parties to the suit.

With regard to the last point it may  
be observed that in a suit for assessment  
of rent, the other cosharers are not ordi-  
narily necessary parties. It does not ap-  
pear that any question was ever raised  
with regard to the extent of the plaintiff's  
share. He has proved a decree of 1884  
which gave him the share he now claims  
and there is no evidence, according to the  
judgments of both the Courts below, that  
that share was ever in dispute. As to the  
first point on which the learned Subordi-  
nate Judge has dismissed the plaintiff's  
suit, namely, that he has failed to prove  
the relationship of landlord and tenant  
between him and the defendants, it is  
enough to say that such a relationship  
does not always arise by contract or ag-  
reement. Such relationship may arise by  
mere occupation of agricultural land. The  
learned vakil for the respondent has fair-  
ly put the case of his clients before us  
and has asked us to hold that the plaintiff  
is not entitled to recover rent but damages  
for use and occupation. It is not neces-  
sary to go into the question as to when  
rent can be claimed in the shape of  
damages but the result being the same



and the Record-of-Rights being in favour of the plaintiff with regard to the proprietary title we do not see why a suit for rent cannot be maintained. The plaintiff's right to recover rent must be determined on the status of the defendants. If the defendants are tenants of the holding and do not profess to claim any higher title than that of a tenant they are liable to pay rent to the plaintiff for his share as to the other cosharers.

With regard to the point made by the learned Subordinate Judge that the char lands were not in existence at the time when plaintiff's father recovered a decree against the Raja of Dighapatia we are not in a position to find out the real state of things as the point was not made in the trial Court. The defendants in para. 15 of the written statement have given a story which does not seem to have been fairly considered by the lower Court. Their case is that when these lands were reformed the Government took possession of them and settled them with the defendants. Thereupon the Raja brought a suit against the Government and recovered these lands on which the defendants took a fresh settlement from the Raja who is in possession of these lands through the defendants. This story has not been carefully examined by any of the Courts below. It must be noted that the defendants have not expressly in their written statement set up the right of a third party nor do they say that they have been paying, under a bona fide belief, rent in respect of the plaintiff's share to some one else. If it is found that the plaintiff has succeeded in establishing his title to the land in suit which is in the occupation of the defendants as tenants he is entitled to a decree though he might not have realized rent for the last 40 years. If on the other hand he fails to establish this point, the question has to be considered as to whether the defendants or any of the other cosharers of the plaintiff by adverse possession have acquired any title to the land in suit. It is accordingly necessary that the matter should be reconsidered by the lower appellate Court. The result is that this appeal is allowed, the decree of the lower appellate Court set aside and the case sent back to it for a re-hearing of the appeal according to law. Costs will abide the result.

S.L./R.K.

*Appeal allowed.***A. I. R. 1929 Calcutta 91**

B. B. GHOSE AND BOSE, JJ.

*Bhola Nath Majumdar—Appellant.*

v.

*Nayeb Khan and others—Respondents.*

Appeal No. 322 of 1927, Decided on 20th July 1928, from order of Sub-Judge, Pabna, D/- 26th April 1927.

**Ejectment—When decree for ejectment is wiped out, decree for mesne profits cannot stand.**

A decree for mesne profits can only be made against the trespasser in a suit for ejectment if ejectment is decreed. If on an appeal against the decree for ejectment that decree is set aside, there cannot possibly be a decree for mesne profits. If, during the pendency of the appeal against the decree for ejectment, a decree for mesne profits has been made, that decree should be considered as a decree dependent upon the original decree for ejectment, and if that decree is set aside the subsequent decree awarding mesne profits on the basis that the plaintiff has obtained a decree for ejectment must fall; and the same should be the result if the two decrees are passed simultaneously. [P 92 C 1]

*Apurba Charan Mukerjee—*for Appellant.

*Surajit Chandra Lahiri—*for Respondents.

**B. B. Ghose, J.**—This is an appeal by the decree-holder under somewhat peculiar circumstances. The decree-holder brought a suit for ejectment and mesne profits against the judgment-debtors in which suit he got a decree for ejectment and mesne profits in the trial Court. The judgment-debtors appealed against the decree which directed ejectment and they were successful in getting the decree set aside. They did not appeal against the final decree for mesne profits which apparently was passed along with the decree for ejectment by the trial Court. What the Subordinate Judge did in decreeing the appeal preferred by the defendant was that he stated that the decree for mesne profits would stand. The plaintiff in the previous suit now seeks for execution of the decree for mesne profits, although his suit for ejectment was dismissed and he was allowed mesne profits only upon the basis that the defendants were trespassers on his land. The learned Munsif held that the Subordinate Judge had jurisdiction to make the order that the decree with re-



gard to mesne profits should stand although he dismissed the suit for ejectment and upon that he allowed the execution to proceed. On appeal the learned Subordinate Judge has reversed that decision. He has held in effect that when the decree for ejectment was set aside the decree for mesne profits as against the defendants as trespasser was without jurisdiction. He has also ordered consequential steps to be taken to give relief to the judgment-debtor because during the pendency of the proceeding in the lower appellate Court the property of the judgment-debtor was sold in execution of that decree.

It is argued on behalf of the appellant that the decree of the Subordinate Judge might have been erroneous but the executing Court has no power to refrain from executing the decree and, therefore, the judgment of the Subordinate Judge is erroneous.

The real question for consideration in this case is whether, when the preliminary decree was set aside the final decree for mesne profits should be considered to stand. A decree for mesne profits can only be made against the trespasser in a suit for ejectment if ejectment is decreed. If on an appeal against the decree for ejectment that decree is set aside there cannot possibly be a decree for mesne profits. If during the pendency of the appeal against the decree for ejectment a decree for mesne profits has been made that decree should be considered as a decree dependent upon the original decree for ejectment, and if that decree is set aside the subsequent decree awarding mesne profits on the basis that the plaintiff has obtained a decree for ejectment must fall; and the same should be the result if the two decrees are passed simultaneously. If the all important decree for ejectment is wiped out there cannot be any ground upon which the decree for mesne profits can stand. In that view it must be held in my opinion that the decree for mesne profits was nullified by the decree made dismissing the plaintiff's suit for ejectment. In that view there was no decree which the plaintiff decree-holder could execute as for mesne profits. The Subordinate Judge in his decree stated that the decree for mesne profits would stand. That portion of the decree was absolutely without jurisdiction. The decree as regards mesne profits was not

before him. The defendants had only appealed against the decree allowing ejectment and that appeal he had allowed. In my opinion the decision of the Subordinate Judge is right and this appeal must be dismissed with costs. The hearing fee is assessed at three gold mohurs.

**Bose, J.**—I agree.

S.L./R.K.

*Appeal dismissed.*

## A. I. R. 1929 Calcutta 92

C. C. GHOSE AND GREGORY, JJ.

*Intaz Mandal*—Accused—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 893 of 1927, Decided on 22nd May 1928.

(a) Criminal P. C., S. 423—Certain facts happening after jury's verdict and not found on record—High Court cannot alter or reduce sentence on that basis.

Facts which happened after the verdict of the jury had been given, and which are not found on the Sessions record, will not induce the High Court to alter or reduce sentence in appeal. [P 93 C 1]

(b) Criminal P. C., S. 423—Jury not constituted according to provision of law—This fact not made ground of appeal—Still High Court should interfere.

The jury which was empanelled to try a person was not constituted in the manner provided by law, i. e., in accordance with principles laid down in *A. I. R. 1928 Cal. 83 (F.B.)*. This fact was not, however made a ground in the appeal.

*Held*: that the High Court was bound to interfere and remand the case for retrial since the Court constituted to try the case was, though not illegal, certainly irregular. [P 93 C 1]

*Fazlul Huq, Suresh Chandra Taluqdar and Janhabi Churn Das Gupta*—for Appellant.

*Khundkar*—for the Crown.

**C. C. Ghose, J.**—In this case the appeal was admitted on the ground of sentence. The appellant has urged that if the facts set out in para. 7 of his petition affirmed with an affidavit bearing date 27th April 1928, had been brought to the notice of the jury the jury might have taken a different view and that bearing that in mind the sentence ought to be reduced. The facts set out in para. 7 of the petition referred to above happened after the verdict of the jury had been given, and it is inconceivable to us how those facts could be utilized for the purpose of inducing this Court to alter or



reduce the sentence passed on the appellant in any manner whatsoever. Those facts are not facts to be found on the Sessions record. Therefore, if the matter stood alone the question of sentence would have to be considered from the point of view indicated above and the result would be that this Court would find itself unable to interfere with the sentence imposed in this case. But in this appeal our attention has been drawn by Mr. Fazlul Huq to the fact that the jury who were empanelled to try the appellant were not constituted in the manner provided by law, that is, in accordance with the interpretation of the law in that behalf given in the Full Bench case reported in *Kedar Nath v. Emperor* (1). The learned Deputy Legal Remembrancer whose attention was drawn to this fact after examination of the order-sheet, admits that the jury were constituted in violation of the principle laid down in the Full Bench case. That being so it follows that the constitution of the Court that was to try the appellant was if not illegal certainly irregular. It is perfectly true that this is not the ground upon which the appeal was admitted; but now that the matter has been brought to our notice and as the matter involves the question of jurisdiction going to the root of the trial it is our bounden duty to take notice of it and act accordingly.

The result, therefore, is that the verdict of the jury in this case must be set aside, the conviction and sentence will also accordingly be set aside and the case must go back for re-trial of the appellant in accordance with law.

S.N./R.K. *Conviction set aside.*

(1) A. I. R. 1928 Cal. 83=55 Cal. 371 (F.B.).

### \* A. I. R. 1929 Calcutta 93

MUKERJI AND MALLIK, JJ.

*Siva Prosad Saw and another*—Defendants—Appellants.

v.

*Bhadramoni Dassi*—Plaintiff—Respondent.

Appeal No. 1772 of 1925, Decided on 14th May 1928, from appellate decree of Addl. Dist. Judge, Midnapur, D/- 21st May 1925.

\* (a) Hindu Law—Widow—Adverse possession.

No length of possession adverse to the widow would bar the reversioners, who have 12 years

reckoned from the widow's death to sue : 9 Cal. 934 (F.B.) and 21 Cal. 8 (P.C), *Foll: A. I. R. 1925 P. C. 249, Expl. and Dist: 23 Bom. 725 (P.C.), Dist: 9 W. R. 505 (F.B.), Diss. from. [But see A. I. R. 1928 Cal. 670 and A. I. R. 1928 All. 561, (F.B.)]* [P 95 C 2]

(b) Civil P. C., O. 2, R. 2 — Causes of action in two suits different—Rule has no application.

Where in the previous suit, the cause of action was dispossession and where the subsequent suit was instituted by plaintiff as surviving daughter of her father, for possession,

*Held:* that the cause of action in the previous suit was entirely different from the cause of action in the subsequent suit and that O. 2, R. 2, had, therefore, no application whatever.

[P 96 C 1]

*Amarendra Nath Basu and Apurba Charun Mukerjee*—for Appellants.

*Sitaram Banerjee and Dipendra Mohan Ghose*—for Respondent.

**Judgment.**—This appeal has arisen out of a suit for recovery of possession of certain properties on establishment of the plaintiff's title thereto and for certain other reliefs. The properties in suit comprised a large number of cadastral survey plots of which one only, namely, cadastral survey plot No. 521, need be specially mentioned in view of the contentions that have been urged in connexion with the appeal. The trial Court decreed the suit in part declaring the plaintiff's title to plot No. 521 and directed that the plaintiff would recover possession of the said plot from the defendants on payment of Rs. 100 to the latter as compensation. An appeal was preferred by the plaintiff, and a cross-appeal by the defendants from the decision of the trial Judge. The learned Additional District Judge has decreed the plaintiff's appeal and dismissed the cross-appeal, thereby decreeing the plaintiffs' suit in full. The defendants have thereupon preferred this second appeal.

It is necessary to state only a few facts in order to appreciate the grounds that have been urged in connexion with this appeal. The lands in suit are said to appertain to a jote of one Gurai Bera. Gurai Bera died leaving a widow named Susila and two daughters, Kamini Dasi and Bhadramoni Dasi, the latter being the plaintiff in the present suit. After the death of Susila, Kamini and Bhadramoni jointly possessed all the properties, and while they were thus in possession, defendants 1 and 2 having got a decree for money against the husband of Kamini and in execution thereof put up



some of the properties alleging that they belonged to Kamini's husband and purchased and took possession of the same some time in 1907. In 1909 the plaintiff instituted a suit for declaration of title to and recovery of possession of a half-share in the properties that had been purchased and taken possession of in the aforesaid way by defendants 1 and 2. This suit included all the lands covered by the present suit except C. S. dag No. 521. The cause of action in that suit was said to be a dispossession that had been effected by defendants 1 and 2 in 1314, that is to say, sometime in 1907. This suit eventually terminated in a decree by which the title of Bhadramoni to a half share in the properties was declared and possession thereof was decreed in her favour. The present suit was instituted by Bhadramoni after the death of Kamini which took place in Bhadra 1330, the plaintiff's allegation being that as the surviving daughter of her father she became entitled to Kamini's share and went to take possession of the same but was resisted by the defendants. The grounds urged on behalf of the appellants are mainly three.

The first ground is to the effect that the question of limitation had not been adequately dealt with by the Courts below. It is urged that although a suit of this description would ordinarily be governed by Art. 141, Sch. 1, Lim. Act, in view of special features of this case the article that is to be considered applicable is Art. 144. It is said that the plaintiff, after the purchase which defendants 1 and 2 had made in 1907 was aware of the fact that the said defendants had been in adverse possession of the share of Kamini in the properties in suit and that inasmuch as the said defendants being thus in possession for a period of over 12 years had acquired an indefeasible right to that share the plaintiff has no right to institute the present suit, because whatever right Kamini had in the property had, before her death, been extinguished by adverse possession on the part of the defendants. In support of this contention, much reliance has been placed on the decision of the Judicial Committee in the case of *Vaithialinga Mudaliar v. Srirangath Anni* (1).

It is necessary to consider this decision

of the Judicial Committee somewhat in detail in view of the misapprehension, that is involved in the arguments that have been advanced as based on it. In that case, the facts to put them quite shortly, were these: A Hindu died in 1849 leaving a widow *C* who survived until 1902. The widow made an adoption in 1862 and thereafter she put the adopted son in possession of certain properties belonging to the estate and reserving some others for her own maintenance. The adopted son then began to deal with the properties of which possession was given to him as absolute owner thereof. The adopted son died in 1864 leaving a widow *M*, who adopted a son after her husband's death. This adopted son died in 1881, leaving a widow who died in 1882 but during their lifetime they possessed the properties. On the death of this widow in 1882 her mother-in-law *M* i. e. the adoptive mother of her husband, took possession of the properties for a Hindu widow's interest and held it till 1884 when *C* forcibly ejected her. *M* then instituted a suit against *C* and others for recovery of possession of the properties alleging that her husband was the adoptive son of *C*, while *C* denied this adoption. This suit was commenced in 1887 and terminated in 1892 in a decree in favour of *M* in which the adoption was declared invalid but *M*'s title by adverse possession was found. *C* died in 1902, and upon that the reversionary heirs of *C*'s husband who had died in 1849, instituted a suit for recovery of possession against the persons who were then in possession.

The two main defences of the defendants which the Judicial Committee considered were: first, that the suit was barred by the result of the litigation of 1887-92, the plaintiff's claim being barred by the decision which had been obtained against *C* by *M*, the predecessor of the defendants, in which *M*'s title by adverse possession had been declared; and second, that the suit was barred by limitation, because the plaintiff's claim depended upon displacing the apparent adoption and the suit was not instituted within 12 years of the adoption being made, as it should have been under Act. 9 of 1871, Sch. 2, Art. 129, and because Art. 141, Act 15 of 1877, would not apply as this last-mentioned Act did not come into force when that period of 12 years expired,—the said

(1) A. I. R. 1925 P. C. 249=48 Mad. 883=52 I. A. 322 (P.C.).



period having expired in 1874. The Judicial Committee disposed of the suit on this last-mentioned defence. Their Lordships also dealt in detail with the authorities which had been cited at the Bar in support of the first of these defences prefacing their observations with these words :

"A protracted argument was submitted to the Board on the question whether under the Hindu Law adverse possession against a widow in possession of an estate for a Hindu widow's interest bars a reversioner. While it is not necessary in the view which will later be announced by the Board on the question of limitation in this case to make any formal pronouncement upon this point, it may be convenient to say that the authorities referred to were as follow".

Then followed a detailed examination of the authorities, and after that their Lordships observed thus :

"The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rule of the *Katama Nachiar v. Rajah of Shivagunga* (2) as sound Hindu Law where that rule was applicable."

Now the *Shivagunga* case (2) related to the case of a decree fairly and properly obtained in the presence of a Hindu widow. To cases of such decrees their Lordships' observations unquestionably apply. Both the proposition that was deducible from the principles laid down in that case, namely that :

"it is impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs" (Per Jackson, J. at p. 510),

or that,

"when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred (per Sir Barnes Peacock, C. J. at p. 509)"—

propositions enunciated in the case of *Nobin Chunder v. Issur Chunder* (3) need not be taken to have been approved of by the Judicial Committee. The law of limitation was altered by Act 9 of 1871 and Act 15 of 1877. Their Lordships did not consider the effect of the alteration of the law and the case, in my opinion, is not to be understood as overruling the uniform current of decisions of all the Courts in India which have had the concurrence and approval of their Lordships all along. In *Harinath Chatter-*

*ji v. Mothoor Mohan Goswami* (4) the Judicial Committee drew a distinction between the effect of a decree adverse to the widow as representing the estate and the effect of adverse possession as against her, and held that Art. 141 in the Schedule to Act 15 of 1877 fixing the date of female heirs' decease as the starting point for limitation, did not alter the existing law as to the effect of a decree adverse to the predecessor as representing the estate, nor did the said article or Art. 142 in the Schedule to Act 9 of 1871 give a new starting point to the successor. This decision did not decide that adverse possession against the widow for the statutory period precludes the reversioners from availing themselves of the benefit of Art. 141, but the crux of the decision was the decree which barred the reversioners on the principle of res judicata. The result, no doubt, as pointed out by Norris and Macpherson, JJ. in the case of *Hari Nath v. Mothoor Mohan* (4) is anomalous, as no length of possession adverse to the widow would bar the reversioners who have 12 years reckoned from the widow's death to sue, but if the widow sues to recover the property from the person in adverse possession and fails, the reversioners are bound by the decree. But it should be remembered that law always is not logic.

The Full Bench decision of this Court in *Sreenath Kuar v. Prosunno Kumar Ghose* (5) is now the settled law in all the Indian Courts and there is no real reason to suppose that the Judicial Committee intended to touch it by their decision in *Vaithialinga Mudaliar v. Srirangath Anni* (1). The observations of the Judicial Committee in *Runchordas v. Parvatibhai* (6) are clear authority for the proposition that Art. 144 which makes the period of limitation commence from the date when the possession of the defendant is adverse to the plaintiff does not apply where a suit is otherwise specially provided for. The Courts below have in our opinion, been right in holding that Art. 141 applies to the case. The first ground urged in support of the appeal must, therefore, fail.

The second ground urged is to the effect that the plaintiff's claim in so far as it

(4) [1893] 21 Cal. 8=20 I. A. 183=6 Sar. 384 (P.C.).

(5) [1883] 9 Cal. 934=13 C. L. R. 372 (F.B.).

(6) [1893] 23 Bom. 725=26 I. A. 71=1 Bom. L. R. 607=7 Sar. 543 (P.C.).

(2) [1863] 9 M. I. A. 543.

(3) [1868] 9 W. R. 505=B. L. R. Sup. Vol. 1008 (F.B.).



relates to C. S. dag No. 521 is barred by O. 2, R. 2, Civil P. C. This argument overlooks the fact that the cause of action in the previous suit was entirely different from the cause of action in the present one. In the previous suit the plaintiff alleged that he had been dispossessed by defendants 1 and 2 after they had made the purchase in 1909 at the auction sale of the properties other than C. S. dag No. 521. The causes of action in the two suits being different, O. 2, R. 2 has no application whatsoever. It is only where some relief is abandoned or omitted from the prayers that are made on a particular cause of action that that rule has any application. This argument therefore has no force.

The third ground that has been urged in support of the appeal relates to the question of the sufficiency of the finding at which the learned Subordinate Judge has arrived on the question of the relinquishment that was set up on behalf of the defendants. The defendants' case was that after the decree in the earlier suit there was a relinquishment by the plaintiff in favour of defendants 1 and 2 in respect of the interest of Kamini and that there was an arrangement under which the parties came to be in separate possession of specific plots of land. The Additional District Judge, in disagreement with the finding of the trial Court, has held that the story as regards this relinquishment cannot be accepted. This is a pure question of fact and it is not possible for us in second appeal to interfere with the finding, as regards this matter, that has been arrived at by the learned Additional District Judge. This ground also fails. All the contentions urged on behalf of the appellants fail and this appeal is accordingly dismissed with costs.

S.L./R.K.

*Appeal dismissed.***A. I. R. 1929 Calcutta 96**

CHOTZNER AND GREGORY, JJ.

*Titan Pramanik and others — Petitioners.*

v.

*Chintan Pramanik—Opposite Party.*

Criminal Revn. No. 1119 of 1927, Decided on 26th January 1928, from order of Dist. Magistrate, Bogra, D/- 14th October 1927.

**Criminal P. C., S. 345 — Trial under Ss. 147 and 325, Penal Code — Acquittal under S. 147 — Appeal against conviction under S. 325 — Parties coming to terms — Permission to compound was granted.**

Where, in a trial under Ss. 147 and 325, Penal Code, the accused was acquitted under S. 147, but convicted under S. 325, and where during the pendency of the appeal against this conviction, the matter was compromised.

*Held:* that there was no reason for rejecting the application praying that the compromise might be allowed, as the offence was a compoundable one.

*Mritunjoy Chhattopadhyaya and Debrata Mukherji—*for Petitioners.

**Chotzner, J.**—The petitioners in this case were tried before the Sub-Deputy Magistrate of Bogra on charges under Ss. 147 and 325, I. P. C. The learned trial Magistrate acquitted the accused persons under the former section but convicted them under S. 325, I. P. C., and passed sentences upon them. Against this conviction, there was an appeal to District Magistrate. While the appeal was pending it appears that the parties made up their differences and an application was filed before the Court praying that the matter might be allowed to be compromised. This application was rejected and it is against this order of rejection that the present rule was granted. Having regard to the fact that there was an acquittal on the charge under S. 147, I. P. C., and to the circumstances set out in the petition, notwithstanding that the occurrence bore more or less a serious aspect, we see no good ground for withholding our consent to the compromise. The offence is a compoundable one. We accordingly exercise our powers in granting this permission. The rule is made absolute and the petitioners are acquitted.

**Gregory, J.**—I agree.

S.L./R.K.

*Rule made absolute.*

*G. N. Das*  
 Advocate High Court  
 Jammu & Kashmir  
 Srinagar.



\* \* A. I. R. 1929 Calcutta 97

RANKIN, C. J., AND C. C. GHOSH, J.

*Radha Kanta Dass*—Appellant.

v-

*Baerlein Bros. Ltd.*—Respondents.

Appeal No. 118 of 1927, Decided on 16th February 1928, from original order of a Single Judge of Calcutta.

\* \* (a) Arbitration Act, S. 19—S at Calcutta ordering goods from Q at Manchester through P—P doing indenting business—S signing indent form containing clause empowering to refer disputes to arbitration—P telegraphing order without referring to arbitration clause—Arbitration clause is still part of bargain and is binding on S.

S a merchant in Calcutta intending to order goods from Manchester, signed and sent an indent form to P who did indenting business. The indent form contained a clause that in case disputes arose regarding the order, P or his agents (meaning thereby the company from whom goods were to be ordered) had power of referring them to certain arbitrators. P telegraphed the effect of the order to England without making any express reference to the indent or to its arbitration clause.

Held, that the indent form signed by S was a part of the offer which the company accepted and that the Court should require S to abide by the arbitration clause. [P 98 C 1]

\* (b) Arbitration Act, S. 4 (b)—Agreement to submit need not be signed by both parties.

The Arbitration Act does not require that an agreement to submit should be signed by both the parties. What it requires is only that there should be a written agreement to submit. *In re E. D. Lewis Ex parte Munro*, (1876) 1 Q. B. D. 724; *Caerleon Tinplate Co. Ltd., v. Hughes*, 60 L. J. Q. B. 640; 33 Cal. 1237; 42 All. 525; *A. I. R. 1926 Cal. 938*; not foll.; *Baker v. Yorkshire Fire and Life Assurance Co.*, (1892) 1 Q. B. 144; *Hickman v. Kent*, (1915) 1 Ch. 188; and *Anglo Newfoundland Development Co. v. Regem*, (1920) 2 K. B. 214; *Appr.* [P 93 C 1]

**Rankin, C. J.**—This is an appeal from an order made by a learned Judge on the original side whereby he stayed the plaintiff's suit under S. 19, Arbitration Act. It appears that the suit was brought by the plaintiff for breach of an agreement to supply certain goods, one term of the agreement being that the goods which the plaintiff was to receive were to be goods of which he would have in some sense a monopoly so far as India was concerned, and the plaintiff's suit was for damages for the defendant's wrongful conduct in sending other goods of the same kind to other ports in India in breach of their agreement. The defendants are a limited Company, Baerlein

Bros. Ltd., incorporated in the United Kingdom and carrying on business at Manchester in England.

The plaintiff Radha Kanta Dass who carries on business in Calcutta being minded to get goods from England approached a person called M. N. Dutta and signed what is called an indent form. This is a common method of doing business when purchase of goods from abroad is desired and in all these forms, which are very badly drafted as a rule, one gets complicated questions as to whether the person to whom the indent is addressed is an agent for the buyer, an agent for the seller or whether the seller is his agent and so on.

The first step was that the plaintiff signed and sent to Dutta an indent, in one case on 15th February 1927. That indent refers to Messrs. Baerlein Bros. Ltd. It begins:

"I we request your agents suppliers principals Messrs Baerlein Bros. Ltd., to buy for me us and ship on my our account and risk." and so forth. There are great many clauses of the indent which refer to how the goods are to be paid for, the liability of M. N. Dutta, the rights of M. N. Dutta and, indeed, other matters.

The arbitration clause is the seventh clause:

"In case of any dispute with regard to this order, you or your agents are to have the option of cancelling this order or submitting the matter to the Bengal Chamber of Commerce or to one or two European merchants resident in Calcutta for arbitration as between us and your agents and his their decision or that of his their referee shall be binding upon both parties."

This clause after further provisions ends up by saying:

"It is hereby expressly agreed that you will in no way be held responsible for the payment of any allowance etc. that may be awarded at the survey or that may otherwise be due to us until fully realized from your agents or suppliers and that the provisions made in this para, shall in no way affect the relation between us as between principal and principals and shall in no way affect any of the terms herein stated."

These are in all 16 clauses containing somewhat elaborate terms and these indents having been signed by the plaintiff, it would appear that Dutta telegraphed to Manchester and that Baerlein Brothers accordingly sent certain sale-notes to the plaintiff. Those sale-notes are as follows:

"We are in receipt of your esteemed order sent by Mr. M. N. Dutta and have booked the same with thanks as specified hereunder."



Accordingly a description of the goods is given and a reference to the monopoly arrangement is included and the terms of payment are set out. Upon that the plaintiff replied to Messrs. Baerlein Brothers at Manchester as follows :

" We duly received your favour of the 16th February confirming our order for 120 bales 60/1 Turkey Red John Orr Ewing & Co. Sun & Lion quality at 46½d. per lb. shipment 10 B/s monthly commencing September 1927 to August 1928 which we find correct."

Now, the first thing to consider is whether the contract between the plaintiff and the defendants is a contract of which clause 7 of the indent is a part or whether, as is contended by Mr. Langford James, the contract between the plaintiff and the defendants does not include that term at all. Mr. Langford James contends that as Dutta merely telegraphed the effect of the plaintiff's order to Manchester and as the sale-note contains no express reference to the indent which the plaintiff signed, it is not shown that clause 7 of the indent was any part of the contract between the plaintiff and the defendants. If that can be made out then of course Mr. James' client is entitled to resist this application to stay the suit.

I am not, however, of opinion that it can be said that this particular clause of the indent or, indeed, any other clause of the indent was no part of the bargain between the plaintiff and the defendants. It seems to me that the mere circumstance that this man Dutta who carries on an indenting business does not repeat to Manchester the whole of the indent clauses has no effect upon the question. The plaintiff's offer was an offer upon all the terms of this indent and although the words "agents" "suppliers" and "principals" are used in a confusing and, indeed, rather absurd manner they are used in this case with reference to and are demonstrative of Messrs. Baerlein Brothers Limited. The intention was that Messrs. Baerlein Brothers Limited should have the right of clause 7 and, in my judgment, when that order was booked by telegram it is not right to say that Baerlein Brothers were contracting with the plaintiff independently of the indent form. In my judgment the indent form signed by the plaintiff is a part of the offer which Baerlein Brothers accepted. It is the only order which the plaintiff gave and, in my judgment, it is not correct to say that the

order which is referred to in the sale-note is the telegraphic order sent by Mr. M. N. Dutta. The order referred to in the sale-note "your esteemed order sent by Mr. M. N. Dutta" does not mean the telegram or cablegram of Mr. Dutta. It means the order given by Mr. Dutta which Mr. Dutta repeats to Manchester.

In the same way when the plaintiff comes to finally close the matter he says:

" We duly received your favour of the 16th February confirming our order for 120 bales "

and so on. It does not seem to me possible to construe this contract by assuming that the whole of this indent is left out as between the plaintiff and the actual suppliers. The purpose of the indent would be entirely nugatory if that was so. That being so, I am of opinion that this clause is a submission clause and a part of the bargain. It is a clause in writing and, therefore, the question arises whether as it has not been signed by Baerlein Brothers it is a submission within the meaning of the Indian Arbitration Act.

Upon that point the case law at one time was in some confusion. The first case was the case of *In re E. D. Lewis : Ex parte Munro* (1) which was followed apparently in *Caerleon Tinplate Co. Ltd. v. Hughes* (2). So far authority was in favour of the view that it was necessary that the agreement should be signed by both parties. Apparently in the case of *Ram Narain v. Liladhar Lowjee Woodroffe, J.*, assumed that to be the law though I do not gather that the exact point was relevant to the case before him. In the case of *Suhhamal Bunsidhar v. Babu Lal Kedia & Co.* (4) that also was assumed to be the law in the judgment of Walsh, J., where he said :

" We agree with the view taken by Woodroffe, J., in *Ram Narain v. Liladhar Lowjee* (3) and with the majority of the English cases on this point, particularly *Caerleon Tinplate Co. v. Hughes* (2) that that provision involves a submission signed by both parties or their agents."

Later in India the same has been laid down by my learned brother Page, J., in *John Balt & Co. (London) Ltd. v. Kanoolal & Co.* (5). Page, J., notices

(1) [1876] 1 Q. B. D. 724 = 45 L. J. Q. B. 816 = 24 W. R. 1017 = 35 L. T. 857.

(2) [1891] 60 L. J. Q. B. 640 = 65 L. T. 118.

(3) [1906] 33 Cal. 1237 = 10 C. W. N. 814.

(4) [1920] 42 All. 525 = 59 I. C. 75 = 18 A.L.J. 652.

(5) A. I. R. 1926 Cal. 938 = 53 Cal. 65.



certain other English cases. He has noticed the case of *Baker v. Yorkshire Fire and Life Assurance Co.* (6), the case of *Hickman v. Kent or Romney Marsh Sheep-Breeders Association* (7) and the case of *Anglo Newfoundland Development Co. v. Rejem* (8). He says, however, that these cases are to be distinguished on the ground that the plaintiff was estopped from asserting that he had not assented to the arbitration clause.

In my judgment the law is the other way. The Arbitration Act of 1889 and the Indian Arbitration Act for the best of good reasons have not required that the agreement to submit should be signed by both parties. What has been required is a written agreement to submit and *Baker's* case, *Hickman's* case and the case of *Anglo Newfoundland Development Co.* show that it is illegitimate to import into the Statute the requirement of a signature by both parties.

This it seems to me has nothing to do with estoppel. In the case of *Baker v. Yorkshire Fire and Life Assurance Co.* (6), the plaintiff brought the suit upon a policy. No doubt he was estopped from asserting that he had not assented to an arbitration clause, but he was not estopped from asserting that he had not signed the arbitration clause. In *Hickman's* case (7), Astbury, J., lays down the law in the following terms which were afterwards accepted by the Court of appeal in the *Anglo Newfoundland Development Company's* case (8):

"The result of these decisions is, I think, that if the submission is in writing and is binding on both parties as their agreement or as the equivalent in law to an agreement between them, the statute is satisfied"

and as Bankes, L. J., pointed out following the decision in *Baker's* case (6) it is not necessary that both parties should have signed the written agreement. If a person has accepted the written agreement and acted upon it he is bound for this purpose although he may not have set his hand to the document.

I am, therefore, of opinion that the law as laid down by Page, J., in the case cited is not accurate and in the present case I do not think that the mere fact that Baerlein Brothers have not put

their signature to the indent form is a matter of any consequence. However, if I am right in thinking that the reference in the sale-note to the order of the plaintiff is a reference to the indent which the plaintiff signed this point does not really give trouble.

It remains only to consider whether there is in this case a good ground which would entitle us to say that the learned Judge has wrongly exercised his discretion in requiring the plaintiff to abide by the arbitration clause. I cannot help observing that such clauses are frequently signed very light heartedly; but it is absolutely essential that people when they enter into contracts should abide by them although no doubt there is power in Court to refuse to stay. When a person in Calcutta is buying goods from another person in Manchester, if the arbitration clause is a part of the contract it may often be exceedingly unfair to one or other of the parties if the arbitration clause is not insisted upon. I see no reason in this case to think that the learned Judge was wrong in insisting that the parties should abide by the arbitration clause. For these reasons I think that the appeal fails and must be dismissed with costs.

**C. C. Ghose, J.**—I agree.

S.N./R.K.

*Appeal dismissed.*

### \* A. I. R. 1929 Calcutta 99

COSTELLO AND LORT-WILLIAMS, JJ.

*Panchu Gopal Shaw*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1093 of 1928, Decided on 7th November 1928.

\* Calcutta Suppression of Immoral Traffic Act (Bengal Act 13 of 1923), S. 4—Act applies to females under S.16, whether married or not—Bengal Children Act (2 of 1922).

Acts apply whether the female in question is unmarried or married and the whole matter turns not on the status of the female from the point of view of marriage or no marriage but on the question of age. If the word "girl" were limited to mean a young unmarried female, it would be easy for a person who desired to live on the immoral earning of young girls to marry them solely for the purpose of enabling him to put himself outside the provisions of the statutes and to set the whole law at defiance. [P 100 C 2, 101 C 1]

*Sures Chandra Talukdar*—for Petitioner.

*Khondkar*—for the Crown.

(6) [1892] 1 Q. B. 144=61 L. J. Q. B. 833=56 L. T. 161.

(7) [1915] 1 Ch. 881=84 L.J. Ch. 688=59 S.J. 478=113 L. T. 159.

(8) [1920] 2 K. B. 214=89 L. J. K. B. 570=94 J. P. 121=122 L. T. 731.



**Costello, J.**—This was a rule obtained on behalf of one Panchu Gopal Shaw who is said to be the husband of one Sakuntala who is a female child under the age of 16 years. I use the expression "female child" advisedly because the question that calls for decision in this case depends upon the right interpretation of the word "girl" as used in S. 4, Calcutta Suppression of Immoral Traffic Act, 1923 which is Bengal Act 13 of that year.

The matter arises in this way. The learned Magistrate of the Juvenile Court, Calcutta on 11th August of this year made an order that Sakuntala should be detained for six years and her sister Urmila should be detained for ten years in the Greave's Home. These periods were based upon the facts that in the case of Sakuntala her age was 12 years and in the case of Urmila some two years less. The Magistrate is obviously desirous that these two children should remain in the home until they attain the age of 18 years. The Magistrate made the order because, as he says, the evidence adduced before him satisfied him that they should be dealt under the provisions of the Calcutta Suppression of Immoral Traffic Act. The order which he made was made under the provisions of S. 4 of that Act which provides in effect that the Commissioner of Police or certain other officers may remove a girl apparently under the age of 16 years from a brothel and the girl so removed may be detained in suitable custody until she attains the age of 16 years; that is provided by sub-S. 2 of that section. Having made that order the learned Presidency Magistrate made a further order, namely that the present petitioner Panchu Gopal Shaw should be brought before the Court in order that he might be dealt with under S. 31, Bengal Children Act 1922. By that section it is provided that the Court which makes an order for the committal of a child or young person to suitable custody may order the parent or other person liable to maintain the young person to contribute to her maintenance, if able to do so. The learned Presidency Magistrate was of opinion that he had power to make an order directing that the husband of Sakuntala should be required to contribute to her maintenance while she was detained in the Greave's Home.

This rule was issued by us because we thought that it was desirable that we should hear argument upon the question

as to whether or not the provisions of S. 4, Calcutta Suppression of Immoral Traffic Act, could be made to apply to the case where the child in question happened to be married. I invited the learned advocate for the petitioner to direct our attention, if he could, to any provision either in the Calcutta Suppression of Immoral Traffic Act, 1923 or in the Bengal Children Act, 1922 which in any way limited the meaning of the word "girl" as used in S. 4, Calcutta Suppression of Immoral Traffic Act, and he was in fact unable to do anything of the kind. There is no limitation, in my opinion, placed on the meaning of the word "girl" as used in that section. It may perhaps be said that in ordinary speech the use of the word implies that the person referred to is unmarried. But obviously the primary meaning of the word is a young female human being. Indeed the earlier meaning of the word was a human being of either sex. But generally speaking the word "girl" simply means a young female; and when one reads sub-S. (1) in conjunction with sub-S. (2) the matter becomes abundantly clear, because sub-S. (2) uses the expression "if satisfied that the girl is under 16 years of age."

The Calcutta Suppression of Immoral Traffic Act, 1923 and the Bengal Children Act, 1922 are really part and parcel of a scheme of legislation designed for the protection of children and particularly for the protection of minor females. I see no reason at all for ascribing to the word "girl" any such limitation as the learned advocate for the petitioner has invited us to put upon it. In my opinion the Act applies whether the female in question is unmarried or married and the whole matter turns not on the status of the female from the point of view of marriage or no marriage but on the question of age. It is quite true that in certain cases it may happen that it would be a hardship that a husband who wants to have his wife in his custody should not be allowed to have her with him. But it seems to me very unlikely that such a case would really occur because he would have had an opportunity of putting his case before the Magistrate who deals with the matter that is provided in the Bengal Children Act, and it would be a question whether it was desirable in the interests of the young female that she should be placed in a suitable custody other than



that of her husband or whether she should be handed over to her husband. The material question in this class of cases is the fundamental one of whether or not the female child concerned is living in such circumstances as to bring her within the terms of S. 4. If the Magistrate is satisfied that the circumstances are such that she does come within the ambit of that section then, in my opinion, he is certainly entitled to make the order that he did. I do not think that we are really concerned with the facts of the case, because I think the Magistrate has found quite clearly that the circumstances of this case are such as to justify him upon those facts in making the order which he thought fit to make.

On the other side the matter is this: the whole purpose and the obvious design of this Act would be defeated if the limitation which we are invited to put upon the word "girl" were put upon it by this Court, as it would then be easy for a person who desired to live on the immoral earning of young girls to marry them solely for the purpose of enabling him to put himself outside the provisions of the statutes and to set the whole law at defiance. Personally I have no doubt whatever that both these Acts apply to females under the age of 16 years whether they happened to have gone through the ceremony of marriage and become legally married or not. That being the position this rule must be discharged.

**Lort-Williams, J.**—I am not prepared to disagree. I must admit that I have felt considerable anxiety over this matter because it astonishes me to find in the case of a female whose husband is prepared to take her to a respectable home that a Magistrate has power to deprive the husband of the custody and companionship of his wife for a considerable period, in this case six years. I am not altogether satisfied that when the Act was passed, it was intended to apply to such a case. Personally I am very reluctant to interfere with the liberty of individuals to a greater extent than is absolutely necessary, and to apply legislation of this character to persons who are married, seems to me to be going very far. I recognize that in this country girls are married at an early age but the consequences of this may be remedied more appropriately by raising the permissible age for marriage. However, I am satisfied that the words of the

Act are wide enough to cover the case of a married girl. The word "girl" is defined in Murray's English Dictionary as "a child or young person of either sex, a youth or maiden." Another definition is "a female child, commonly applied to all unmarried women." I cannot say that the word "girl" used in this connexion is inapplicable to a child who happens to be married. A further reason for coming to this conclusion is, that if the legislature had intended to limit the effects of this section to "unmarried" girls, it would have stated so specifically. For these reasons I agree that the rule must be discharged.

S.L./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 101

MUKERJI AND GRAHAM, JJ.

G. H. C. Ariff—Plaintiff—Appellant  
v.

Jadu Nath Majumdar—Respondent.

Appeal No. 1719 of 1925, Decided on 18th January 1928, from appellate decree of Dist. Judge, 24-Parganas, D/- 10th July 1925.

(a) Landlord and Tenant—Parole agreement of permanent lease in 1913—No formal lease executed—Landlord giving possession of land in accordance with agreement—Tenant on faith of oral agreement erecting permanent structures on land—Landlord knowing erection of structures but not objecting to them—In 1918 landlord giving notice of refusal to perform his contract and suing in 1923 for ejectment—Notwithstanding efflux of time barring defendant from enforcing specific performance of contract, landlord's part performance of this contract by delivery of possession would be good defence—Landlord's allowing to erect permanent structures on land would be such acquiescence as would disentitle him from asking for ejectment—Part performance—Acquiescence.

Where a person does not obtain a lease executed and registered in conformity with the provisions of law, he cannot resist ejectment, unless the case may be brought within the range of one or other of the principles of equity established in *Maddison v. Alderson* (where there is parole contract and such performance of it as unequivocally refers to the contract, equity will charge the party with acts done its execution of the contract) or in *Walsh v. Landsdale* (enforceable right of specific performance of contract is a good defence to an action for the ejectment). [P 103 C 1]

In 1913 the landlord contracted to grant a permanent lease in respect of certain land. No formal lease was executed under the terms of S. 107, T. P. Act. Pursuant to the contract the



tenant obtained possession of the land and erected permanent and costly structures thereon. The landlord was aware of the erection of those structures and must have realized that the tenant would not have constructed such a building unless he was assured of the possession of a permanent right in the land. In December 1918 the landlord gave notice to the tenant of his refusal to specifically perform the contract. The landlord in 1923 brought a suit for ejectment against the defendant.

*Held* : there was part performance of the contract on the part of the landlord in the shape of the delivery of possession of the land. The landlord would not succeed in his suit for ejectment as he would be unable to displace the tenant's possessory title by reason of the equities arising out of the executed contract blocking his way. Notwithstanding, therefore, that the right of the tenant to enforce performance was barred at the date of the suit, landlord's performance afforded a good defence to the action for ejectment. *Maddison v. Alderson*, (1883) 8 A. C. 473, *Foll.*; A. I. R. 1914 P. C. 27; A. I. R. 1916 P. C. 9; 40 All. 187; A. I. R. 1923 All. 433; A. I. R. 1923 Bom. 473; and A. I. R. 1924 Mad. 271 (F.B.); *Rel. on.*; *Walsh v. Lansdale*, (1882) 21 Ch. D. 9, *not Appl.*

[P 104, C 1 P 106 C 1]

*Held further* : that the landlord having allowed the tenant to erect structures on his land would not be allowed to eject the tenant as he acquiesced in tenant's conduct: *Ramsden v. Dyson*, (1861) 1 H. L. 129 and *Gregory v. Mighell*, (1881) 18 Vis. 328, *Foll.*; 21 All. 496 (P. C.), *Dist.*; 28 Cal. 693 (P. C.) and A. I. R. 1925 P. C. 146, *Rel. on.*

[P 104 C 2]

**(b) Landlord and Tenant—Oral contract of permanent lease—Tenant put in possession—Landlord giving notice of refusal to perform his contract—Tenant must sue for specific performance within time limit—Part performance.**

Where a tenant is in possession of certain land by virtue of an oral contract of permanent lease, which, however, is not reduced to writing and registered, and where the landlord afterwards has given notice of refusal to perform his part of contract, the tenant cannot sue for specific performance of contract by requiring landlord to execute a formal lease after efflux of time since the notice has barred his suit. It is not sufficient to say that the original contract was specifically enforceable. *Walsh v. Lansdale*, (1882) 21 Ch. D. 9, *Expl.* 16 C. L. J. 217 and 17 C. L. J. 167, *Ref.*

[P 106 C 1]

*Bijan Kumar Mukherji*—for Appellant.

*Brojo Lal Chakravarty, Hemendra Chandra Sen, Bhudar Haldar, Provash Chandra Chatterji and Nagendra Kumar Dutt*—for Respondent.

**Mukerji, J.**—The facts of the case are sufficiently set out in our order of remand of 10th February 1927. The two questions of fact on which we asked for the findings of the Court of appeal below have now been answered by that Court. Since the return of the records and the submis-

sion of the findings we have heard the parties again and we are thankful to the learned lawyers who represent them for the assistance they have given us in arriving at our conclusions on this somewhat difficult case. We now proceed to judgment.

Amongst the findings of fact which the Courts below have concurrently arrived at in this case it is necessary to refer to one, viz., that in 1913 there was a parole agreement between the plaintiff and the defendant to the effect that the plaintiff would grant a permanent lease to the defendant in respect of the land at a rental of Rs. 4 per catta, that is to say, at a total rental of Rs. 80 per month. The two questions which we sent down for determination were : first, was there, at any time, and if so, when, a clear refusal on the part of the plaintiff to the knowledge of the defendant to specifically perform this contract ? and second, whether the structures which the defendants erected on the land, shortly after 1913, and in expectation of getting a permanent lease, involved such an outlay of money as would reasonably strike the plaintiff as being an assertion of a permanent right in the land on the part of the defendant, or such as would reasonably call for objection from a landlord who never intended to grant a permanent lease. As regards the first question, in the opinion of the learned District Judge, the plaintiff's letter of 14th. December 1918 contained, and gave notice to the defendant of such a refusal, and the present suit, it should be mentioned was instituted on 12th April 1923. On the second question the answer of the learned District Judge is that the structures erected by the defendant cost Rs. 10,000 to Rs. 12,000, that the plaintiff was aware of the erection of these structures and must have realized that the defendant would not have constructed such a building unless he was assured of the possession of a permanent right in the land and that if the intention of the plaintiff was not to grant such a lease it might reasonably be expected that he would have objected to the construction of such a building.

Now, it seems to me that the defendant, not having obtained a lease in conformity with the provisions of S. 107, T. P. Act read with S. 49, Registration Act, can resist ejectment, in view of the circumstances of the case, only if the case



may be brought within the range of one or other of those principles of equity which have been held to apply to this country and the operation of which may be attracted by the facts found as above.

One such principle is to be found in the class of cases of which *Maddison v. Alderson* (1), is the type, in which case the principle is fully explained. In that case it was held that where there is a parol contract not provable by reason of S. 4, of the Statute of Frauds, which however, did not avoid a parol contract but only barred the legal remedies which might otherwise have been enforced, if there had been such performance of it by some acts unequivocally referable to or indicative of the contract, a Court of equity will charge a party upon the equities resulting from the acts done in execution of the contract. In that case Lord Selborne, L. C., observed thus :

"If such equities are excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance ; the whole purchase money paid ; the purchaser put into possession ; expenditure by him (say in costly buildings) upon the property ; leases granted by him to tenants. The contract is not a nullity ; there is nothing in the Statute to stop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heirs against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract ; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed ; but it is not arbitrary or unreasonable to hold that when the Statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connexion of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be in-

ferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the Statute, which might otherwise interfere an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance founded upon an unsigned agreement."

The Judicial Committee in the case of *Mahomed Musa v. Aghore Kumar Ganguly* (2), referring to the principles enunciated as above, observed :

"Many authorities are cited in support of these propositions from English and Scotch Law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange in *Potter v. Potter* (3) may be here repeated : 'if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such in equity. Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them.'"

Their Lordships also said:

"To use language common from very early times in Scotland, and highly approved in the case of *Maddison v. Alderson* (1) in the House of Lords, it is no doubt true that there is a *locus pœnitentiæ* that is a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape.' This is a situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his *Principles* [10th Edn.] *reinterventus* raises a personal exception, which excludes the plea of *locus pœnitentiæ*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocally referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable."

As has been pointed out by Lord Cranworth in *Jorden v. Money* (4) which is one of the cases relied upon by the Judicial Committee in *Venkayamma Rao v. Venkata Narasimha* (5).

"The question upon this part of the case is simply one of fact. Is it made out by such evidence as can justify a Court of Justice in acting upon it, that such a contract as that which is alleged really was entered into?"

(2) A. I. R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1 (P.C.).

(3) [1750] 1 Ves. Sen. 437=3 Atk. 719.

(4) [1854] 5 H. L. C. 185=23 L. J. Ch. 865.

(5) A. I. R. 1916 P. C. 9=39 Mad. 509=43 I. A. 138 (P.C.).

(1) [1883] 8 A. C. 478=52 L. J. Q. B. 737=47 J. P. 821=31 W. R. 820=49 L. T. 303.



Now in the present case, apart from the performance or part performance, it has been proved aliundi that there was a parol agreement that the plaintiff would grant a permanent lease to the defendant on certain terms and conditions, and it has also been proved that the defendant came into possession on the basis of the agreement. There is therefore no necessity to infer the agreement from the fact of the defendant's possession or to consider whether the possession of the defendant is referable to such an agreement; but the other part of the principle of *Maddison v. Alderson* (1) comes into play by reason of equities resulting from the part performance in the shape of delivery of possession which has been productive of an alteration of circumstances, and the locus pœnitentiæ that exists in the case of an inchoate or incomplete agreement is for that reason excluded and the plaintiff therefore cannot resile from the agreement. On the principles of *Maddison v. Alderson* (1) then it must be held that the defendant is holding under a permanent lease which the plaintiff agreed to grant him and which equity will regard as having been so granted. At one time it was doubted whether the principles of *Maddison v. Alderson* (1) could be invoked in cases in which there is an absence of a document which under the Statute Law would be necessary to create a title in the defendant, but in view of the broad form in which the principles have been recited and adopted by the Judicial Committee in *Mahomed Musa v. Aghore Kumar Ganguly* (2) and *Venkayamma Rao v. Venkata Narasimha* (5) the doubt, in my opinion, cannot reasonably arise. It is true that in the absence of a lease executed and registered in accordance with law (vide S. 107, T. P. Act and S. 49, Registration Act) the defendant has not acquired a valid title as that of a lessee, and has only such title as possession may confer, but the plaintiff cannot succeed as he is unable to displace the defendant's possessory title by reason of the equities arising out of the executed contract blocking his way.

Somewhat akin to the principle of *Maddison v. Alderson* (1) and owing its source to the same fountain head of equity is the doctrine enunciated in the cases of which *Walsh v. Lansdale* (6) is the type.

(6) [1882] 21 Ch. D. 9=52 L. J. Ch. 2=31, W. R. 109=46 L. T. 858.

Shortly put, it may, in the case of an action in ejectment, be said to be this, that an enforceable right on the part of the defendant to specific performance of a contract entitling him to remain in occupation is a good defence to the action. The doctrine was approved by Cotton, L. J. in *Lowther v. Heaver* (7) and explained by Lord Esher in *Swain v. Ayres* (8) and *Foster v. Reeves* (9). One of the best expositions of this doctrine as regards the limits of its applicability was by Farwell, J., in *Manchester Brewery Co. v. Coombs* (10), who observed thus:

"It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates. It involves two questions: (1) Is there a contract of which specific performance can be obtained? (2) If yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question? It is to be treated as though before the Judicature Acts there had been, first, a suit in equity for specific performance, and then an action at law between the same parties; and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties, in the same Court, and at the same time as the subsequent legal question falls to be determined. Thus in *Walsh v. Lansdale* (6) the landlord under an agreement for a lease for a term of seven years distrained. Distress is a legal remedy and depends on the existence at law of the relation of landlord and tenant; but the agreement between the same parties, if specifically enforced, created that relation. It was clear that such an agreement would be enforced in the same Court and between the same parties: the act of distress was therefore held to be lawful".

The action in *Walsh v. Lansdale* (6) it should be mentioned, was one claiming damages for improperly distraining, for an injunction to restrain the defendant from selling under the distress and from continuing in possession, and for specific performance of the agreement for a lease. The applicability of this doctrine of *Walsh v. Lansdale* (6) in this country has been recognised in a course of decisions, though the decisions are not quite uniform as to whether the principle can be invoked in a case where the remedy by way of specific performance is not available by reason of efflux of time. A good deal of argument has been advanced be-

(7) [1888] 41 Ch. D. 248=58 L. J. Ch. 482=37 W. R. 465=60 L. T. 310.

(8) [1888] 21 Q. B. D. 289=57 L. J. Q. B. 428=36 W. R. 798.

(9) [1892] 2 Q. B. 255=61 L. J. Q. B. 763=40 W. R. 695=67 L. T. 597.

(10) [1901] 2 Ch. 608=70 L. J. Ch. 814.



fore us on behalf of the respondent to establish that the doctrine is to be understood as operating even in cases where the right to enforce specific performance is not available by reason of the bar of limitation and that it is sufficient for the operation of the doctrine that the nature of the agreement is such that it may be specifically enforced. The words of Jessel M. R. in *Walsh v. Lansdale* (6)

"it being a case in which both parties admit that relief is capable of being given by specific performance"

and of Farwell, J., in *Manchester Brewery Co. v. Coombs* (10)

"the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls due"

have been sought to be interpreted as indicating merely the nature of the contract, that is to say, that it is inherently one capable of being specifically enforced and that it does not also mean that there is a present right to have it specifically enforced. This argument, in my opinion, is not well-founded; and the leading authorities on Contract, I may say, do not understand the doctrine in that way. To quote a passage from Leake in Contract [7th Edn. p. 916] referring to *Walsh v. Lansdale* (6), this is what is said:

"By force of the Judicature Act, 1873, the tenant under a parol agreement for a lease, if the right to specific performance by or against him has not been lost, is to be regarded as a tenant claiming under a deed".

The reason of the rule in *Walsh v. Lansdale* (6) is thus explained in Odger and Odger, Common Law of England [Vol. II p. 869]

"Leases in writing, but not under seal may be construed as agreements capable of being specifically enforced. At Common Law the tenant under such an agreement remained a tenant at will only, until he paid rent and so became a tenant from year to year; while in equity he became at once a tenant under the lease, if his agreement was one which he could have specifically enforced. 'Since the Judicature Act . . . there are not two estates as there were formerly, one estate at common law by reason of payment of rent from year to year and an estate in equity under the agreement. There is only one Court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted' provided relief could have been granted by specific performance."

Or viewed in another light, where a person entitled in equity to an interest in land under an agreement is also entitled to specific performance and to have

his interest turned into a legal interest, he will in a Court having jurisdiction to order specific performance, be treated as having the rights of a legal owner (Halsbury's Law of England) [Vol. XIII p. 64 note (k)]. I am of opinion that there is a wide distinction between *Maddison v. Alderson* (1) and *Walsh v. Lansdale* (6), so far as the practical application of the principles which they respectively lay down is concerned. To put the matter quite shortly, the part performance of a contract, inchoate or incomplete, may in view of *Maddison v. Alderson* (6) give rise to equities which complete the contract and it will then assume the character of a contract already executed and on the footing of that executed contract all the equities of the case may be adjusted; on the other hand there may be cases where to give the necessary reliefs to the parties a legal right may have to be established, and for the purpose of establishment of that legal right it may be necessary to invoke the aid of *Walsh v. Lansdale* (6). I am of opinion that for a defendant in an action in ejectment, if he can successfully bring his case within *Maddison v. Alderson* (1), it is not necessary to resort to *Walsh v. Lansdale* (6). *Maddison v. Alderson* (6) gives him higher rights, making it unnecessary for him to have specific performance of the contract, and so long as the rights of third parties are not sought to be affected, treating the contract as an executed one and debarring the plaintiff from any remedy.

Unfortunately the two cases or rather the principles which they seek to propound have been considerably mixed up in reported decisions in this country, especially of this Court, and I say with the utmost respect that it is on account of misconception of the principles which these cases respectively lay down that there is a considerable divergence of judicial opinion whether or not a person who is in possession in performance or part performance of a contract may successfully resist an action in ejectment when his right to specific performance of the contract is already barred by efflux of time. In the case of a defendant who has come to be in possession in performance or part performance of a contract and who is sought to be ejected, there seems to be now a concurrence amongst the High Courts of Allahabad, Bombay and Madras,



that notwithstanding that the right of the defendant to enforce performance was barred at the date of the suit the performance affords a good defence to the action. [See *Salamatuzzamin Begam v. Masha Alla Khan* (11), *Ram Sewak Rai v. Sheonaik Rai* (12), *Sandu Valji v. Bhikchand Surajmal* (13), *Vizagapatam Sugar Development Co. Ltd. v. Muthuramareddi* (14).]

So far as the Calcutta High Court is concerned, as has been pointed out in *Kali Pada Basu v. Fort Gloster Jute Manufacturing Co. Ltd.* (5), there is some, though somewhat slight divergence of opinion, the preponderance of authority being in favour of the limited application of the doctrine that is to say in favour of the applicability of the doctrine to only those cases where at the date of the suit there is an enforceable right on the part of the defendant not extinguished by efflux of time. The finding of the learned District Judge in the present case is that there was a definite refusal by the plaintiff to the knowledge of the defendant to grant a permanent lease more than three years prior to the suit. This finding has been challenged on behalf of the defendant upon several grounds, all of which, however, more or less involve questions of fact on which I am not prepared to dissent from the view that the learned District Judge has taken. Nor am I prepared to assent to the view that when the defendant is still in possession under the promise that he would have a permanent lease, a suit for specific performance may be instituted at any time, a position that has been contended for on behalf of the respondent on the supposed authority of the decision in the case of *Secretary of State v. Forbes* (16) and *Matilal v. Darjeeling Municipality* (17), because I am of opinion that though it may well be that being in possession he will not stand in need of a formal lease, yet if he wants one and sues to get it, time must be taken to have run against him since the date of the refusal to which I have referred. Nor again am I prepared to hold, as I have been

asked to hold on behalf of the respondent, on the authority of the decision of the House of Lords in *Hughes v. Metropolitan Ry. Co* (18) that he is entitled to a deduction on the ground of suspension of the notice of the refusal, because I cannot find any circumstances which would have the effect of suspending the definite notice of the refusal that was given. If then, I am to follow the current of authority of this Court, I think I must hold that *Walsh v. Lansdale* (6) will not assist the defendant in the present case in view of the fact that the defendant's claim to specific performance of the agreement to lease was barred at the date of the present suit. I am of opinion, however, as I have tried to make it plain, that *Walsh v. Lansdale* (6) has no application in the present case but the case is one clearly governed by *Maddison v. Alderson* (1).

The case, again, seems to me to fall well within the doctrine of equitable estoppel laid down in *Gregory v. Mighell* (19), as explained in the case of *Ramsden v. Dyson* (20), and from the application of that doctrine the same result follows. In *Ramsden v. Dyson* (20) two principles were stated by Lord Kingsdown : 1st :

"If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* (19), and as I conceive is open to no doubt."

2nd :

"If on the other hand a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce. This was the principle of the decision in *Pelling v. Armitage* (21) and like the decision in *Gregory v. Mighell* (19), seems founded on plain rules of reason and justice."

The findings of the Courts below, such as they are now, clearly bring the case within the first of the aforesaid two prin-

(18) [1877] 2 A. C. 439=46 L. J. C. P. 583=36 L. T. 932=25 W. R. 680.

(19) [1811] 18 Ves. 328=11 R. R. 207.

(20) [1866] 1 H. L. 129=14 W. R. 926=12 Jur. (n.s.) 506.

(11) [1918] 40 All. 187=43 I. C. 645=16 A. L. J. 98.

(12) A. I. R. 1923 All. 433=45 All. 388.

(13) A. I. R. 1923 Bom. 473=47 Bom. 621.

(14) A. I. R. 1924 Mad. 271=46 Mad. 919 (F.B.).

(15) A. I. R. 1927 Cal. 365.

(16) [1912] 16 C. L. J. 217=17 I. C. 180.

(17) [1912] 17 C. L. J. 167=18 I. C. 344.



ciples. Indeed, it may be said that the appellant has not really sought to controvert this position. What has been said on his behalf, however, is that Lord Kingsdown was dissentiente in the case and the rule should be taken as qualified by the decision in *Willmott v. Barber* (22), and reliance is placed on his behalf in support of this contention upon the decision of the Judicial Committee in the case of *Beni Ram v. Kundan Lal* (23). Now it is true that Lord Kingsdown's was the dissenting speech in *Ramsden v. Dyson* (20), but it will be seen that his dissent was only on the effect of the evidence in the case. There is nothing in the speeches of Lord Cranworth, L. C., or of the other noble and learned Lords who agreed with him which in any way is in conflict with these principles and the only difference was as to the applicability of these principles in view of the effect of the evidence that was there. The first of these principles has been expressly adopted by their Lordships of the Judicial Committee in the case of *Forbes v. Ralli* (24) and has been said in that case to have been accepted by the same Board in *Ahmad Yar Khan v. Secretary of State* (25). In *Willmott v. Barber* (22) in which *Ramsden v. Dyson* (20), was cited at the Bar Fry, J. said :

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mis-

taken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment nothing short of this will do."

It is said, on behalf of the appellant that the elements of "fraud" and "encouragement" are wanting in the present case. With this contention I do not agree. It will be seen that in *Willmott v. Barber* (22), a third party Bowyer was involved and these elements had to be specifically considered having regard to the effect that the transaction then in question had on him. As between parties to the agreement once it is found that in fact there was an agreement, then with the findings such as they are now in the present case what else but fraud of the character contemplated by these propositions should be imputed to the plaintiff and should not encouragement, by abstaining from asserting his legal right, be a finding that must legitimately follow? The case of *Beni Ram v. Kundan Lal* (23), on which the appellant relies was the case of tenants for a term who knowing the limited character of their real rights erected permanent structures on the land in their occupation, and so cannot help the appellant in the present case. Nothing that was said by the Judicial Committee in that case militates against the first of the two propositions of Lord Kingsdown in *Ramsden v. Dyson* (20) within which the present case, in my judgment, clearly falls.

In their judgments the Courts below have taken a correct view of the rights of the parties in this suit and the plaintiff is not entitled to eject the defendant.

The appeal must accordingly be dismissed with costs.

**Graham, J.**—I confess that during the hearing of the appeal I felt at times that there was a good deal to be said for the point of view of the appellant, inasmuch as, if his claim for ejectment fails, the result virtually will be that a permanent lease will be created against his wishes and notwithstanding the fact that no valid lease was ever executed.

I agree, however, with my learned brother that upon the facts proved in this

(21) [1905] 12 Ves. 78=8 R. R. 295.

(22) [1880] 15 Ch. D. 96=28 W. R. 911=43 L. T. 95.

(23) [1899] 21 All. 496=26 I. A. 58=7 Sar. 523 (P. C.).

(24) A. I. R. 1925 P. C. 146=4 Pat. 707=52 I. A. 178 (P. C.).

(25) [1901] 28 Cal. 698=28 I. A. 211=5 C. W. N. 634=8 Sar. 39 (P. C.).



case and upon the authorities, the prayer for ejectment cannot succeed, that the appeal fails and should be dismissed with costs.

M.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 108

SUHRAWARDY AND GARLICK, JJ.

*Tinkari Mukherjee* — Defendant—Appellant.

v.

*Mahima Niranjana Chakrabarty* and another—Plaintiffs—Respondents.

Appeal No. 956 of 1926, Decided on 19th July 1928, from appellate decree of Dist. Judge, Birbhum, D/- 11th December 1925.

(a) Bengal Patni Regulation (8 of 1819), S. 5—Liability of patnidar continues till his transferee's name is registered as a tenant.

The liability of the patnidar for rent continues even after a transfer till the zemindar registers the transferee of the patnidar as a tenant and removes the name of the original patnidar: 20 W. R. 380; 13 M. I. A. 160 (P.C.); and (1846), S.D. 372; Foll. [P 109 C 2]

(b) Bengal Patni Regulation (8 of 1819), Ss. 5 and 6—Liability of patnidar ceases when he fulfils conditions of S. 5 and if necessary follows it up by proceeding under S. 6.

The liability of the patnidar for rent does not cease by the deposit of the fee by the transferee and the tender of the necessary security as required by S. 5. He must be ready, if the zemindar refuses to register his transferee's name and accept the security, to follow it by the procedure laid down in S. 6: (1864) W.R. 53, Foll.: 22 Cal. 494, Ref.; 19 Cal. 17 and 16 Cal. 642, Dist. [P 109 C 2]

*Bankim Chandra Mukherjee* and *Hari Prasanna Mukherjee*—for Appellant.

*Sitaram Banerjee*—for Respondent.

**Judgment.**—The only point canvassed in this appeal is whether the appellant (defendant 1) is liable for the amount of rent decreed against him. The suit is for patni rent for the period from Magh kist of 1327 to Baisakh 1330, that is, from January 1921 to April 1923. The appellant's contention is that his liability for rent had ceased from 22nd March 1922—the date on which he made a gift of this patni to his daughter-in-law. The trial Court passed a decree against the appellants up to the Magh Kist of 1329 or 17th February 1923—that being the date when the security money was paid and the name of the transferee was re-

gistered in the zamindar's sherista. The decree was upheld by the District Judge in appeal. It is argued that the patni regulation invests the patnidar with absolute right of transfer and, therefore, as soon as the patnidar assigns his interest to any person his liability for rent ceases on and from that date. It is contended on the other side that the liability of the patnidar under the Regulation continues till the zemindar registers the transferee as a tenant and has removed the name of the original patnidar. In our opinion the respondent's contention must be upheld.

Section 5 of Regulation (8 of 1819) vests the right of alienation of a patni taluk in the holder thereof. It further says that it shall not be competent to the zemindar to refuse to register and otherwise to give effect to such alienations by discharging the party transferring his interest from personal liability. But he may demand his fee fixed at a certain percentage and may also demand security from the transferee or purchaser to the amount of one-half of the jama or yearly rent payable to him for the tenure transferred. S. 6 says that it shall be competent to the zemindar or other superior to refuse the registry of any transfer until the fee above stipulated is paid and until substantial security for the amount specified is tendered and accepted. S. 5 gives the patnidar a general right of transfer even without the consent of the zemindar but S. 6 protects the right of the zemindar and postpones the discharge of the patnidar from personal obligation till the zemindar is secured in his right to receive rent. So long, therefore, as the zemindar is not satisfied that the transferee may be looked upon for the rent reserved, he has the right to refuse to recognize the transferee. But if he wilfully refuses to approve the security tendered by the purchaser he may be compelled to accept it and give effect to the transfer without delay. These two sections read together indicate that the patnidar has the absolute right of transfer; but the zemindar has the right to refuse to recognise the transfer and hold the patnidar liable under the obligation created by the contract until the transferee gives substantial security which is accepted by the zemindar or which he is compelled by the civil Court to accept. A great deal of argument has been wasted on what should be the gene-



ral law in a matter like this or whether under other enactments liability of a lessee should continue after the transfer. These sections of the patni law have been interpreted in several cases. In *Khettur Paul Singh v. Luckhee Narain Mitter* (1) the question was between the patnidar and the durpatnidar. It arose under S. 5 and 6 patni Regulation. The suit was brought by durpatnidar to recover from the patnidar certain sum which he had paid as rent to the zemindar in order to save the patni. The durpatnidar, however, had not got his name registered in the zemindar's sherista; and it was, therefore, objected that the payment of rent made by him was voluntary payment. It was held that though the durpatnidar was not registered in the zemindar's record he had sufficient interest to protect it from sale. In coming to this conclusion the learned Judges observed:

"In all cases until the transfer is registered the old tenant and the tenure itself are liable for the rent due."

The case was carried to the Privy Council *Lakhinarain Mitter v. Khettro Pal Singh* (2). Their Lordships referred to several reported cases in which it was held:

"The grantor of a darpatni taluk is not bound to recognize the assignee of the tenure until the transfer has been registered in his sherista and that, until such registry has been effected he may sue the original durpatnidar for the rent and sell the tenure in execution of a decree obtained in such suit without notice to the assignee."

Accepting this view, their Lordships proceeded to observe:

"Until the assignment has been registered or the assignee has been accepted by the patnidar as his tenant the assignor is not discharged from liability, and such liability may be enforced by the sale of the durpatni taluk in execution of a decree against him for the rent."

In *Robert Watson & Co. v. Collector of Rajshahye* (3) the Judicial Committee considered the effect of Ss. 5 and 6 and at p. 175 observed,

"It is to be considered that the zemindar has granted a tenure of a particular kind, the incidents of which are well defined by law to a tenant, and that he has a right to look to the ostensible tenant, and is not bound to take notice of the various interest which may be created otherwise than by an authorized alienation."

There can be no dispute that the liability of the patnidar does not cease with

the transfer before the zemindar has accepted the transfer and registered the name of the transferee by removing the name of the patnidar from the record. Some support of this view is to be found in the old case of *Peetumburree Dossea v. Chukooram Singh* (4). The facts are not quite similar but the observation made in that case is relevant. There the patni stood in the names of two persons. Subsequently there was a litigation with a third person and by partition the patni fell to the share of that third person. It was contended by the two persons whose names stood in the sherista of the zemindar that they were not liable for rent after the date of the allotment. It was observed by a Bench of three Judges of the Suddar Diwani Adalat:

"They deemed the appellants also responsible inasmuch as they have not resorted to the easy remedy provided by S. 5, Regulation 8 of 1819 of relieving themselves by compelling the zemindar to record the transfer and erase their names."

Then it is contended on behalf of the appellants that his liability ought to cease from the date when the fee and the security were offered to the zemindar and he wrongfully refused to accept them. It appears that proceedings were started in the civil Court with reference to this matter under para. 2 of S. 60. Only a copy of the judgment of the District Judge relating to these proceedings has been filed. That judgment shows that the District Judge directed the zemindar to accept the fee mentioned in S. 5 and he was further directed to advise the defendant 2 (the transferee) to furnish or tender the security mentioned in S. 5. It does not appear from the judgment that any fee or security was offered and refused by the zemindar before the order made by the civil Court. It is said on behalf of the respondent and it seems to be very likely that the zemindar was unwilling to accept the transferee as a tenant because she was a pardanashin lady and the daughter-in-law of the original patnidar. The liability of the patnidar for rent does not cease by the deposit of the fee by the transferee and the tender of the necessary security. He must be ready if the zemindar refuses to accept the security and register his name to follow it by the procedure laid down in S. 6. That was the view which was adopted

(1) [1871] 15 W. R. 125.

(2) [1873] 20 W. R. 380.

(3) [1869] 13 M. I. A. 160 = 12 W. R. 43 = 2 Suther 269 = 2 Sar. 500 (P. C.).

(4) [1846] S. D. 372.



in *Kristo Jeebun Bukshee v. A. B. Mackintosh* (5) when it was remarked :

"We think too, that it is not enough to ask for registration only, but that S. 6 specifically provides what is legally to be done if the request be refused, and that this legal course was not adopted by the appellant."

Several cases have been cited before us which relate to the provisions relating to tenures under the Bengal Tenancy Act. It has been held on the wording of S. 12, Ben. Ten. Act, that the transfer is complete as soon as the deed is registered. This has no application to the present case. Then again several cases have been cited in which S. 108, (j), T. P. Act, came under consideration. There too it has been held that the liability of the lessor does not cease before the landlord had accepted the transfer of the lease : *Sasi Bhusan Raha v. Tara Lal Singh* (6). In *Chintamani Dutt v. Rash Behary Mondal* (7) which was a case under the Bengal Tenancy Act it was observed that

"Although it certainly was the case before the Bengal Tenancy Act was passed that the Courts always held that the landlord is entitled to look to his recorded tenant for all rent until he receives due notice of the transfer, the present law, as explained by the decision in *Kristo Bullary Ghose v. Krizto Lal Singh* (8) appears to have altered that state of things."

This observation goes to indicate the law outside the operation of the Bengal Tenancy Act. Our conclusion on the facts and the law applicable to this case is that the decree passed by the Courts below is correct in law and that this appeal should be dismissed with costs.

M.N./R.K.

*Appeal dismissed.*

(5) [1864] W. R. 53.

(6) [1891] 22 Cal. 494.

(7) [1891] 19 Cal. 17.

(8) [1889] 16 Cal. 642.

## A. I. R. 1929 Calcutta 110

SUHWARADY AND GRAHAM, JJ.

*Jabbar Ali Sardar and others*—Defendants—Appellants.

v.

*Monmohan Pandey*—Plaintiff — Respondent.

Appeal Nos. 1656 to 1663, 1726 to 1733 and 1742 of 1925, Decided on 1st February 1928, from appellate decrees of Special Judge, Jessore, D/- 25th March 1925.

(a) Civil P. C., O. 40, R. 1—Where proprietor of land is appointed receiver, proceedings started by him, though in his own

name and not as receiver, though without leave of Court, are not void ab initio.

The omission as to the description of the plaintiff as receiver does not render a suit or proceeding incompetent if under the letter of appointment he has the power to institute the suit and it has been instituted in the course of the management of the property over which he has been appointed receiver. A proprietor appointed as receiver does not lose his character as a party to the suit nor a fortiori does he lose the right that he possesses as proprietor of the property in respect of which he is appointed a receiver. Leave of Court is strictly necessary in the case of appointment of a person who is not a party to the suit or who is not interested in it : 34 Cal. 305 and *Scott v. Platel*, (1847) 2 Ph. 229, *Rel. on.*

[P 111 C 2 ; P 112 C 1]

(b) Bengal Tenancy Act, Ss. 105 and 106 — Proceedings under, are continuation of proceedings in connexion with preparation of Record-of-Rights.

An application under S. 105 or even a suit under S. 106 is in the nature of a continuation of proceedings in connexion with the preparation of Record-of-Rights. The requirement of the law is satisfied if the application is made by a party to the Record-of-Rights against a party in whose favour an entry has been made in the Record-of-Rights : *A. I. R. 1921 Cal. 591 ; Diss. from. ; A. I. R. 1926 Cal. 1037 and A. I. R. 1928 Cal. 146, Foll.*

[P 113 C 1, 2]

(c) Civil P. C., O. 41, R. 31—In first appeal all objections to decree should be considered as in trial Court.

Where very old receipts, showing that the same jama continued, had been filed but where the trial Court discarded the presumption raised by this fact by referring to plaintiff's papers showing that rent had been reduced at some time,

*Held* : that the matter ought to have been examined by the lower appellate Court because a party in appeal expects that all the objections which he has taken to the decree should be considered by the appellate Court in the same way as they were considered by the trial Court.

[P 114 C 1]

(d) Evidence Act, S. 32 (2) — Papers 45 years old.

Where papers about 45 years old proved to have come into the respondent's hands as purchaser are produced in evidence, and where the papers cannot be shown to be in the hand of any one alive.

A Court of fact may in the circumstances of the case presume that the writer was dead at the time they were produced : 16 C. L. J. 24, *Rel. on.*

[P 115 C 1]

*Bijoy Kumar Bhattacharjee, Tarkesswar Pal Chowdhury and Jitendra Mohan Banerjee*—for Appellants.

*Sarat Chandra Roy Chowdhury and Annada Charan Karkoon* — for Respondent.

**Judgment.**—The tenants are the appellants in this group of eight appeals which arise out of proceedings under S. 105, Ben. Ten. Act. The respondent



landlord claims settlement of fair and equitable rent in respect of the lands of the appellants who have been entered in the Record-of-Rights as settled raiyats. The defence mainly was that the defendants were mokarari tenants whose rents were not liable to enhancement. Both the Courts below have held that the jamas are liable to enhancement and settled rents in respect thereof. The Assistant Settlement Officer enhanced the rents under S. 30 (b), Ben. Ten. Act, for rise in the price of staple food crop to two and half annas in the rupee. The learned Special Judge reduced it to two annas in the rupee. Except this modification the decisions of the first Court in the cases before us were upheld in appeal.

Some preliminary objections have been taken before us with regard to the validity of the proceedings in the trial Court which are common grounds in all these appeals. The first objection under this head is on the ground that Gunendra Nath Basu Mallik who made the applications under S. 105, Ben. Ten. Act, was a receiver appointed by Court in respect of the property in suit and as the applications were filed without the leave of the Court which appointed him receiver the proceedings are bad in law and they should not have been continued. During the course of the proceedings Gunendra Nath Basu Mallik sold his interest in the lands in suit to the respondent before us—Monmohan Pandey—who continued the proceedings under S. 105, Ben. Ten. Act. There is no evidence on the record, as has been admitted by the appellants' wakil, except the kobala executed by Gunendra Nath Basu Mallik in favour of Monmohan Pandey, relating to the appointment of Gunendra as receiver in respect of this property. From a perusal of the kobala it appears that Monmohan Pandey had brought a suit on a mortgage which he held against Gunendra Nath. In that suit Gunendra was appointed receiver by the Court for the purpose of selling the mortgaged properties by private treaty for paying off the mortgage debt. Gunendra under the authority thus given to him sold the properties to the mortgagee Monmohan Pandey.

On these facts, the first question that has to be determined is whether the proceedings were bad and void ab initio not having been instituted with the leave of the Court appointing Gunendra as re-

ceiver. In the first place, Gunendra's appointment as receiver was limited to a particular purpose. In the second place admitting that he was appointed a receiver under O. 40, R. 1, Civil P. C., with all the powers and liabilities attached to a receiver, there does not seem to be any bar to his instituting these proceedings. As I have said there is no evidence as to the terms under which the receiver was appointed; and it may be presumed that he was appointed under O. 40, R. 1, Civil P. C., and his appointment was in terms of the form given in Appendix F to the Code of Civil Procedure which is the form in use in the mofusil. Under those terms the receiver is vested with all the powers mentioned in O. 40, R. (1) (d). Under that sub-clause the receiver is vested with the power of bringing suits for the management, protection, preservation and improvement of the property and the present proceedings are proceedings taken in course of proper and due management and for the improvement of the property. But it is said that these proceedings were started by Gunendra in his own name and not as receiver. The omission as to the description of the plaintiff as receiver does not render a suit or proceeding incompetent if under the letter of appointment he has the power to institute the suit and it has been instituted in the course of the management of the property over which he has been appointed receiver. In the case of *Jagat Tarini Dasi v. Nabagopal Chaki* (1), the learned Judges observe at p. 318 thus:

"A Court may authorize a receiver to sue in his own name, and that a receiver who is authorized to sue, though not expressly in his own name, may do so by virtue of his appointment with full powers under S. 305 (corresponding to O. 40, R. 1) is supported on principle and authority and is consistent with the existing practice."

Thirdly, there does not seem to be any bar in the circumstances of the present case to Gunendra's instituting these proceedings in his own name as proprietor of the property in spite of the fact that he was appointed a receiver in respect of it. If a party is appointed receiver he does not lose his character as a party to the suit nor a fortiori does he lose the right that he possesses as proprietor of the property in respect of which he is appointed a receiver. In *Scott v. Platel* (2), it was held that a party by being appointed a

(1) [1907] 34 Cal. 205=5 C.L.J. 270.

(2) [1847] 2 Ph. 229.



receiver does not thereby lose his privilege as a party to the cause. It is not disputed that if a party who is admittedly the owner of a property is appointed a receiver he does not lose the right of dealing with the property during the continuance of the receivership by selling, mortgaging, or transferring his interest therein in any way but not so as to impair the value of the property in his hand or to cause interference with his possession of the property as receiver. By appointing a receiver the Court takes upon itself the management of the property during the continuance of the litigation. The proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed by it. There is no bar in law to the proprietor dealing with his property though a receiver may have been appointed in respect of it with certain reservations with regard to the right of the Court to manage the property through a receiver. The present proceedings were started by Gunendra for the improvement of the property and for increase in the value of the property which he was charged with selling and which it was his interest to sell at the highest value. The strictness of the rule as to the necessity of the leave of the Court to bring or defend the suit applies more appositely in the case of appointment of a person who is not a party to the suit or who is not interested in it.

Fourthly, Gunendra was a party to the settlement proceedings under Ch. 10, Ben. Ten. Act, and an application under S. 105, Ben. Ten. Act, was made in the course of those proceedings which a party to them is entitled to maintain. Fifthly, the initiation of the proceedings even without the leave of the Court was not absolutely void but could have been subsequently sanctioned by the Court appointing Gunendra as receiver. During the course of the proceedings and before they had terminated Gunendra had sold his interest in the property to the respondent who continued them up to the finish. Whatever defect there might have been at the initiation of the proceedings must be taken to have ceased to affect them when Monmohan became the proprietor and continued the proceedings in his own name. This ground accordingly must be overruled.

The second preliminary objection taken

to the proceedings is that the respondent Monmohan being the karta of a joint Mitakshara family is not competent to maintain proceedings under S. 105 being one of several landlords, his cosharers being his sons. The proceedings at the start were not open to this objection and it has been held in *Kali Charan Singha v. Mahammad Ismail Chowdhury* (3) that if proceedings are started regularly it would make no difference if during the continuance of them one of the cosharer landlords dies, and when once an application is properly made further proceedings are governed by the Code of Civil Procedure. But on the merits, this objection has no force. It has not been proved that the respondent is still a member of a Mitakshara family consisting of more members than one and that he is still governed by the law of that school. A case connected with the family to which the respondent belongs came up to this Court, namely, the case of *Sarada Prasanna Roy v. Uma Kanta* (4). In that case it was held that the family of which the respondent was a member migrated more than 200 years ago from upcountry to Bengal and had adopted the Bengal School of Hindu Law as the law governing it. We have referred to the paper-book and the decree in the case and we find that Monmohan Pandey is a descendant of the ancestor who had migrated to this province more than 200 years and had adopted the Dayabhaga School of Hindu Law by which the family is being governed. This objection must also be overruled.

The third preliminary objection is to the effect that some tenants, specially in second appeals Nos. 1656, 1658 and 1662 were joined after the period of limitation namely, two months from the date of the publication of the Record-of Rights. The fact appears to be that an application was made under S. 105, against the tenants whose names were recorded in the Record-of-Rights. But at the time when the application was made some of them were dead. It is argued that the applications against the dead persons are incompetent in the same way as a suit against a dead person is not maintainable. In second appeal No. 1662 this objection is of no avail because the defendants there were properly described

(3) A.I.R., 1925 Cal. 637=52 Cal. 139.

(4) A.I.R. 1929 Cal. 485=30 Cal. 370



but as they were minors at the time their guardian was appointed subsequently. The fact that the guardian was appointed after two months from the publication of the Record-of-Rights will not render the application barred by limitation. On the recent authorities of this Court the objection must be regarded as without substance. In the case of *Sati Prasad Garga Bahadur v. Sonaton Dhara* (5) a view was expressed that proceedings under S. 105, Ben. Ten. Act, are in the nature of suits and all the formalities and the procedure laid down by the Code of Civil Procedure should apply to proceedings under that section. This broad proposition was not necessary for the decision in that case in which the principal question raised was whether the proceedings by a member of a joint Mitakshara family were maintainable in view of S. 188, Ben. Ten. Act, and it was held that they were not. The opinion expressed in *Sati Prasad Garga's* case (5) has not been accepted in subsequent decisions.

In *Bir Bikram Kishore v. Ambika Charan* (6) it was held that in an application under S. 105, Ben. Ten. Act, it is not necessary for the landlord or the tenant to name any person as opposite party and that all that is necessary is to indicate the holdings in the record in respect of which settlement of fair and equitable rent is sought. This view has been endorsed by the Chief Justice and D. N. Mitter, J., in *Siba Kumari v. Doshi Ghosain* (7). Whatever view I might have previously expressed in the matter, on reconsideration I think that the interpretation put upon the law in these later cases is correct. It seems to me that an application under S. 105, Ben. Ten. Act, or even a suit under S. 106, Ben. Ten. Act is in the nature of continuation of proceedings in connexion with the preparation of Record-of-Rights. S. 105 says that within two months from the date of the certificate of the final publication of Record-of-Rights the landlord or the tenant may apply for settlement of fair rent; and S. 106 provides that in proceedings under Part 3 which deals with settlement of rent and decision of disputes a suit should be instituted within three months from the date of the certificate of the publication of the Record-of-

Rights relating to the disputes mentioned in that section. Both the application and the suit are to be filed and instituted before the Revenue Officer and these proceedings come under Chap. 10, Ben. Ten. Act, which is headed as "Record-of-Rights and settlement of rent." Whatever may be said with regard to the application under S. 105 without naming any party against whom it is directed, the requirement of the law to my mind is satisfied if the application is made by a party to the Record-of-Rights against a party in whose favour an entry has been made in the Record-of-Rights. In this view the third preliminary objection must fail.

Now, certain special grounds have been taken in some of these appeals. In second appeal No. 1661 the objection taken is that the view of the lower Court that the ekrar filed in that case showed variation of rent is not correct. A translation of the ekrar has been placed before us and we are satisfied that the view taken by the Courts below is justified. The ekrar shows that the defendants' predecessors applied for settlement of the lands in suit held by the late tenant Gour Mondal for a period of ten years and there was a stipulation to the effect that after the expiry of the term there should be a subsidiary settlement with the tenant. Reading the ekrar as a whole it appears that it was an agreement for fresh settlement in respect of a holding which previously stood in the name of another tenant.

In the second appeal No. 1656 the ground taken is that the kabuliyat upon which the Courts below have relied as showing variation of rent has been misconstrued. The kabuliyat, however, shows that the land was purchased in execution of a rent decree of which the landlord was in khas possession by taking delivery of possession through Court. It was resettled with the appellant's predecessor together with another plot of land at a jama which was not the same as had been paid by the original tenant. This objection also fails.

With regard to the other cases a general ground has been taken that the decrees upon which the Court below have relied to prove variation of rent do not relate to the holdings in suit. This ground was not taken in any of the Courts below nor has it been taken specifically in this Court in the memorandum of appeal. It is very

(4) A. I. R. 1928 Cal. 485=50 Cal. 370.

(5) A. I. R. 1921 Cal. 591.

(6) A. I. R. 1926 Cal. 1037.

(7) A. I. R. 1928 Cal. 146.



difficult for the second Court of appeal to determine a question which mainly depends upon facts. It is possible that no objection was taken upon this ground at the trial Court because it was understood by both parties that the decrees related to the jamas in suit or it may be that the landlords' papers showed that the old jama as mentioned in the decrees continued in the names of the appellants. We cannot give effect to this contention at this stage of the litigation.

In second appeal No. 1663 the objection taken is that the Special Judge has not considered the Special features of this case and has not come to any finding with regard to them. This objection has substance in it. It appears that the learned Judge has confined his attention mainly to the question about the tenancy being held at rates fixed in perpetuity or otherwise. He has not considered the preliminary objections to which I have referred at length before, which in the face of them do not seem to be entirely frivolous. The learned Judge ought to have dealt with the points raised in these cases and should not have contented himself by observing that the preliminary points were rightly dismissed. A party in the first Court of appeal expects that all the objections which he has taken to the decree should be considered by the appellate Court in the same way as they were considered by the trial Court. In this appeal the defendant filed very old rent receipts which show that the same jama continued for about 50 years. The trial Court discarded the presumption raised by this fact by making reference to the plaintiff's papers which showed that the rent of these holdings was at some time reduced. This is a matter which ought to have been examined by the lower appellate Court and we think that in this case the learned Judge has not given that consideration which the special facts deserved. We accordingly, set aside the judgment of the lower appellate Court in this case and send the case back to that Court for a re-hearing of the appeal.

In second appeal 1742 which forms one of this batch the ground taken is that the tenant should have been recorded as raiyat and not as tenure-holder, as was done by the Assistant Settlement Officer. In the finally published Record-of-Rights the tenant was described as a tenure-hol-

der. The trial Court held that the tenant had adduced no evidence to rebut the presumption of the correctness of the entry in the Record-of-Rights. We cannot say that the Court was not justified in holding that the tenant was a tenure-holder relying solely upon the Record-of-Rights without any evidence to controvert it. This point moreover was not taken before the learned Special Judge and is not mentioned in his judgment. This appeal also fails. The result is that all the appeals of this group fail and are dismissed with costs, one gold mohur in each case except No. 1663 which is remanded to the lower appellate Court for further hearing; costs to abide the result, hearing fee one gold mohur.

*Second Appeals Nos. 1726 to 1733.*

In this group of eight cases the same preliminary objections are urged as were taken in the other group of cases comprising second appeals Nos. 1656 to 1663. It is not necessary to repeat the grounds which have induced us to overrule all those objections and they are accordingly overruled. In second appeals Nos. 1726 and 1731, it is stated that applications under S. 105 were made against dead persons. We have already dealt with this point and it need not be further considered. This objection cannot prevail. In No. 1726 a special ground is taken that the learned Judge is wrong in saying that the tenants have not produced rent-receipts showing uniform payment of rent for a period of more than 20 years. It has been pointed out that certain rent-receipts Exs. D17—D40 were filed by the appellant which are more than 20 years old. The learned advocate for the respondent has answered by saying that there is nothing on the record to show that the rent-receipts D17—D40 related to this holding. These rent-receipts stand in the name of one Joy Gopal Chakravarti and the holding in suit stands in the name of Hohan Mondal. There is no evidence as to how Hohan Mondal succeeded to the jama held by Joy Gopal. It has further been brought to our notice that no specific ground has been taken in the grounds of appeal filed in this Court though subsequently the appellant served the respondent with a copy of the ground relating to this objection which he intended to urge at the hearing. This objection fails.



Objection has also been taken that the decrees relied on by the Courts below have not been proved to relate to the holdings in suit. We have dealt with this objection in the other cases and overrule it on the same grounds.

A great deal has been said in connexion with these cases as well as in the cases of the other batch which we have just disposed of with regard to the jama wasil baki papers produced by the plaintiff and proved on his behalf. It is said that these papers under the law are only admissible in evidence if they are corroborated under S. 34, Evidence Act. It is, however, conceded that these papers may be proved in evidence under S. 32 (2), Evidence Act, without any corroboration. The evidence is that these papers were of the time of the previous landlords which came into the hands of the respondent after his purchase. There is further evidence that many of the gomasthas of the previous landlord are dead. We are not in a position to ascertain as to whether the papers were written by any of those persons. There is nothing to show that the papers were in the hand of any one now living. These papers are about 45 years old and a Court of fact, may in the circumstances of a particular case presume that the writer was dead at the time they were produced. In *Dukha Mandal v. W. N. Grant* (8), entries in papers began over 70 years before the action was tried, and it was presumed that the person who made them was dead and could not be called. A Court of fact, in a proper case may raise such a presumption also in this case. But the point does not seem to have been taken in any of the Courts below. Where admissibility of a certain document rests upon facts which need to be proved, the proper place to take objection is the trial Court where the document is admitted. In the present case it may be the Courts below presumed that the writers of the papers were dead. We cannot allow this ground to be taken for the first time in second appeal. This objection also fails. In the result all these appeals are dismissed with costs—one gold mohur in each case. The respondent has filed cross-objections in both the batches of cases and does not press them at the hearing. They are dismissed.

(8) [1912] 16 O. L. J. 24=16 I. O. 467.

In Second Appeal No. 1742 the cross-objection has been pressed and it is to the effect that the calculation made by the learned Judge as to the division of assets of the tenure is not correct on the facts of the case. The learned Special Judge has deducted 10 per cent. from the gross assets under the heading of collection charges. Of the balance that is left over he has allowed 40 per cent. to the tenure-holder and 60 per cent. to the landlord. The trial Court allowed 65 per cent. to the landlord upon the gross assets. Under S. 7, Ben. Ten. Act, the profit left to the tenure-holder should not be less than 10 per cent. In the present case the learned Judge has allowed him about 50 per cent. including the collection charges. The proportion generally allowed in this Court is 40 per cent. to the tenant and 60 per cent. to the landlord. We accordingly modify the decree of the lower appellate Court and order that in this case the rent of the landlord be assessed at 60 per cent. of the total assets found by the Court below. We allow the cross-objection, but we make no orders as to costs.

S.L./R.K. S. A. 1663 remanded; Other appeals dismissed.

### A. I. R. 1929 Calcutta 115

SUHWARWADY AND JACK, JJ.

*Amulya Ratan Haldar and others—*  
Petitioners.

v.

*Amulya Chandra Bhaduri —* Opposite Party.

Civil Rule No. 637 of 1928, Decided on 19th June 1928, from order of Dist. Judge, Hooghly, D/-11th April 1928, in Misc. Case No. 15 of 1928.

**(a) Contempt — Proceedings resemble criminal proceedings—Court acting on receiver's or other officer's report—Finding should be based on evidence, either oral or by means of affidavits.**

A proceeding in contempt of Court partakes of the nature of a criminal proceeding in as much as the party charged, if found guilty, is punished with fine or imprisonment. No doubt, the Court may act summarily in matters of this kind. But when it acts on the report of a receiver or any other officer, there should be some evidence either oral or by means of affidavits in order to enable the Court to come to a finding. As the proceeding taken by the Court in matters of contempt is a judicial proceeding in which the Court acts



judicially, ordinarily, if the offence is not committed in the presence of the Court, it is started by means of an application supported by an affidavit : 45 Cal. 169, *Rel. on.*

[P 116 C 1, 2]

(b) **Contempt—Order should not be passed unless there is ample material to justify it.**

The law relating to contempt of Court invests the Court with absolute power. It is, therefore, more necessary that it should be exercised with great caution and not without ample materials before it. [P 116 C 2]

*Asitaranjan Ghose*—for Petitioners.

*Jatindra Nath Sanyal*—for Opposite Party.

**Judgment.**—This is a rule calling upon the opposite party to show cause why the order of the District Judge of Hooghly, dated 11th April 1928 imposing a fine of Rs. 50 on each of the petitioners for contempt of Court should not be set aside on the ground that it is based on no material evidence on the record. It appears that the Judge appointed a receiver in a suit in respect of some properties alleged to belong to the Tarakeswar Temple. On 28th January 1928 the receiver submitted a report to the Judge the purport of which is that from the report of his collection agent he has found that the persons named in the report are systematically opposing his collection agent and obstructing the collection of rent from the tenants by him. On receipt of this report on 31st January the Judge issued notices to the petitioner to show cause why they should not be dealt with according to law for systematic opposition to the receiver's collection. The petitioners appeared before the Judge and in showing cause said that they were falsely implicated because they were not on good terms with the receiver's gomashtha or collection agent. Without further materials, the learned Judge by his order of 11th April 1928 found the petitioners guilty of contempt of Court and sentenced them to pay a fine of Rs. 50 each. The only point which calls for consideration in this case is whether the order of the Judge based on the mere report of the receiver which again was based upon the report of his collection agent can be supported in law. A proceeding in contempt of Court partakes of the nature of a criminal proceeding inasmuch as the party charged, if found guilty, is punished with fine or imprisonment. No doubt the Court may act summarily in matters of this kind.

But when it acts on the report of a receiver or any other officer, there should be some evidence either oral or by means of affidavits in order to enable the Court to come to a finding. As the proceeding taken by the Court in matters of contempt is a judicial proceeding in which the Court acts judicially, ordinarily, if the offence is not committed in the presence of the Court, it is started by means of an application supported by an affidavit; and it is the practice in England that copies of the affidavit and other necessary papers are served with the notice of motion on the other party. Oswald on Contempt, Edn. 3, p. 205. At p. 212 the law is thus stated :

"In cases of criminal contempt, the facts are proved by affidavits and the person against whom a committal is sought has the right to see the applicants' evidence in reply."

In *re Motilal Ghose* (1) Woodroffe, J. at p. 200 observed thus :

"It is what is called a 'criminal' contempt, but all proceedings, whether in respect of civil or criminal contempts, are, in my opinion, of a criminal nature where and in the sense that they are in poenam, that is, when their object is to punish by fine or imprisonment. It does not, however, follow that the procedure in such cases is in all respects the same as in an ordinary criminal case" . . . . .

"As regards the question of proof, no case, either civil or criminal should be tried and determined otherwise than according to the law governing it."

Mookerjee, J. at p. 240 of the report drew a distinction between civil contempt, and observed:

"In the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law, and as the primary purpose of the punishment is the vindication of the public authority, the proceeding conforms as nearly as possible, to proceedings in criminal cases."

Now in this case the only material before the Judge was the report of the receiver and that report too was based on hearsay evidence. That hearsay evidence also was not before the Court. The law relating to contempt of Court invests the Court with absolute power. It is, therefore, more necessary that it should be exercised with great caution and not without ample materials before it to justify the order proposed to be passed so as to enable the superior Court to test the propriety of the order. We do not think that there was any legal evidence before the Court upon which the order of the learned Judge could be

(1) [1918] 45 Cal. 169=26 C. L. J. 459=45 I. C. 338=21 C. W. N. 1161 (F.B.).



based. The rule is therefore made absolute and the order of the Judge set aside. We direct that the fine if paid be refunded.

S.L./R.K.

*Rule made absolute.*

### A. I. R. 1929 Calcutta 117

REMFRY, J.

*Sudhir Chandra Das*—Plaintiff.

v.

*Raseswari Chaudhurani*—Defendant.

Original Civil Suit No. 415 of 1912,  
Decided on 11th June 1928.

**(a) Calcutta High Court Rules—Original Side—Ch. 14, R. 3—Except for purposes of defence, defendant in contempt cannot claim benefit of Court's procedure—Extent of right is matter for discretion—Party is entitled to resist proceedings.**

A defendant in contempt cannot claim as of right the benefit of the procedure of the Court except for the sole purpose of defending himself and how far these rights extend is a matter for the discretion of the Court. Though the party cannot himself come into Court to take any advantage of the proceedings in the cause, yet he is entitled to appear and resist any proceedings against him: *Hewitt v. McCartney*, (1807) 13 Ves. 560 and *King v. Bryant*, (1838) 3 Myl. & Cr. 191, *Foll. Gordon v. Gordon*, (1904) P. 163, *Expl.* [P 118 C1; P 119 C1]

**(b) Civil P. C., O. 11, R. 21—Party against whom order has been made continues in contempt unless and until contempt has been cleared by the only way of obeying Court's order.**

Where the original order of the Court stated that, if the defendant failed to obey a certain order of it, certain penalties would follow:

*Held*: that it would be an entirely wrong construction to place on this order that the Court finally or at all assessed a penalty for prospective contempt and informed the defendant of the terms on which he might defy the order. A distinction must be drawn between the two aspects of contempt, viz., (1) a process to assist a party against an opponent who defies the order and (2) a process to maintain the dignity of the Court. [P 118 C 2]

A party against whom an order has been made under O. 11, R. 21, cannot say that the order has cleared his contempt; the Court may proceed to attach him; for, unless and until his contempt has been cleared from both aspects, he continues in contempt, to clear which there is only one way, viz., obedience to the order: *Seward v. Paterson*, (1897) 1 Ch. 545, 555; 7 Bom. 5; 27 All. 380; and 6 C. L. J. 374; *Ref.* [P 118 C 2]

*H. D. Bose and K. C. Basu, (Jr.)*—for Plaintiff.

*Bimala Chandra Dev and Prafulla Chandra Bose*—for Defendant.

**Judgment.**—In this matter the defendant Raseswari Chaudhurani has filed exceptions to the report made by the Official Referee of this Court in pursuance of an order made on 6th May 1913. The report was made on 8th December 1916. A preliminary objection was taken on behalf of the plaintiff on the ground that as the defendant was in contempt she was not entitled to file exceptions to the report. It appears that the defendant is an executrix under the will of her late husband and that there was another executor since deceased. This suit was filed on 27th April 1912 on behalf of the adopted son of the defendant against her and her co-executor for, inter alia, on account of the dealings of the defendant and her co-executor with the estate. To put the matter shortly, accounts were ordered and the defendant as one of the accounting parties was ordered to file her accounts. A preliminary decree was passed on 6th May 1913. An order was made on 6th May 1916, by Greaves, J., directing the defendant to file her accounts. On 7th August 1916, Chaudhuri, J., passed an order the material portion of which is:

"I gave her time up to 15th September to file her accounts. This date is fixed peremptorily. In default the referee to proceed without her accounts and she will be precluded from filing any accounts thereafter and the reference will be treated as being heard ex parte against her."

Against this order the defendant appealed. The judgment of the appeal Court was:

"We have come to the conclusion that the matters which were before the learned Judge were matters for his discretion and on the materials before us we cannot say that he has exercised his discretion wrongly. We desire to make it clear that the applicant, the executrix, is not precluded by the order as we construe it from appearing at the reference. If any order is necessary (I do not think it is necessary) to make it quite clear we include in our judgment a direction that she shall have a right to appear at the reference."

The appeal was dismissed with costs.

It was argued on behalf of the plaintiff that the defendant having failed to comply with the order of the Court was and is in contempt, citing *Gordon v. Gordon* (1) and Daniel's Chancery Practice, Vol. I, p. 786. Being in contempt, the defendant, it was argued, could not move the Court and under the rules and orders the application is a motion. For the defendant, it was contended that it had never been suggested that she was in contempt, and that the judgment of the appeal Court, as

(1) [1904] P. 163.



it gave her the right to appear, reversed the order of Chaudhuri, J., in so far as it directed that the reference should proceed *ex parte* against the defendant.

Now undoubtedly the defendant, an accounting party, was in contempt inasmuch as she failed to obey the orders of the Court that she was to file her accounts. It is also clear that the order of Chaudhuri, J., was affirmed in every particular by the Court of Appeal, although it was construed. This was the view taken of the judgment by the defendant—see exception filed, ground 7. It was argued for the plaintiff that all the Court of appeal did was to point out that although the reference would proceed *ex parte* the defendant would have the rights allowed under the rules and Orders, Ch. 14, R. 3. In my opinion a defendant in contempt cannot claim as of right the benefit of the procedure of this Court except for the sole purpose of defending herself, and how far those rights extend is a matter for the discretion of the Court and this last point accounts for the fact that in circumstances apparently similar the Court has and has not allowed a defendant to appear : See *Hewitt v. McCartney* (2) per Lord Eldon.

The point which requires consideration is this. Undoubtedly this Court treated the defendant as being in contempt, but the order passed by Chaudhuri, J., was that if she failed to obey the order of the Court certain penalties would follow : one penalty was that the reference would proceed *ex parte*. Under the practice of this Court a party who has allowed a reference to proceed *ex parte* may still file exceptions. The question therefore arises whether the order of this Court having specified the consequences of a failure to file accounts must be taken to have limited the consequences or whether the defendant after incurring the specified penalty is still in contempt.

It was argued that as the Court had imposed a penalty on the defendant for her contempt, that should be regarded as analogous to a conviction and sentence and that it was not open to the Court to treat the defendant, once the penalty had been exacted, as being still in contempt and still liable to any further disability or penalty. But the form of the original order was that in the event of a failure to obey the order of the Court, certain conse-

quence would follow and in the Court of appeal that order only was before the Court, and although the defendant had then failed to obey the order, the Court did not deal with the matter as, so to speak, a completed contempt. And it seems to me that it would be an entirely wrong construction to place on this order that the Court finally or at all assessed a penalty for prospective contempt and informed the defendant of the terms on which she might defy the order of this Court. There are two aspects of contempt. A distinction must be drawn between a process to assist a party against an opponent who defies the orders of the Court, and a process to maintain the dignity of the Court : see *Seward v. Paterson* (3).

A party against whom an order has been made under O. 11, R. 21, will not be heard to say that that order has cleared his contempt ; the Court may proceed to attach him : See *Navivahoo v. Narotamdas Candas* (4). A litigant, unlike a practitioner in the Court, is not treated as in contempt in any but the suit in connexion with which the contempt has been committed, but unless and until his contempt has been cleared from both aspects of the offence, he continues in contempt. The order in this case, in my opinion, should be regarded merely as directions to the Official Referee, and not as a final settlement with the defendant in the event of her failure to obey the order of the Court.

I therefore hold that the defendant is still in contempt and that there is only one way in which contempt in a matter of procedure can be cleared and that is by obedience to the order of the Court, for otherwise the defendant might obtain an advantage from her own contempt.

But, assuming that defendant is still in contempt and has in no way cleared her contempt, it does not follow that she is not entitled to file these exceptions. Mr. H. D. Bose laid great stress on the judgment of Sterling, J. in *Gordon v. Gordon* (1). But in that case Vaughan Williams L. J. laid down the proposition that a defendant though in contempt will be heard in some cases in which all that he is seeking is to be heard in respect of matters of defence. Sterling L. J. cited a passage from a judgment of Lord Cottenham's which certainly reads as if such a defendant will only be heard if an order

(2) [1807] 13 Ves. 560.

(3) [1897] 1 Ch. 545.

(4) [1883] 7 Bom. 5.



subsequent to her contempt was made without jurisdiction or on the ground that there was some irregularity in the order. But Lord Cottenham added in his judgment a passage not quoted by Sterling L. J., namely:

"but he was not generally entitled to take a proceeding in the cause for his own benefit. That there were exceptions to the last rule, but they were few in number." : see *Chuck v. Cremer* v. (5) and in *King v. Bryant* (6).

He made an order which throws a good deal of light on his view of the law. In that case the defendant to an action for foreclosure was committed to the Fleet for failure to file his reply. While he was there, the plaintiff proceeded to obtain an order for an account and served the defendant with no notice of it. The plaintiff then served no notice of an application for confirmation of the Master's report. The defendant, who was still in the Fleet, moved the Court to set aside these proceedings, and Lord Cottenham granted his application on the ground that though in contempt a defendant was not to be deprived of his property without being heard in his defence.

The Lord Chancellor said the Court would not hear a party in contempt coming himself into Court to take any advantage of the proceedings in the cause, yet such a party was entitled to appear and resist any proceeding against him and that it would be a most unjust extension of the rule against parties in contempt to take away a man's estate without giving him any opportunity of coming in and protecting himself.

It is true that Cozens-Hardy, L. J., declined in *Gordon v. Gordon* (1) to assent to any proposition beyond that necessary in that case—namely, that a defendant in contempt could move against an order made without jurisdiction. Still the view taken by Vaughan Williams L. J. was, if I may respectfully say so, more in accord with the authorities and Sterling L. J. was not prepared to dissent without further consideration from a view taken by Lord Cottenham. I cannot distinguish this case from *King v. Bryant* (6) and *Wigram, V. C. in Morrison v. Morrison* (7), held that a defendant in contempt for non-payment of an order for costs, was entitled to file exceptions to a report of the Master, for that was merely a step

taken in his own defence. There the default was not wilful, but in *King v. Bryant* (6) as the defendant was committed to the Fleet his default was presumably wilful and therefore assuming that the defendant in this case was and is in wilful contempt of the Court, I am unable to hold that she is not entitled to be heard, but as it is not suggested that the report was made without jurisdiction or that any irregularity occurred, she is only entitled to be heard in her own defence: see *Morrison v. Morrison* (7). The view which I take of the matter seems to me to be in exact accord with that taken by the Court of Appeal. The defendant was allowed by both Courts to appear and that meant to appear in order to defend herself and no more. The argument that liberty to appear presupposed that the defendant was not treated as in contempt was founded on a misapprehension of the position of a defendant in contempt.

As I read the cases it was never the rule that a party in contempt in a matter or procedure was not entitled to be heard in his own defence, for the penalty as far as the Court is concerned in maintaining its own dignity may be assessed by the Court as if it were as it is, a criminal offence, but is by no means limited to that, nor is the contempt cleared whatever penalty be imposed until the Court's order is obeyed, but as far as the other side is concerned the penalty is to be limited to frustrating the effect of a failure to comply with the procedure and does not, if that can be avoided, give him any further advantage.

In this matter I have considered the provisions of O. 11, R. 21, Civil P. C. It is clear that the rule in no way limits the powers of the Court: see *Hassonbhoy v. Cowasji Jehangir* (8), *Navivahoo v. Norottandas Candas* (4) and *Godu Ram v. Surajmal* (9). The order appears to have been considered in only two cases in this Court by Woodroffe, J. in *Kamalakhya Dossee v. Jotindra Mohan Banerjee* (10) and Okinealy, J., in *Kesharia Acoomar Sreesungje v. Patooah Set* (11). I find nothing in these decisions which is not in accord with the views expressed above, though in the Calcutta decisions the posi-

(8) [1881] 7 Bom. 1.

(9) [1905] 27 All. 380=2 A. L. J. 18=(1905) A. W. N. 10.

(10) [1907] 6 C. L. J. 374.

(11) [1898] 2 C. W. N. 676.

(5) [1846] 1 Coop. O. C. 247.

(6) [1838] 3 Myl. & Cr. 191.

(7) [1844] 4 Hare 590.



tion of a party in contempt was not considered in any detail.

I must add, that although Lord Cottenham in *Smith v. Smith* (12) where the defendant was imprisoned for breach of an injunction in the cause, held that the rule that a defendant in contempt shall not be heard, would not extend to a step necessitated by the proceedings of the plaintiff, still in *Hewitt v. McCartney* (2), which was a suit for foreclosure, the defendant not having put in an answer and stood out all process for contempt, applied for the usual reference although the cause was set down to take a decree pro confesso, Lord Eldon said that the effect of the contempt according to the law of every Court was that the defendant could not come in upon such a motion. But in my opinion I am bound by the order of the Court of appeal in this suit which gave the defendant the right to appear at the reference and I think impliedly gave her the right to file exceptions, but in my opinion as I have endeavoured to explain that order, if I may respectfully say so, is in entire accord with the view of Vaughan Williams L. J. in *Gordon v. Gordon* (1) and of Lord Cottenham and Wigram V. C. in the cases cited above and as I have been able to find no authority which allows a defendant in contempt to do more than protect herself except in exceptional cases. I will hear the exceptions, but will confine the defendant strictly to a defence of her rights, and as she has not yet filed her accounts she is still bound by the order that she can file no accounts and in my opinion the Court is bound to see that the plaintiff is not placed at a disadvantage by reason of the defendant's failure to file her accounts.

The defendant argued that the plaintiff waived contempt citing anon 15 Ves. 174. It seems to me that the alleged waiver, which is that the defendant was allowed by the Official Referee to file a state of facts and the plaintiff thereupon filed his answer to that state of facts, does not come within this ruling, and that there is no case of waiver of contempt in this case.

S.L./R.K.

Order accordingly.

## A. I. R. 1929 Calcutta 120

MITTER, J.

*Aminaddin Sheikh and another—Defendants—Appellants.*

v.

*Chandranath Sen and others—Plaintiffs—Respondents.*

Appeal No 658 of 1926, Decided on 1st August 1928, from appellate decree of Sub-Judge, Jessore, D/- 10th November 1925.

(a) Bengal Tenancy Act, S. 87—Abandonment is established by cessation of cultivation and absence of arrangement for payment of rent—Leaving the village is not necessary.

All that is necessary, in order to establish an abandonment by a raiyat, is to show that he has ceased to cultivate his holding either by himself or by some other person and that he has made no arrangement for the payment of his rent. The tenant need not have left the village in which the holding is situate in order to constitute abandonment under S. 87.

[P 121 C 1]

(b) Bengal Tenancy Act, S. 87—Abandonment—Civil P. C., S. 100.

Abandonment is a question of fact.

[P 121 C 1]

(c) Bengal Tenancy Act, S. 87—Principles with regard to abandonment govern both raiyats and under-raiyats.

The principles which govern the case of a raiyat also govern the case of an under-raiyat with regard to the circumstances under which the landlord can re-enter in case of an abandonment: 42 Cal. 751 and 29 C. L. J. 1, *Foll.*

[P 121 C 2]

*Profulla Kamal Das*—for Appellants.  
*Bimala Charan Deb, Tarakeswar Nath Mitter, Nagendra Nath Bose and Biraj Mohan Majumdar*—for Respondents.

**Judgment.**—In this appeal by defendants 1 and 2 the only question raised is that the lower appellate Court was not justified in treating the tenancy as having been abandoned as the tenant did not leave the village in which the holding was situate. It appears that the plaintiffs, now respondents, instituted the suit in which this appeal arises for recovery of possession of a plot of land on eviction of defendants 1 and 2 who are described as principal defendants after establishment of their jamai right to the same. There is no dispute with regard to the plaintiffs' title before me but it is said that the findings of the lower appellate Court (i) that defendants 3 and 4 who are under-raiyats under the plaintiffs are not in possession of any portion of the disputed land and (ii) that they have made



no arrangement for the payment of rent are not sufficient to constitute abandonment within the meaning of S. 87, Ben. Ten. Act and in support of this contention reliance has been placed on an unreported decision of this Court in appeal from appellate decree No. 2620 of 1912 decided on 22nd January 1915 in which two learned Judges of this Court held that in order to come to a finding that there was an abandonment under S. 87, Ben. Ten. Act there must be a finding that the tenant had left the village in which the holding was situate without making any arrangement for the payment of rent. Looking to the terms of S. 87, Ben. Ten. Act it seems to me that all that is necessary in order to establish an abandonment by a raiyat is to show that he has ceased to cultivate his holding either by himself or by some other persons and he had made no arrangement for the payment of his rent. I do not understand how in the face of this section it can be contended that in order to constitute an abandonment a tenant must leave the village in which the holding is situate. There is no other case of this Court except the unreported case to which I have already referred. I do not think that the unreported case could have laid down any inflexible rule that in every case a tenant must be proved to have left the village before abandonment could be inferred. S. 87, Ben. Ten. Act does not in terms apply to the present case as the persons who abandoned their residence are not raiyats but are under-raiyats and they were made defendants 3 and 4 to the suit in which this appeal arises. The Court of first instance dismissed the plaintiffs' suit. On appeal the learned Subordinate Judge of Jessore has reversed that decision and has declared plaintiff's title to the disputed land and has directed that they do get khas possession of the same on ejecting defendants 1 and 2 therefrom.

The question of abandonment is a question of fact and in second appeal I am bound by the findings arrived at by the lower appellate Court to the effect that there has been an abandonment of the under-raiyati tenancy by defendants 3 and 4. It was sought to be argued at one stage by the learned advocate for the appellants that S. 87, Ben. Ten. Act does not apply to the case of an under-raiyat and that there may be other methods of evicting an under-raiyat but he cannot be

evicted under S. 87, Ben. Ten. Act. This argument fails to take into account several decisions of this Court in which it has been held that the same principles which govern the case of a raiyat also govern the case of an under-raiyat with regard to the circumstances under which the landlord can re-enter in case of an abandonment. Reference may be made in this connexion to the cases of *Aminunnissa v. Jinnat Ali* (1) and *Ishan Chandra Dhupi v. Nishi Chandra* (2). I think this appeal is concluded by the findings of fact and must be dismissed with costs.

M.N./R.K.

*Appeal dismissed.*

(1) [1914] 42 Cal. 751=20 C.L.J. 548=27 I.C. 271=19 C. W. N. 43.

(2) [1917] 29 C. L. J. 1=41 I.C. 378=22 C.W. N. 853.

### A. I. R. 1929 Calcutta 121

SUHRAWARDY AND CAMMIADÉ, JJ.

*Adhar Chandra Naskar* — Judgment-debtor—Appellant.

v.

*Sarnwamoyi Dasi* — Decree-holder—Respondent.

Appeal No. 1751 of 1925, Decided on 3rd May 1928, from appellate decree of 2nd Sub-Judge, Zillah Hooghly, D/- 29th May 1925.

Civil P. C., O. 34. R. 6—For application under R. 6, it is not a condition precedent that property must first be sold and proceeds found insufficient.

A second mortgagee brought a suit against the mortgagor and obtained a final decree. Before he applied for execution the prior mortgagee brought a suit on his mortgage making both the mortgagor and the second mortgagee parties and sold the property in execution of his decree. The sale proceeds satisfied only the decretal debt of the prior mortgagee. The second mortgagee applied under R. 6 for a personal decree. It was contended that no action could be taken on it as the mortgagee had not brought to sale the property and found that the sale proceeds were insufficient to satisfy his decree.

*Held:* that the Court will not compel the mortgagee to make a fruitless attempt to sell the property which was already sold, in order to enable him to apply under R. 6 read with S. 68, T. P. Act. In order that the application for personal decree should be held to be untenable, there must be something which the mortgagee should be able to recover by such sale: *A. I. R. 1918 P. C. 159, Appl. 17 Mad. 309 and 38 Mad. 677 Appr.; 33 Cal. 890; A. I. R. 1924 Cal. 209; 18 C. L. J. 133; 22 All. 404 and 31 All. 373, 1 I.C. 799; Held Overruled.*

[P 123 C 1]

*Sitaram Banerji and Bejoy Prosad Singha Roy*—for Appellant.

*Asita Ranjan Ghose*—for Respondent.



**Suhrawardy, J.**— The appellant in this case has been described as the judgment-debtor but he is in reality the defendant in the suit out of which the present appeal arises. The facts are that the plaintiff as second mortgagee in respect of certain properties brought a suit on his mortgage and obtained a final decree. But before he could execute the decree, a suit was brought by a prior mortgagee on his mortgage to which the mortgagor and the plaintiff in the present suit as puisne mortgagee were parties. A decree was obtained in execution of which the property mortgaged with the plaintiff was sold in satisfaction of the debt due to the prior mortgagee. Thereafter the plaintiff made an application to the Court for a decree under O. 34, R. 6, Civil P. C. That application was granted and a decree has been passed under that rule in favour of the plaintiff.

The defendant appeals and it is contended on his behalf that the trial Court had no jurisdiction to pass a decree under O. 34, R. 6, before the plaintiff had exhausted all his remedies under the decree obtained by him, in other words, before he had sold the mortgaged property or attempted to sell it, and that only in the event of a balance of the debt remaining unpaid that he had the right to apply for a decree under that rule. On the wording of the rule it would seem that the contention of the appellant has some substance. But a recent decision of their Lordships of the Judicial Committee has to my mind settled the point in controversy. In *Jeenu Bahu v. Parmeswar Narain* (1) a decree was passed in favour of the mortgagee which was a combined decree under Ss. 89 and 90, T. P. Act, corresponding to Rr. 5 and 6, O. 34, Civil P. C. The same objection as is now urged before us was pressed at their Lordships' Bar but it was overruled. On the point with which we are now concerned the following observation was made:

"The appellants contend that the opening words establish as a condition precedent to the power of decreeing payment of the balance that the mortgaged property must first be sold and found insufficient to satisfy the debt. It is admittedly a strict and technical construction of the statute and one for which no reason can be assigned and from which no advantage can possibly be derived by any mortgagor. It would be unfortunate if the statute by its terms rendered necessary the adoption of this conten-

tion; but in their Lordships' opinion it is not necessary so to construe the Act."

The principle on which the decision of their Lordships is based is that on a reasonable construction of the statute a decree may be passed under S. 90, even before the condition contemplated by the section has been followed; that is, before it has been ascertained that the proceeds of the sale of the mortgaged properties are insufficient to pay the mortgage debt. And it is in accord with English law. *Fisher on Mortgage*, Ss. 806, 990. In this view of the decision of the Judicial Committee the rulings of this Court and of the Allahabad High Court which held a contrary view must be deemed to have been overruled such as *Ramranjan Chakravarty v. Indra Narayan Das* (2), *Chand Mal v. Ban Behary* (3), *Lakhi Narayan v. Krithibas Das* (4), *Badri Das v. Inayat Khan* (5) and *Kamta Prasad v. Syed Ahmad* (6). Now if a combined decree under Rr. 5 and 6, O. 34, can be passed before the mortgaged property has been sold and the sale proceeds found insufficient, there seems no reason why a decree cannot be passed under R. 6 before that under R. 5 has been executed. In other words, the difference between the decree before the Judicial Committee and the present decree is that in that case there was a combined decree under Rr. 5 and 6 of O. 34, Civil P. C., and in the present case there are two decrees one under R. 5 and another under R. 6. The only difference is that in one case there was a combined decree and in the other case there are two decrees which taken together would have the effect of combined decree. There is difference in form but not in principle.

Then again under S. 68, T. P. Act, the mortgagee has the right to bring a suit for the mortgage money when the mortgaged property has been wholly or partially destroyed or the security rendered insufficient. The plaintiff's case is that the mortgaged property was lost to his mortgage and it is not now available as security for his debt. He has accordingly asked for a personal decree under R. 6. Had he not brought a suit upon his mortgage he would certainly have been entitled under S. 68, T. P. Act,

(2) [1906] 33 Cal. 890=10 C. W. N. 862.

(3) A. I. R. 1924 Cal. 209=50 Cal. 718.

(4) [1913] 18 C. L. J. 133=19 I. C. 971.

(5) [1900] 22 All. 404=(1900) A. W. N. 132.

(6) [1909] 31 All. 373=1 I. C. 799=6 A.L. J. 451.

(1) A. I. R. 1918 P. C. 159=47 Cal. 370=46 I. A. 294 (P.C.).



to sue the mortgagor for the mortgage money or to sue on the original consideration for the money lent. I do not think that for simply bringing a fruitless suit on his mortgage he should be held to be without any remedy. To give full effect to the contention of the appellant is to hold that even though the mortgaged property ceased to exist or become available to the mortgagee for the purpose of realization of his dues, the mortgagee cannot claim a decree under R. 6 or any decree for that matter, and must lose his money, or he must go through the farce of attempting to sell the mortgaged property which at the time may not be existing or may not be available. This is the view taken by the Madras High Court on this point before the pronouncement of the Judicial Committee in the case of *Jeenu Bahu v. Parmeshwar Narayan* (1). In *Shanmuga Pillai v. Ramanathan Chetti* (7), the property mortgaged was found not to belong to the mortgagor but to a third party. It has been held that in the circumstances the mortgagee was entitled to claim a money decree against the mortgagor. In *Periasami Koni v. Muthia Chettiar* (8), it was held that when the judgment-debtor has no saleable interest in the properties directed to be sold the decree-holder need not go through the farce of putting them up to sale. The remark of the learned Judge is happily worded and may be quoted here:

"If of course the mortgaged properties directed to be sold under the mortgage decree do not belong to the mortgagor, the mortgagee need not be compelled to resort to the farce of bringing them to sale and to undergo useless delay involved in bringing them to sale, because it is an elementary principle of law that the Court will not do a vain thing, nor will it compel a man to do a fruitless thing."

It is not the appellants' case that there is any other remedy open to the plaintiff to satisfy his decree under the mortgage. It would seem absurd that the plaintiff should be compelled in order to entitle him to get a decree under R. 6 to attempt to sell a property which belongs to a third person. In this view the objection on the ground that the decree passed by the Court below is ultra vires must be overruled. This appeal accordingly fails and is dismissed with costs.

**Cammiade, J.**—I agree. As my learned brother has said, the proposition

(7) [1894] 17 Mad. 309=4 M. L. J. 91.

(8) [1915] 38 Mad. 677=23 I. C. 515=15 M.L. T. 232.

that it is necessary for the mortgagee to put to sale the mortgaged property before a personal decree can be obtained against the mortgagor cannot be maintained. What the mortgagor should prove in order to be able to set up a contention of this sort is that there was something which the mortgagee could recover by such sale. Such a contention was never made. The mortgagor appellant filed a written objection to the application made by the mortgagee respondent for a final decree; but he did not think it worth his while to come forward and support the objection filed by him. It is not even suggested that the property which was the subject of the two mortgages was worth anything more than what it fetched at the sale held in execution of the decree on the first mortgage. In these circumstances it would be grossly unjust to require the respondent to go through the empty formality of a second sale which would have been productive of no result. It would also have been foolish to require him to redeem the first mortgage, as he could recover nothing. In all these circumstances the only possible course which the Court below could follow was to give a personal decree against the mortgagor.

M.N. R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 123

RANKIN, C. J., AND MUKHERJI, J.J.

*Abinash Chandra Bidyanidhi Bhattacharjee*—Plaintiff—Appellant.

v.

*Dasarath Malo and others*—Defendant  
2—Respondents.

Appeal No. 1551 of 1926, Decided on 25th July 1928, from appellate decree of 4th Sub-Judge, Zillah Dacca, D/- 1st March 1926.

(a) Transfer of Property Act, S. 59—Scribe as witness.

Scribe affirming marginal statements with his signature and elsewhere putting his name underneath the word "scribe" is not an attesting witness : 5 C. W. N. 454; A. I. R. 1921 Cal. 208; and A. I. R. 1928 Cal. 154; *Diss. from* : 7 C. W. N. 160, *Dist.* [P 125 C 2]

(b) Transfer of Property Act, S. 3 (Amended by Act 10 of 1927)—Object of requiring attesting witness explained.

The object of requiring an attesting witness is that when the factum of the document comes into question, it may be years afterwards, the document shall be proved by the evidence of witnesses who have this to vouch for the truth.



of their evidence—the consideration that not only do they now say that at the time when they were present they saw and witnessed the execution, but they are able to go on to say “I put my signature on the instrument at the time by way of saying then what I am saying now, namely, that it was executed and that I saw it “executed.” [P 126 C 1]

(c) Civil P. C., O. 41, R. 33—Appellate Court has power to make a decree in favour of non-appealing parties.

It does constantly occur where some people appeal and others do not that the Court is put in a position of having to make impossible or contradictory or unworkable orders. Accordingly, it has been given power to make a decree in favour of persons who have not even approached it. This power may be exercised by the Court in favour of any of the parties who may not have filed any appeal or objection.

[P 126 C 2]

*Hemendra Kumar Das and Priya Nath Dutt*—for Appellant.

*Govinda Chandra De Roy and Hiran Kumar Roy*—for Respondent.

**Rankin, C. J.**—In this case, the plaintiff brought his suit upon a mortgage bond. The Munsif decreed the suit for the full amount holding that the execution of the bond had been proved and holding also as regards defendant 2 (who was interested because subsequently to the mortgage bond he had purchased a tin hut which was part of the mortgaged subjects) that the plaintiff's claim prevailed against the claim of the defendant 2. Defendant 2's case was that he had purchased the tin hut not from the mortgagor but from another. However, the Munsif decreed the suit both as regards the tin hut and the land. So far as defendant 1 is concerned, he did not appear at the trial to contest the suit. The contest was between the plaintiff and defendant 2 throughout. Defendant 2 appealed to the lower appellate Court and the first ground he took was that this mortgage was invalid because it had not been properly attested as required by law. On that issue, the learned Subordinate Judge of Dacca found for the appellant and held that the mortgage bond was not attested as required by law.

Now, when we come to look into the matter, we find that there are two people who are put forward as attesting witnesses. As to one, there can be no doubt at all because he was a person who was present at the time of the execution and who put his name down on the instrument to authenticate its execution. As

regards the other, the position is this: that man was, in fact, the scribe or the person who wrote the document out. He put his name to a statement in the margin to the effect that he had read the document out to the executant and also that he had put in certain alterations at the executant's desire. This statement he affirmed with his signature and it is reasonably clear that he put his signature down for that purpose before the document was executed at all. There is, however, another part of the document on which the same man's signature appears. Underneath the word “scribe” the man has put his name. It is not a case where a person has put his name with the word “scribe” after it by way of extra information. It is a case where the man has put his name under the heading “scribe.” The question is whether, in these circumstances, this man is an attesting witness so as to satisfy the requirements of the law. The appellant says that the trial Court is to go into the evidence to find out from the oral evidence of the man if he is available—whether or not he put his name down with the object of attesting the document. It is contended also that it does not matter for what purpose that signature was put down and that, as a matter of law, it is a good attestation.

That contention is based upon certain cases of this Court. The first case that is relied upon is the case of *Raj Narayan Ghose v. Abdur Rahim* (1) being a decision of Harrington, J. In that case, the document is not well described in the report; but it is said that the plaintiff called a person who was described in the deed as the writer of the mortgage and the learned Judge said that he was of opinion that a person who was present and witnessed the execution of the deed and whose name appeared on the document was a competent witness to prove the execution of the deed. In other words, he held that the person was a good attesting witness if he was present and witnessed the execution and his name appeared on the document at all for whatever purpose and in whatever manner. Whether the decision on the particular document before the Court was right or wrong, I have no materials before me to say. But it does appear to me that the learned Judge's exposition of the law is somewhat too wide. The next case

(1) [1901] 5 C. W. N. 454.



relied upon is the case of *Dinomoyee Debi v. Bon Behary Kapur* (2). That was a case of a woman who executed a document by making her mark and underneath her mark was written her name "by the pen of so and so." These words were written in the ordinary way of "bakalam" signature as written in India, and the Court held that the person who wrote down the statement that the mark was the lady's mark and the statement that her name was written by his pen was an attesting witness. That is a very different case from the present case and from the case before Harrington, J. and I have no doubt that that decision was perfectly right because the man had put his name down on the document by way of saying that the lady had executed in his presence. The next case is the case of *Jaganath Khan v. Bajrang Das* (3). There again the document and the facts are not too clear. But it would seem that the name of the writer—the name of the witness in question was put somehow upon the instrument but apparently only for the purpose of saying that he was the writer of the bond; and the learned Judges there differing from certain decisions of the Allahabad and the Patna High Courts and proceeding upon the two cases which I have mentioned took the view that a person who was present and witnessed the execution of the deed and whose name appeared on the document though he was therein described merely as the writer of the deed was a competent witness.

Now, we have by recent legislation had a definition of "attested" given by Act 27 of 1926 and that definition has been made retrospective by an Act of 1927. The definition is:

"attested, in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Now, the word "attested" is the word to be defined because that word when it is used in the Statute with reference to

an instrument is really a shorthand expression and the meaning of it is given at length in this Act—Act 27 of 1926. The word "attested" occurs not merely as the thing to be defined but as a part of the definition or explanation and it remains, therefore, to enquire in cases such as the present, what is meant by saying that a document has been attested or that its execution has been attested. In my judgment, the matter is reasonably clear. A person may be a witness to the execution of a mortgage or a will and yet may not have written his name at the time by way of saying that he was a witness. It is quite clear that in India no formal attestation clause is necessary. Ordinarily a string of signatures towards the end of an instrument or somewhere on the instrument without any explanation will be quite sufficient to show that the persons put their signatures by way of saying that they had seen the document executed or had received an acknowledgment. Again, the mere fact that a person is the scribe or that he puts the word "scribe" after his name will not, in itself, show that he has not put his signature on the document by way of saying that he had seen the instrument executed. Such a signature often occurs under the heading "witness" or, at least among a host of signatures put down without any explanation but obviously as the signatures of witnesses. The present case is not of that sort. The present case is where under the separate heading "scribe" the man has put his name. The question is whether it is right to hold as a matter of law that, even although on the construction of the document the name is put *alio intuitu*; the fact that the name is on the document at all makes the man an attesting witness.

In my judgment, any such proposition is erroneous. A man's name may be put on the instrument by way of authenticating a statement that the supposed testator did not execute. It may be put by way of professional advertisement to show that he acted as the scribe or by way of showing that he acted as the scribe for other purposes than professional advertisement. It may be put down for authenticating a particular correction in the body of the deed. In all those cases, it seems to me wrong to say that because the man's signature is on the document at all disregarding the purpose for

(2) [1903] 7 C. W. N. 160.

(3) A. I. R. 1921 Cal. 208=48 Cal. 61.



of their evidence—the consideration that not only do they now say that at the time when they were present they saw and witnessed the execution, but they are able to go on to say “I put my signature on the instrument at the time by way of saying then what I am saying now, namely, that it was executed and that I saw it “executed.” [P 126 C 1]

(c) Civil P. C., O. 41, R. 33—Appellate Court has power to make a decree in favour of non-appealing parties.

It does constantly occur where some people appeal and others do not that the Court is put in a position of having to make impossible or contradictory or unworkable orders. Accordingly, it has been given power to make a decree in favour of persons who have not even approached it. This power may be exercised by the Court in favour of any of the parties who may not have filed any appeal or objection. [P 126 C 2]

*Hemendra Kumar Das and Priya Nath Dutt*—for Appellant.

*Govinda Chandra De Roy and Hiran Kumar Roy*—for Respondent.

**Rankin, C. J.**—In this case, the plaintiff brought his suit upon a mortgage bond. The Munsif decreed the suit for the full amount holding that the execution of the bond had been proved and holding also as regards defendant 2 (who was interested because subsequently to the mortgage bond he had purchased a tin hut which was part of the mortgaged subjects) that the plaintiff's claim prevailed against the claim of the defendant 2. Defendant 2's case was that he had purchased the tin hut not from the mortgagor but from another. However, the Munsif decreed the suit both as regards the tin hut and the land. So far as defendant 1 is concerned, he did not appear at the trial to contest the suit. The contest was between the plaintiff and defendant 2 throughout. Defendant 2 appealed to the lower appellate Court and the first ground he took was that this mortgage was invalid because it had not been properly attested as required by law. On that issue, the learned Subordinate Judge of Dacca found for the appellant and held that the mortgage bond was not attested as required by law.

Now, when we come to look into the matter, we find that there are two people who are put forward as attesting witnesses. As to one, there can be no doubt at all because he was a person who was present at the time of the execution and who put his name down on the instrument to authenticate its execution. As

regards the other, the position is this: that man was, in fact, the scribe or the person who wrote the document out. He put his name to a statement in the margin to the effect that he had read the document out to the executant and also that he had put in certain alterations at the executant's desire. This statement he affirmed with his signature and it is reasonably clear that he put his signature down for that purpose before the document was executed at all. There is, however, another part of the document on which the same man's signature appears. Underneath the word “scribe” the man has put his name. It is not a case where a person has put his name with the word “scribe” after it by way of extra information. It is a case where the man has put his name under the heading “scribe.” The question is whether, in these circumstances, this man is an attesting witness so as to satisfy the requirements of the law. The appellant says that the trial Court is to go into the evidence to find out from the oral evidence of the man if he is available—whether or not he put his name down with the object of attesting the document. It is contended also that it does not matter for what purpose that signature was put down and that, as a matter of law, it is a good attestation.

That contention is based upon certain cases of this Court. The first case that is relied upon is the case of *Raj Narayan Ghose v. Abdur Rahim* (1) being a decision of Harrington, J. In that case, the document is not well described in the report; but it is said that the plaintiff called a person who was described in the deed as the writer of the mortgage and the learned Judge said that he was of opinion that a person who was present and witnessed the execution of the deed and whose name appeared on the document was a competent witness to prove the execution of the deed. In other words, he held that the person was a good attesting witness if he was present and witnessed the execution and his name appeared on the document at all for whatever purpose and in whatever manner. Whether the decision on the particular document before the Court was right or wrong, I have no materials before me to say. But it does appear to me that the learned Judge's exposition of the law is somewhat too wide. The next case

(1) [1901] 5 C. W. N. 454.



relied upon is the case of *Dinomoyee Debi v. Bon Behary Kapur* (2). That was a case of a woman who executed a document by making her mark and underneath her mark was written her name "by the pen of so and so." These words were written in the ordinary way of "bakalam" signature as written in India, and the Court held that the person who wrote down the statement that the mark was the lady's mark and the statement that her name was written by his pen was an attesting witness. That is a very different case from the present case and from the case before Harrington, J. and I have no doubt that that decision was perfectly right because the man had put his name down on the document by way of saying that the lady had executed in his presence. The next case is the case of *Jaganath Khan v. Bajrang Das* (3). There again the document and the facts are not too clear. But it would seem that the name of the writer—the name of the witness in question was put somehow upon the instrument but apparently only for the purpose of saying that he was the writer of the bond; and the learned Judges there differing from certain decisions of the Allahabad and the Patna High Courts and proceeding upon the two cases which I have mentioned took the view that a person who was present and witnessed the execution of the deed and whose name appeared on the document though he was therein described merely as the writer of the deed was a competent witness.

Now, we have by recent legislation had a definition of "attested" given by Act 27 of 1926 and that definition has been made retrospective by an Act of 1927. The definition is:

"attested, in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Now, the word "attested" is the word to be defined because that word when it is used in the Statute with reference to

an instrument is really a shorthand expression and the meaning of it is given at length in this Act—Act 27 of 1926. The word "attested" occurs not merely as the thing to be defined but as a part of the definition or explanation and it remains, therefore, to enquire in cases such as the present, what is meant by saying that a document has been attested or that its execution has been attested. In my judgment, the matter is reasonably clear. A person may be a witness to the execution of a mortgage or a will and yet may not have written his name at the time by way of saying that he was a witness. It is quite clear that in India no formal attestation clause is necessary. Ordinarily a string of signatures towards the end of an instrument or somewhere on the instrument without any explanation will be quite sufficient to show that the persons put their signatures by way of saying that they had seen the document executed or had received an acknowledgment. Again, the mere fact that a person is the scribe or that he puts the word "scribe" after his name will not, in itself, show that he has not put his signature on the document by way of saying that he had seen the instrument executed. Such a signature often occurs under the heading "witness" or, at least among a host of signatures put down without any explanation but obviously as the signatures of witnesses. The present case is not of that sort. The present case is where under the separate heading "scribe" the man has put his name. The question is whether it is right to hold as a matter of law that, even although on the construction of the document the name is put *alio intuitu*; the fact that the name is on the document at all makes the man an attesting witness.

In my judgment, any such proposition is erroneous. A man's name may be put on the instrument by way of authenticating a statement that the supposed testator did not execute. It may be put by way of professional advertisement to show that he acted as the scribe or by way of showing that he acted as the scribe for other purposes than professional advertisement. It may be put down for authenticating a particular correction in the body of the deed. In all those cases, it seems to me wrong to say that because the man's signature is on the document at all disregarding the purpose for

(2) [1903] 7 C. W. N. 160.

(3) A. I. R. 1921 Cal. 208=48 Cal. 61.



which it is on the document and disregarding altogether what his signature is put to authenticate the man in question is an attesting witness. To take the ordinary case, a man is an attesting witness when he has seen the execution of the instrument and has put his name on the document by way of saying at the time that he has seen the execution of the document. To meet the cases where the execution is not seen but is acknowledged, this definition would have to be extended. The present is not such a case. The purpose of requiring an attesting witness would be entirely defeated by any other rule. The object is that when the factum of the document comes into question it may be years afterwards the document shall be proved by the evidence of witnesses who have this to vouch for the truth of their evidence. I take again the ordinary case the consideration that not only do they now say that at the time when they were present they saw and witnessed the execution, but they are able to go on to say :

I put my signature on the instrument at the time by way of saying then what I am saying now, namely, that it was executed and that I saw it "executed".

Any other meaning to the word "attestation" reduces the whole purpose of this requirement to an absurdity. It seems to me that the definition, if I may so call it, given by Act 27 of 1926 would be entirely perverted if the word "attested" which appears at the beginning of the definition is not correctly considered. For these reasons, it appears to me that in this case the signature as a matter of construction is not capable of being read as an attestation at all. In my opinion, therefore, the learned Subordinate Judge, so far as defendant 2 the appellant before him was concerned, was right in dismissing the suit of the plaintiff altogether.

The only other question is whether or not the learned Judge of the Court of appeal below was right, defendant 1 having done nothing to resist the decree of the first Court and bringing no appeal before him in dismissing the whole suit, that is, not only as against defendant 2 but also as against defendant 1 the mortgagor. In my judgment, the learned Judge had jurisdiction to do that by virtue of R. 33, O. 41, Civil P. C. It does constantly occur where some people appeal and others do not that the Court is

put in a position of having to make impossible or contradictory or unworkable orders. Accordingly, it has been given power to make a decree in favour of persons who have not even approached it. This power may be exercised by the Court in favour of any of the parties who may not have filed any appeal or objection. The only question is whether the learned Judge exercised a proper discretion in dismissing this mortgage suit against defendant 1 on the ground of this technical defect as regards attestation. Upon the whole, it seems to me that in a case of this character the learned Judge would have done well to confine himself to the case of defendant 2 and I think that this appeal ought to be allowed so far as regards the setting aside of the decree as against defendant 1.

It remains to consider in the present case another decision of this Court, namely, the decision in *Radha Mohun v. Nripendra Nath* (4). In that case, as in the present, the mortgagor at the time of registration admitted the execution of the mortgage-deed and the Sub-Registrar by his signature and seal acknowledged or asserted on the document that execution had been admitted by the mortgagor. Accordingly, in the case to which I am now referring, it was held that the Court would take judicial notice of that signature and seal and that the Sub-Registrar was a good attesting witness as required by law. It appears to me that the learned Judges in that case may not have paid sufficient attention to the circumstance that by Act 27 of 1926 and, indeed apart from that Act, it is necessary that each of the witnesses should have signed the instrument in the presence of the executant. It does not appear that there was any evidence before the learned Judges that the Sub-Registrar had affixed his signature or seal in the presence of the mortgagor. But in the case before us now, it is quite clear that there is no such evidence at all. In view of the fact that the instrument is an old one now, it seems unreasonable that we should reopen the matter by sending the case for further evidence. It has been suggested to us that the ordinary practice is for the Sub-Registrar to sign his statement in such cases in the presence of the mortgagor. Not only do I entertain considerable

(4) A. I. R. 1928 Cal. 154.



doubt as to whether this is, in fact, the ordinary practice but I need hardly say, whether it is so or not, there is no evidence that it is a practice which has been followed in this case. I do not therefore, think that the present case is complicated at all by any question as to what happened at the time of the registration. In this view, the appeal succeeds so far as against the heirs of defendant 1 and the Munsif's decree against the said defendant is restored. But the appeal must be dismissed with costs as against defendant 2. It is quite clear that the right of defendant 2 to the hut in question cannot be affected by the plaintiff's decree against the heirs of defendant 1.

**Mukherji, J.**—I agree.

S.L./R.K. Appeal partly allowed.

### \* A. I. R. 1929 Calcutta 127

SUHRWARDY AND GARLICK, JJ.

*Daksha Bala Dasia*—Plaintiff—Appellant.

v.

*Raja Mondal* — Defendant—Respondent.

Appeal No. 1762 of 1926, Decided on 13th August 1928, from appellate decree of Sub-Judge, Rajshahi, D/- 1st May 1926.

\* Bengal Tenancy Act (8 of 1885) S. 128 (2) (d)—Interest of occupancy raiyat of a non-transferable holding is interest in immovable property and therefore bequeathable—Such raiyat has as much right to bequeath as transfer as is not limited by the Act.

The right of an occupancy raiyat in a non-transferable holding is a right in immovable property and not a mere personal right and he has a right to transfer it. The right to bequeath is also one of the incidents of ownership; it cannot be taken away or restricted except by express enactment. Therefore, a raiyat holding a non-transferable holding has as much right to make a testamentary disposition of the holding as he has to transfer its subject to the limitation mentioned in the Act. (Case Law considered). [P 129 C 1]

*Bireswar Bagchi*—for Appellant.

*Dwijendra Krishna Dutt*—for Respondent.

**Suhrawardy, J.**—This appeal arises out of a suit for recovery of bargah produce for the years 1324 to 1327 against the under-raiyat. The plaintiff's allegations are that the jama originally belonged to Alokemani Baishnabi who bequeathed it to the plaintiff's husband

Shama Charan by a will of which probate was duly taken. The plaintiff as successor of Shama Charan thereupon sued the defendant who is an under-raiyat for rent. The defendant denied the relation of landlord and tenant on the ground that neither the plaintiff nor her husband was ever in possession of the jama. He also took exception to the quantity and the price of the bargah produce claimed. The learned Munsif who tried the suit overruled the defendant's objections except with regard to issue 2 and gave the plaintiff a partial decree. The defendant appealed and the learned Subordinate Judge in deciding the question as to whether the relation of landlord and tenant existed between the parties raised the point as to whether Alokemani as an occupancy raiyat had the right to make a will in favour of Shama Charan. Relying upon certain cases which we shall refer to later the Subordinate Judge has held that an occupancy raiyat, as the law stands, is not competent to make a will and, therefore, the plaintiff has no right to the jama. The plaintiff has appealed and it is argued on his behalf firstly that the view taken by the lower Court is incorrect and secondly that the point not having been raised in the trial Court an opportunity should have been given to the plaintiff to prove that by local usage and custom an occupancy raiyat has the right to make a will.

With regard to the question whether an occupancy raiyat has the right to make a testamentary disposition the law seems to be in a fluid state. The point so far as the reports go was first seriously raised and discussed in *Haridas v. Uday Chandra* (1) before Doss, J., sitting singly. The learned Judge held that an occupancy raiyat has the right to make a testamentary disposition as much as he has the right to make a gift or a transfer. There was a letters patent appeal from that decision, but the point now raised before us was not considered by the Bench hearing the letters patent appeal as the case was disposed of on a different point. The question next came up for consideration in *Amulya Ratan Sircar v. Tarini Nath De* (2) where it was held that a non-

(1) [1908] 12 C. W. N. 1086=8 C. L. J. 261.

(2) [1915] 42 Cal. 254=21 C. L. J. 187=27 I. C. 235=18 C. W. N. 1290.



transferable occupancy holding could not be the subject of a valid testamentary disposition. This case was followed without further discussion in *Kunja Lal Roy v. Umesh Chandra Roy* (3) in which one of the learned Judges expressed the opinion that the law on the point was admittedly in unsatisfactory condition, but on the authorities as they then stood, an occupancy right was not capable of being made the subject of testamentary disposition. The case of *Amulya Ratan Sircar v. Tarini Nath De* (2) was again followed in *Umesh Chandra Dutta v. Jeynath Das* (4). There it was held that the testamentary disposition of a part of a non-transferable holding like that of the whole holding was invalid though at the time the case was decided it was firmly established that a transfer of a portion of a non-transferable occupancy holding was valid even without the consent of the landlord.

The basis of all these decision is the ratio decidendi adopted in *Amulya Ratan Sircar's* case and, therefore, we have to examine whether that decision can be said to be good law at the present day. In *Haridas Banerji's* case Doss, J., held that gift and testamentary disposition stood on the same footing. In *Amulya Ratan Sircar's* case Mookerjee, J., observes that the Bengal Tenancy Act does not invest a raiyat holding a non-transferable occupancy right with the power to transfer his holding. But such transaction by the raiyat must be held to be operative against him and the persons claiming through him on the application of the principle of estoppel. The principle of estoppel does not apply to the case of a simple gift where there is no consideration and no representation to work estoppel. There can be no estoppel as against the heir-at-law as his right to the properties and the operation of the bequest accrue at the same time, namely, on the death of the testator. On these considerations the learned Judge held in *Amulya Ratan's* case that an occupancy raiyat has no right to make a testamentary disposition. It should be noted that this case was decided shortly before the Full Bench case of *Dayamoyi v. Annada Mohan Roy* (5). In *Behari Lal*

*Ghose v. Sindhu Bala Dassi* (6) Mookerjee, J. held that *Dayamoyi's* case has made such an alteration in the view of the law as to make gift of a non-transferable occupancy holding valid except as against the landlord. But in that case the learned Judge adhered to his view that the case of a gift must be distinguished from that of a testamentary disposition in that in the latter case bequest was revocable up to the last moment of the life of the testator and that the moment the bequest came into operation, if legal and valid, was the moment at which the right of the heir accrued by operation of law. In the Full Bench Case of *Dayamoyi* which dealt only with the question of transfer the deductions drawn by the learned Judges from the authorities were merely given in the form of propositions of law without discussion of the grounds of the decision. It was there laid down that the transfer of the whole or part is operative against the raiyat where it is voluntary and also where it is involuntary, if the raiyat with knowledge fails to have the sale set aside. As I have said, in the Full Bench case there is no discussion of law; but it is evident that the rules laid down there were based on the application of the principle of estoppel and the doctrine of derogation of grant by the grantor; and also in cases of involuntary transfer, on the application of the doctrine of waiver.

The Full Bench case came up for consideration by a Special Bench the decision of which must now be taken to have settled all points in controversy with regard to the right of an occupancy raiyat to transfer or make a gift or bequest. Up to the time of the Special Bench case of *Chandra Benode Kundu v. Ala Bux* (7), the question in controversy was as to whether the right of a raiyat in a non-transferable occupancy holding was a personal right or an interest in land. If it was a personal right it could not be transferred under the law and, therefore, there could not be any question of estoppel but strangely enough it is in the cases which held that the right of an occupancy raiyat in his holding was not much distinguishable from a personal right that the doctrine of estoppel was

(3) [1914] 18 C. W. N. 1294=27 I. C. 352.

(4) [1918] 22 C. W. N. 474=43 I. C. 779.

(5) [1915] 42 Cal. 172=20 C. L. J. 52=27 I. C. 61=18 C. W. N. 971 (F.B.).

(6) [1918] 45 Cal. 434=22 C. W. N. 210=41 I. C. 878=27 C. L. J. 497.

(7) A. I. R. 1921 Cal. 15=48 Cal. 184 (S.B.).



employed. In the Special Bench case the same learned Judge who had decided *Amulyaratan's* case and who was then the Acting Chief Justice in his elaborate judgment, the result of a scholarly research in the history and nature of the right of a raiyat apparently went back on his view which he had expressed in his previous decisions. On the question as to whether the right of an occupancy raiyat is a personal right or a right in immovable property the learned Acting Chief Justice held that whatever might have been the law earlier the occupancy raiyat enjoys under the Bengal Tenancy Act substantial right in the land and his interest cannot be appropriately described as merely a personal right or personal privilege. With regard to the application of the principles of estoppel and waiver the learned Chief Justice observed :

"There were manifest difficulties in the application of all such doctrines because if the right of occupancy was purely personal right or personal privilege it is not easy to appreciate how it could in fact be made transferable by invoking the aid of one or other of those principles of law."

The result of that decision is that the right of an occupancy raiyat in a non-transferable holding is a right in immovable property ; that if it was a personal right the application of the doctrine of estoppel and waiver would be inconsistent with the nature of the right and that if it is an interest in land the applications of those principles would be superfluous. The Special Bench case was considered by a Full Bench of the Patna High Court in *Jugeshar Misra v. Nath Koeri* (8) in which the learned Chief Justice of the Patna High Court following the Special Bench case of this Court negatived the application of the principles of estoppel and waiver to transfers by an occupancy raiyat and held that the right of an occupancy raiyat in a holding was an interest in land and carried with it all the incidents of an immovable property. The foundation of the decision of *Amulya Ratan's* case has accordingly, by subsequent decisions, been entirely cut away.

Looking at the rules as laid down in the Bengal Tenancy Act it appears that the statute does not pretend to lay down all the incidents of an occupancy right as was pointed out in *Kripa Sindhu Mukherjee v. Annada Sundari Debi* (9) approved.

(8) A. I. R. 1922 Pat. 114=1 Pat. 317 (F.B.).

(9) [1908] 35 Cal. 34=6 C. L. J. 273=11 C. W. N. 983 (F.B.).

by the Special Bench. The preamble of the Act shows that it presumes to amend and consolidate the law relating to landlord and tenant. It was therefore beyond its scope to deal with the law as between the tenant and a third party. The Bengal Tenancy Act does not invest the occupancy raiyat with any particular right as against a third party nor does it take away any right which he may have under the general law. It was at one time argued that an occupancy raiyat has no right of transfer because the Bengal Tenancy Act though it expressly mentions such right as existing in tenure-holders and raiyats at fixed rates does not refer to such right (right of transfer or testamentary disposition) in occupancy raiyats ; and reliance was also placed on S. 178 (3) (d) which prohibits a contract likely to take away the right of the raiyat to transfer or bequeath his holding in accordance with local usage, as showing that the right of transfer or testation does not exist in a raiyat except in accordance with local usage. This argument does not seem to be effective as it can be explained on the general principles of law. As in an ordinary lease there may be enforceable terms relating to restraint against alienation so in the case of an occupancy holding a raiyat may contract with his landlord not to transfer his holding to any one except the landlord. But the law invalidates a contract where the right to transfer or bequeath is acquired by the raiyat in accordance with local custom or usage.

The right of a raiyat in his holding has gradually improved according to the decisions of this Court and it must now be taken to be co-extensive with the right to any other immovable property. At one time his interest was supposed to be not heritable, subsequently it was held to be so. It was then again held to be non-transferable. It has subsequently been held that it is transferable except in so far as it is prohibited by the Bengal Tenancy Act namely, that it should not affect the interest of the landlord. Under the Bengal Tenancy Act the right to transfer and the right to bequeath are placed on the same footing as was admitted by Mookerjee, J., in *Amulya Ratan's* case. If the right of transfer is available to the raiyat by virtue of his interest being an interest in the land there can be no doubt that the right to bequeath must also be held available to him. The right to bequeath is



one of the incidents of ownership and it cannot be taken away or restricted except by express enactment. The distinction that was originally made between the right of transfer and the right to bequeath was based on the application of the principle of estoppel. Since that has disappeared there is nothing to support the distinction as has been fairly conceded before us by the learned advocate for the respondent. The absence of mention of a right in any enactment which does not deal completely with the law of immovable property as the Bengal Tenancy Act does not necessarily prove that the right does not exist. In the Special Bench case of *Chandra Binode Kundu v. Ala Bux* (8) at p. 244 the learned Chief Justice remarked :

"the fact that S. 26 makes the occupancy right heritable and does not refer to the question of transferability does not consequently justify the inference that the legislature did not intend to make the occupancy right transferable."

We adopt this passage verbatim by only altering the word "transferable" into "bequeathable." It is worthy of note that on the conclusions arrived at by the learned Chief Justice in the Special Bench case he expressly stated that it was not necessary to examine the cases which dealt with voluntary transfer for value by an occupancy raiyat or with the power to make testamentary devise. There can be no doubt that if the cases with regard to bequest had come under scrutiny the Special Bench would have held that they were wrongly decided.

I have given full consideration to the point raised before us and to the authorities bearing on it and have come to the conclusion that as the law now stands a raiyat holding a non-transferable holding has as much right to make a testamentary disposition of the holding as he has to transfer it subject of course to the limitation mentioned in the Bengal Tenancy Act. In this case we should not lose sight of the fact that the objection with regard to the validity of the bequest is not taken by the heir-at-law but by an under-tenant. It is in evidence as remarked by the Munsif that Alakmani left two nephews as heirs one of whom was Shama Charan in whose favour the will was and the other was a witness to the will. In the view that we have taken of the matter it is not necessary to consider the second point raised on behalf of the appellant. The

result is that this appeal is allowed that the decree of the lower appellate Court is set aside and that of the Munsif restored with costs in all the Courts.

**Garlick, J.**—I agree.

M.N./R.K.

*Appeal allowed.*

### \* A. I. R. 1929 Calcutta 130

B. B. GHOSE AND BOSE, JJ.

*Dwarkanath Mandal and another—*  
Defendants—Appellants.

v.

*Srigobinda Choudhuri* — Plaintiff—  
Respondent.

Appeal No. 278 of 1926, Decided on 6th June 1928, from appellate decree of 2nd Offg. Sub-Judge, Pabna, D/- 16th September 1925.

(a) **Landlord and Tenant—Partial dispossession by landlord — Lands separately assessed — Abatement and not suspension of rent should be allowed.**

Where the lands demised are included in several schedules which are separately assessed, partial dispossession of the tenant from the tenure by the landlord does not entitle the tenant to total suspension of the rent. He can get only abatement thereof: *A. I. R. 1925 P.C. 97* and *A. I. R. 1927 Cal. 737, Foll.* [P 131 C 2]

(b) **Bengal Public Demands Recovery Act (1919), S. 57—Certificate Officer is not Court with special jurisdiction—His decision cannot operate as res judicata in a civil Court—Civil P. C., S. 11.**

A Certificate Officer, who is a mere agent for speedy and summary recovery of rents due to an estate under the management of the Court of Wards and on whom certain powers of a civil Court have been conferred, is not a Court exercising special jurisdiction. And so any decision arrived at by a certificate officer cannot operate as res judicata on any question raised in the civil Court: *A.I.R. 1927 Cal. 421, Ref.* [P 132 C 1,2]

*Atul Chandra Gupta and Bansori Lal Sarkar*—for Appellants.

*Naresh Chandra Sen Gupta and Krishna Kamal Moitra*—for Respondent.

**B. B. Ghose, J.**—This is an appeal by the defendants which arises out of a suit for rent which was dismissed by the Munsif, but an appeal by the plaintiff was decreed by the Subordinate Judge. The points which are urged on behalf of the appellants are three in number. The suit was for rent for the years 1326 to 1330. With regard to the rent of 1326 no decree has been made in favour of the plaintiff, as it was barred by limitation.



The facts which gave rise to the question in controversy are these:

The estate of the plaintiff was under the management of the Court of Wards. The Manager of the Court of Wards applied for a certificate to be filed to the Certificate Officer for rent alleged to be due on account of this tenure from the year 1326 to the year 1329 B. S. The certificate was filed. On the objection of the defendants made under S. 9, Public Demands Recovery Act 3 of 1919 (B.C.), the Certificate Officer cancelled the certificate. The objection was that the rent was to be suspended on account of the defendants having been dispossessed at the instance of the plaintiff, of about 12 bighas of land. The tenure of the plaintiff consists, we are told, of about 100 bighas. The Certificate Officer apparently held that under the circumstances proved the landlord was not entitled to receive any rent. The contention in the Court below was that on account of this decision of the Certificate Officer the plaintiff is precluded from suing for rent for the period covered by the decision of the Certificate Officer, and the same argument has been addressed before us which includes the rent for the years 1327 to 1329 B.S. The Subordinate Judge held that in the present case the Certificate Officer filed the certificate without any jurisdiction and, therefore, his order must be treated as if non-existent. It is, however, argued on behalf of the appellants that the Subordinate Judge is wrong in his conclusion.

It is submitted in the first place that the Certificate Officer took cognizance of the requisition for filing the certificate with jurisdiction, and he had also jurisdiction to make the order cancelling the certificate. That being so his order should be treated as the order of a Court of special jurisdiction and as the order was made in the exercise of the jurisdiction of that Court, that order should operate as *res judicata* in the present case. A third point was urged that upon the facts found that the defendants had been deprived of 12 bighas of the lands comprising his tenure there should be total suspension of rent.

With regard to the last point raised as regards the total suspension of rent the Subordinate Judge found that in the patta granted to the defendants the lands are included in several schedules and each schedule containing different plots of land

was separately assessed. The lands of which the defendants have been dispossessed are included in one schedule the rent for which was Rs. 3 odd per year. Upon that finding the Subordinate Judge came to the conclusion that there should be abatement of rent by that amount, and he gave a decree for the balance at the rate of Rs. 35-10-6. This question of suspension of rent has been elaborately dealt with by me in the case of *Susil Kumar Biswas v. Rajani Kanta* (1) where I have endeavoured to examine the question from all points of view with reference to the decided cases, and I do not propose to travel over the same grounds. In the present case the point appears to me to be covered by the decision of the Judicial Committee in the case of *Katyayani Debi v. Uday Kumar Das* (2) although in this case the rent was not fixed at so much per bigha. It was fixed for each schedule separately; and, therefore, it falls within that decision. I think, therefore, that the learned Subordinate Judge is right in his view that there should be no suspension of rent in this case but only abatement of rent as ordered by him.

The real question in controversy is whether the decision of the Certificate Officer could operate as *res judicata* or not in the present litigation. The learned advocate for the appellants relies upon a case, in which the judgment was delivered by me: *Dwijapada Das v. Kalipada De* (3) in support of the contention that the judgment of the Certificate Officer with which we are concerned was the judgment of a Court of special jurisdiction and is, therefore, binding upon the civil Court in this case.

This leads us to the question as to whether the Certificate Officer is a Court and secondly, it is a Court of special jurisdiction as contemplated in the decision I have referred to and in all the cases cited in that judgment. Reference is made first to S. 57, Act 3 of 1913 (B. C.) where it is stated that the Certificate Officer shall be deemed to be a Court and any proceeding before him shall be deemed to be a civil proceeding within the meaning of S. 14, Lim. Act 1908. It is argued that this shows that the Certificate Officer shall be deemed to be a Court for all purposes and this position of the Certificate Officer is

(1) A. I. R. 1927 Cal. 737=55 Cal. 689.

(2) A. I. R. 1925 P. O. 297=52 Cal. 417=52 I. A. 160 (P.C.).

(3) A. I. R. 1927 Cal. 421.



not restricted to the matter referred to in S. 14, Lim. Act. The contention of the learned advocate for the respondent, on the other hand, is that no such construction can be put on that section. He refers to S. 49 of the Act. Under S. 49 of the Act it is specially provided that every Collector, Certificate Officer and other officers acting under the Act shall have the power of a civil Court for the purpose of receiving evidence and so forth. It is contended, therefore, that certain powers of the civil Court have only been conferred on the Certificate Officer and he cannot be deemed to be a Court. It seems to me that there is considerable force in this contention, many officers have been invested with the powers of a Court for different purposes; for instance a Registering Officer exercises the powers of a Court for the purpose of summoning witnesses, taking evidence and so forth. In certain instances a Survey Officer has also been given that power. That does not necessarily make those officers a Court with special jurisdiction.

In my view the Certificate Officer cannot in any circumstance be considered as a Court. He is the mere agent for speedy and summary recovery of rents due to an estate under the management of the Court of Wards. (I deal at present merely with the question of recovery of rent by the certificate procedure). The mere requisition in a prescribed form by a person entitled to recover rent enables the Certificate Officer to file a certificate. This certificate may be challenged by the certificate debtor by following a certain procedure. If you call this officer a Court the procedure is contrary to all sense of justice and the rules universally followed by a Court. First comes the sentence and then the trial of the certificate debtor who comes and seeks for trial. That certainly cannot be the procedure of a Court of Justice. Then again the Certificate Officer may cancel the certificate on various grounds which need not be such as a judicial officer considers proper. For instance it appears from the judgment of the Munsif that in this case the Certificate Officer cancelled the certificate on a previous occasion relying upon the Commissioner's letter containing certain directions to the manager in which he directed that requisition should be made for certificate only in cases where there would be no contest.

Now if it is held that the decision of the Certificate Officer cancelling the certificate prevents the plaintiff from bringing a suit in the regular Court, could it be said that even in the case last mentioned a person who made the requisition for certificate shall be debarred from getting his rent by a suit in the civil Court? I think not. Moreover it seems to me that the intention of the legislature was that the Certificate Officer should deal with such simple questions as to whether the certificate debtor was really in possession of the land for the rent of which the certificate has been filed, or whether he has actually paid the amount due. It could not possibly have been the intention of the legislature that the Certificate Officer who cannot be presumed to be a trained lawyer, should decide such complicated question as arose in this case, as to whether there should be a suspension of the entire rent because the defendants had been dispossessed of a small area of the tenure. The question involved is one of considerable difficulty and there has been a number of authorities taking different views on different sets of facts. In that view, in my opinion, the judgment of the Certificate Officer cannot operate as *res judicata* as regards the suspension of rent. Another argument raised on behalf of the respondent is that power has been given to the certificate debtor to question the certificate in the civil Court, but no power has been given to the landlord when the certificate is cancelled to question the decision of the Certificate Officer in a civil Court. To say that the landlord must be bound by the order of the Certificate Officer who cancels his certificate but the certificate debtor may question his decision by a reference to the civil Court would be essentially wrong. There is considerable force in this argument which is not met by the reply of the appellants that the landlord chose his own tribunal and he must abide by its decision, right or wrong; and he cannot make a grievance if he is prevented from going to the civil Court and question the decision of the Certificate Officer.

I hold, therefore, that the Certificate Officer not being a Court exercising special jurisdiction, any decision arrived at by him cannot operate as *res judicata* on any question raised in a civil Court. In that view it is unnecessary for me to discuss the question whether the action of



the Certificate Officer in filing the certificate was ultra vires or not.

This appeal is, therefore, dismissed with costs.

**Bose, J.**—I agree.

M.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 133

MITTER J.

*Sailaja Sundari Rai*—Petitioner.

v.

*Surja Kanta Choudhury and others*—  
Opposite Parties.

Civil Rule No. 572 of 1928, Decided on 13th August 1928, from order of 1st Munsiff, Habiganj, D/- 11th February 1928.

(a) **Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 52.**

A transferee from a tenant is entitled to make a deposit of the decretal amount for the non-payment of which the tenant is liable to be ejected. 1 *Marshall's Rep.* 417; 7 *Cal.* 474; 23 *C. W. N.* 132, *Rel. on.* 42 *Cal.* 172 (F.B.), *Ref. A. I. R. 1927 Cal. 752, Diss. from.*

[P 134, C 1]

(b) **Interpretation of Statutes—Expropriating statute—Restriction on rights of person having interest in holding must be express or plainly implied.**

In order to affect the rights of persons who have got an interest in holding, so as to debar them from preventing the total loss of the holding, the statute must either expressly or by plain implication say that they are so debarred.

[P 134, C 2]

*Birendra Chandra Das and Bhagirath Chandra Das*—for Petitioner.

*Satyendra Kissore Ghose and Benoyendra Nath Palit*—for Opposite Parties.

**Judgment.**—This rule was obtained by the petitioner who happens to be a mortgagee of a non-transferable occupancy holding for the revision of an order by which the Munsiff declined to allow her to make a deposit of the decretal amount under S. 52, Act 8 of 1869 which prevails in the district from which this case comes. It appears that the opposite party 4 held a mourashi occupancy holding under the opposite parties 1, 2 and 3 for a considerable length of time, that on 7th December 1915 opposite party 4 mortgaged a portion of the holding to the petitioner on executing a mortgage bond and taking a loan of a certain sum which afterwards swelled into Rs. 329. Opposite party 4 not having paid the money he borrowed, the petitioner instituted a suit on 6th December 1926 in the

Court of the Munsiff at Habiganj for enforcing the dues under the mortgage and for realizing the sum of Rs. 329. After the institution of the mortgage suit opposite parties 1 to 3 brought a rent suit against opposite party 4 for arrears of rent. The suit was decreed ex parte on 1st February 1927. The decree directed that if the defendant did not pay Rs. 9-1-0 as rent for the year 1322 B. S. within fifteen days of the date of the decree, the defendant in that suit would be liable to be ejected from the suit land. The petitioner states that on coming to know of this fact and of the decree for ejectment she applied on the 9th February 1927 to be allowed to make the deposit and as a matter of fact she actually deposited the sum of Rs. 9-1-0 in the Court on 16th February 1927. Her application to make the deposit was considered after several adjournments on the 11th February 1928 and the Munsiff held that she had no locus standi to make the deposit although the application was not contested by the defendant in the rent suit, that is, opposite party 4. For the revision of that order this Rule was asked for and obtained and it is argued on behalf of the petitioner that the Munsiff had failed to exercise a jurisdiction vested in him by law in not allowing the petitioner to make the deposit under S. 52 and in declining to entertain her application for that purpose. In support of this contention reliance has been placed on a very early decision reported in *Saroda Proshad Roy v. Nobinchandra Dutt* (1), where Norman, J. and Kemp, J. dealing with S. 78, Act 10 of 1859, the words of which section are precisely similar to the words of S. 52 of Act 8 of 1869, held that the arrear could be paid not only by the tenant but also by his transferee or by any other party interested in saving a forfeiture of the tenure. Reliance has also been placed on a decision of this Court in the case of *Inder Pershad Singh v. Campbell* (2) where it was assumed by Ramesh Chandra Mitter, J. and Maclean, J. that a deposit could be made not only by the tenant but by a transferee from him or by a person who held under the tenant. At p. 478 of the Report the learned Judges said this :

“The mere fact that the plaintiff might have paid up the amount of the decree against the Bhatowlia Factory, and thus saved the factory

(1) [1864] 1 *Marshall's Rep.* 417=2 *Hay.* 527.

(2) [1881] 7 *Cal.* 474 = 8 *C. L. R.* 501.



and himself as its tenant from ejectment, is not enough. We are informed it was a decree for rent and for ejectment under S. 52, Beng. Act 8 of 1869 : but it may be that the decree was for a sum which the plaintiff could not reasonably be expected to pay, considering that he would have no security for his payment. The law which allows any one interested in protecting a tenure from sale to pay up a decree, gives him full security in the shape of a right to take possession of the tenure: but this is not the case under S. 52 of the same Act."

The next decision on which reliance has been placed is a decision of Teunon, J. and Cuming, J. in the case of *Kali Kishore Das v. Gopal Ram Shaha* (3), and the learned Judges there held that where in execution of a decree for rent the landlord decree-holder proposed to eject the tenant of a non-transferable holding under the provisions of S. 52, Bengal Act 8 of 1869, and to avoid the ejectment a third person claiming to be a transferee from the tenant sought to make the deposit provided for by the section he was entitled to make the deposit. In arriving at that decision the learned Judges referred to the Full Bench case of *Dayamoyi v. Ananda Mohan* (4) and the learned Judges held that having regard to the principles laid down in the case from *Marshall's Reports* to which I have referred and to the principles of the decision in the Full Bench case in *Dayamoyi v. Ananda Mohan* (4), the transferee of a portion of a non-transferable occupancy holding was entitled to make the deposit under S. 52. So the view of the law is that under S. 52 it is not the judgment-debtor alone but anyone who happened either to be a transferee from the judgment-debtor or a person who was otherwise interested in protecting the tenure from forfeiture, was entitled to make the deposit.

This was the view of the law which obtained in this Court from the year 1864 to the year 1927 when two of my learned brothers (Suhrawardy, J. and Mallik, J.) took a view contrary to the view taken in the cases to which I have referred. In that case the learned Judges held that there was nothing in Act 8 of 1869 which entitled the purchaser of a non-transferable occupancy holding to make a deposit under S. 52 of the said Act in order to avoid ejectment of the tenant. Apart from authorities it

becomes necessary to examine the language of S. 52 which runs as follows:—

"Any person desiring to eject a raiyat or to cancel a lease on account of non-payment of arrears of rent, may sue for such ejectment or cancelment and for recovery of the arrear in the same action, or may adduce any unexecuted decree for arrears of rent as evidence of the existence of such arrear in a suit for such ejectment or cancelment. In all cases of such suits for the ejectment of a raiyat or the cancelment of a lease, the decree shall specify the amount of the arrear, and if such amount together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed."

The words "to be paid into Court within fifteen days" do not impose any limitation as to the person by whom the payment is to be made and it has been argued on behalf of the petitioner that if under S. 62 of Act 8 of 1869 any one interested in the protection of the under-tenure can put in the money for the purpose of preventing the sale there is no reason why any person other than the judgment-debtor who is interested in protecting the holding from forfeiture by the landlord is not entitled to make a deposit. The language of the section itself does not suggest that the money must be paid by the judgment-debtor in the rent suit and by him alone. It has, however, been argued by Mr. Satyendra Kishore Ghose, who appears for the opposite party that the language of Ss. 46 and 47, Act 8 of 1869, suggests that there is also an implied prohibition in S. 52, for any person other than judgment-debtor to make the deposit in just as under Ss. 46 and 47, it is said, the judgment-debtor alone could make that payment, so also in S. 52, the payment could only be made by him. I do not think that would be the proper mode of the interpretation of the statute.

In order to affect the rights of persons who have got interest in the holding, the statute must expressly say so, as it seems unreasonable as to why any one having an interest in the holding should be prohibited under S. 52 unless the statute either expressly or by the plainest implication suggests a contrary construction. Besides, looking to the facts of this particular case before me it would certainly be a great hardship to the petitioner if for a decree for Rs. 9-1-0 obtained in circumstances I have narrated, the tenant would be evicted from the holding which had been mortgaged to the petitioner for a large sum of Rs. 329 odd. Looking from the common sense point of view the land-

(3) [1919] 23 C. W. N. 132 = 49 I. C. 766.

(4) [1915] 42 Cal. 172 = 20 C. L. J. 52 = 27 I. C. 61 = 18 C. W. N. 971 (F.B.).



lord certainly is entitled to get the arrears of rent from his tenant and if a tenant chooses for his benefit to effect a transfer of a portion of his occupancy holding for a large sum, the interest of such a transferee ought not to be allowed to be affected to his prejudice so long as the landlord gets all his dues which is said to be recoverable from the tenant. There is undoubtedly the decision in the case of *Baneswar Singh v. Abdul Hassan* (5), which supports the contention of the opposite party but having regard to the language of the statute and having regard to the fact that the earlier authorities applicable to the case and which are relied on on behalf of the petitioner have stood for more than half a century, I feel myself reluctant to follow the last decision in the case. It is true, as I have said in another case that it cannot be said that the last word has been said on the subject. I think the ends of justice will be met if the petitioner be allowed to make the deposit. The order of the Munsiff is, therefore, set aside and he is directed to receive the deposit which has been made by the petitioner. The Rule is made absolute. There will be no order as to costs.

M.N./R.K. *Rule made absolute.*

(5) A. I. R. 1927 Cal. 752.

### A. I. R. 1929 Calcutta 135

B. B. GHOSE AND CAMMIADÉ, JJ.

*Moosa Soleman Salehji and others—Appellants.*

v.

*Secretary of State—Respondent.*

In the matter of an application in Appeal No. 340 of 1927, Decided on 2nd December 1927, from original decree of Dist. Judge.

**Court-fees Act (7 of 1870), S. 17—Matter for consideration in a number of appeals same and parties same—Appeals may be consolidated into one appeal but Court-fees must be paid separately for each according to the provisions of the Act.**

There is no objection to consolidating a number of appeals in the exercise of the inherent jurisdiction of the Court, if the matter for consideration in a number of appeals is the same and the parties are the same. But it is another matter when it is sought to invoke the aid of S. 17, Court-fees Act, on the allegation that the memorandum of appeal in each of these cases should be consolidated into one memorandum of appeal and treated as if it was

one memorandum for a single appeal. The appeals may be consolidated for the purpose of hearing them but Court-fees must be paid separately for each according to the provisions of the Court-fees Act : 29 Cal. 140, *Expl.*

[P 136 C C 1]

*Bupendra Kumar Ghose—*for Petitioners.

*Senior Government Pleader—*for Respondent.

**Judgment.**—This is an application made on behalf of the appellants who filed four appeals against the decision of the District Judge in four land acquisition matters relating to the compensation awarded for acquisition of four plots of land. The appellants are the same and the respondent is the Secretary of State in all the cases. Although the lands were in possession of different tenants, they are no parties to these appeals. The application on behalf of the appellants is that all the four appeals may be consolidated and, in effect, the prayer is that the memoranda of appeals in all these cases should be considered as one memorandum of appeal; after having done that, to apply S. 17, Court-fees Act, and to allow them to pay Court-fees on the consolidated value of all the four appeals instead of paying Court-fees for each appeal separately, as they are bound to do under ordinary circumstances. In support of the application, the learned vakil for the petitioners referred to the case of *Kashi Prosad Singh v. Secretary of State* (1). The last paragraph of the head note to the report apparently supports the contention of the petitioners: but as the learned Government Pleader has drawn our attention to the reasoning in the judgment it seems to us that the learned Judge did not accept the contention of the counsel on behalf of the appellant petitioners in that case that they should be required to pay Court-fees on the consolidated value of all these appeals. At p. 147 the learned Judges make the following observation.

“There seems to be no reason in principle why we should not in these cases make an order consolidating them, so as to enable the appellants to have any benefit to which they may be entitled under S. 17, coupled with the proviso of Art. 1, Sch. 1, to which we have already referred. S. 17 declares that, if there are distinct subjects involved in a plaint or in an appeal, the Court-fee payable was to be calculated on the aggregate amount of the fees to which the plaints or memorandum of appeal in suits embracing separately each of such subjects would be liable under this Act.

(1) [1902] 29 Cal. 140.



Mr. Donogh on behalf of the appellants contends that the subject-matter of these different references are practically one and the same. We are not prepared to give effect to that contention. The plots are different; they are occupied by different tenants; the references were separate, and no application was made in the Court below for consolidation. The application to the Subordinate Judge was simply for the purpose of treating the cases as similar in their nature, and, therefore, we think that we ought not to treat them as all referring to one subject-matter. So far we are at one with the learned Government Pleader.

These observations clearly support the contention of the Senior Government pleader in the present case. There is no objection to consolidating a number of appeals in the exercise of the inherent jurisdiction of the Court, if the matter for consideration in a number of appeals is the same and the parties are the same. But it is another matter when it is sought to invoke the aid of S. 17, Court-fees Act, on the allegation that the memorandum of appeal in each of these four cases should be consolidated into one memorandum of appeal and treated as if it was one memorandum embracing two or more distinct subjects. That, in our opinion, it is difficult to hold and the learned Judges in the case referred to did not hold it to be so. The learned Judges in the concluding portion of the judgment expressed their order in that appeal in the following terms.

"We, accordingly direct that the appeals be consolidated, and that the appellants do pay Court-fees upon the value of the consolidated appeals under S. 17, Court-fees Act, subject to the limitation under Art. 1, Sch. 1 of the Act, namely, Rs. 3000."

We are unable to follow why the learned Judges referred to S. 17, Court-fees Act, in this connexion. The question as to the maximum amount of Court-fees payable does not arise in the case before us. So far as the judgment goes, the learned Judges were of opinion that S. 17 could not be invoked in aid of the petitioners in such a case as this. We are also of opinion that we are unable to treat the memorandum in each of these appeals as one memorandum for a single appeal. The appeals may be consolidated for the purpose of hearing them but Court-fees must be paid separately for each according to the provisions of the Court-fees Act. The petitioners have paid the proper Court-fees for two of these appeals; with regard to the other two, the deficit Court-fees have not been paid. We allow them time to pay the

balance of the Court-fees due on or before Monday, 5th December next. There will be no order as to costs of this hearing.

Let the papers be sent down to the office without delay.

A.L./R.K.

*Order accordingly.*

## A. I. R. 1929 Calcutta 136

MUKERJI AND BOSE, JJ.

*Hamitulla—Plaintiff—Appellant.*

v.

*Karim Bux and others—Defendants—Respondents.*

Appeal No. 1032 of 1926, Decided on 6th July 1928, from appellate decree of First Sub-Judge, Dacca, D/- 7th December 1925.

**Mahomedan Law — Pre-emption — Invocation of witnesses is absolutely necessary in the second demand if it has not been done in the first.**

In a case of pre-emption under Mahomedan law in order to dispense with the necessity of Talad-i-Ishhad the Talab-i-Mowasibat must be accompanied by the formality that is prescribed under the Mahomedan law as to the invoking of witnesses. If this invocation of witnesses has been done in the first demand no second demand would be necessary, otherwise the second demand is absolutely necessary. 4 B. L. R. A. C. 171 and 8 B. L. R. 455 Ref. [P 137 C 1]

*Nagendra Nath Bose—for Appellant.*

*Hiralal Ganguli—for Respondents.*

**Judgment.**—This appeal has arisen out of a suit to enforce the right of pre-emption. Defendant 1 who is the brother of the plaintiff was the vendor and the other defendants, namely, defendants 2 to 5 the vendees. The Courts below have dismissed the suit on the ground that the second demand, namely, the Talabi-i-ishhad has not been satisfactorily proved. So far as this finding is concerned it is a finding of fact. But then it has been argued on behalf of the plaintiff-appellant that inasmuch as the Talab-i-mowasibat was duly proved and it was accompanied by the requisite formalities and was made in the presence of witnesses, the necessity for a second demand of Talabi-i-ishhad has been dispensed with. Now the precise question as to the circumstances under which the first demand would be sufficient has been considered in a very recent case of this Court namely to which decision one of us was a party and which is about to be reported. It has been held in that case on a consideration of the



authorities that in order to dispense with the necessity of Talabi-i-ishhad the Talabi-mowasibat must be accompanied by the formality that is prescribed under the Mahomedan law as to the invoking of witnesses. It has been held in that case that if this invocation of witnesses has been done in the first demand no second demand would be necessary. It has thus been said in that case :

"The right is strictissimi juris and failure to perform the demands in accordance with the requirements of the Mahomedan law would defeat the plaintiff's claim."

The invoking of witnesses, as far as may be gathered from the authorities, is no mere matter of form; it imparts to the demand a solemnity clothed in which the demand becomes not a casual one but on the other hand assumes the nature of a serious transaction. No particular form of words is necessary for the invocation of witnesses, but the claimant in the presence of witnesses must say to the following effect :

"Such a person bought such a property (sufficiently indicating the same) of which I am the Shafi; I have already claimed my right of Shafia and now again claim it, be therefore witness thereof." (Ameer Ali on Mahomedan Law, 4th Edition, Vol. II, p. 72.)

The last word or words to that effect must be said even where the two demands are combined into one. The importance of this invocation as an essential part of the ceremony has been impliedly recognized in several cases amongst which reference may be made to *Jadu Singh v. Raj Kumar* (1); *Ramdular Misser v. Jhumack Lal* (2).

Upon the findings of the two Courts below and indeed upon the evidence on the record there is nothing to suggest that this invocation of witnesses accompanied the Talabi-i-mowasibat. Under these circumstances the second demand was absolutely necessary.

The appellant's contention therefore in our opinion fails and the appeal must be dismissed with costs.

A.L./R.K.

*Appeal dismissed.*

(1) [1871] 4 B. L. R. A. C. 171=13 W. R. 177.

(2) [1872] 8 B. L. R. 455=17 W. R. 265.

### A. I. R. 1929 Calcutta 137

BUCKLAND, J.

*I. J. Cohen*—Applicant.

v.

*Bipin Behari Sadkhan* — Opposite Party.

Misc. Appln., Decided on 19—7—1927.

**Calcutta Municipal Act (1923), S. 47 and Sch. 2, Part 1 (iii)—Corrupt practice—Connivance of candidate or agent in procuring application material — Connivance involves some degree of knowledge on their part—Section need not be construed strictly.**

A candidate and his agent had no reason to believe that there was any imposture at the time when voters came forward to apply for voting papers in the name of persons who were afterwards proved to be dead. When the rival candidate challenged their identity, the candidate merely stood by and the agent identified the voters.

*Held* : that there was no corrupt practice by either the candidate or his agent, whose connivance in procuring the application is material, and some degree of knowledge of the truth on their part must be proved in order to establish connivance. The section need not be construed strictly. [P 130 C 2]

*Surita, Pankridge and S. N. Banerjee*—for Applicant.

*S. C. Bose and Langford James*—for Opposite Party.

**Judgment.** — This is an application made on behalf of Mr. Immanuel Jacob Cohen who was a candidate for election to the Corporation of Calcutta at the last general election for an order that the election of his successful rival, Bipin Behari Sadkhan, as councillor for the non-Mahomedan constituency of ward 13 on 16th March 1927, be declared null and void.

The application is made under Ss. 46, 47 and Sch. 2, Part 1, Sub-S. 3, Calcutta Municipal Act of 1923. S. 43 provides that if the validity of any election is questioned by reason of the commission of any corrupt practice by a candidate or his agent any person enrolled in the electoral roll may at any time within a specified period apply to the High Court. Under S. 47 if the High Court is of opinion that any corrupt practice specified in Part 1, Sch. 2, has been committed the election of the returned candidate shall be void. Sch. 2, Part 1 (iii) provides that the procuring or abetting or attempting to procure by a candidate or his agent or by any other person with the connivance of the candidate or his agent, the application by a person for a voting paper in the name of any other person whether living or dead is a corrupt practice.

In his petition the applicant has made the charges, but for the purpose of the hearing, which the nature of the case requires should be decided upon oral evidence, the charges have been limited to three. The first is that one Lachman Tora



whose name appeared as voter No. 1255 on the electoral roll at the time of the election, was dead; that somebody else appeared at the polling both representing himself to be Lachman Tora, and was identified by the agent of the successful candidate as Lachman Tora though Mr. Cohen challenged his identity, while Sadhukhan was present and allowed the imposter so to be identified.

The second charge is with reference to a voter of the name of Jasoda Lal Roy No. 1181. He too, it is charged, had died prior to the date of the election, and it is stated in the petition that with reference to him also the same occurred.

The third charge is that, among others, thirteen specified persons were out of Calcutta but that they were personated and the polling agent of the successful candidate identified them although the identity of each was challenged by Mr. Cohen. Though thirteen names are given, this item of charge has been limited at the hearing to the case of Sadhu Charan Pal, Voter No. 1156, the second on the list, who, Mr. Cohen says, was very well known to him for a long time and was out of Calcutta on the day in question.

In answer a number of affidavits have been filed by Bipin Behary Sadhukhan and by others to whom the third of these charges relate. As regards Sadhu Charan Pal the affidavit is that of Radhanath Sett, his nephew, who asserts that his uncle was in Calcutta on the day of the election.

The parties have been cross-examined on their affidavits and in canvassing voters their procedure was much the same, but with different results. Mr. Cohen says that before the election he went round to a large number of the electors canvassing their votes in the manner which is usual in contested elections, and on calling at the shops where these two persons Lachman Tora and Jasoda Lal Roy were supposed to carry on business he was informed that they were dead. In the list which he had with him he made a note that they were dead, and accordingly prepared himself on the day of the election to challenge any votes that it might be attempted to record on their behalf.

Sadhukhan says that he was a member of the last previously elected body of Municipal Commissioners, and as such he was one of the Market Committee. It was

his duty frequently to make tours of the Municipal market and in that capacity he became well acquainted with this individual by sight but not by name, who, when he enquired of him with special reference to this election, announced that his name was Lachman Tora.

The evidence with regard to Jasoda Lal Roy is much the same except that Sadhukhan does not say that he knew the man by sight before hand.

Consequently we have it that on one side on enquiry at the voter's places of business one candidate was told that they were dead while the other candidate was given to believe that they were alive and would vote in his favour. I may say at once that I see no reason to doubt either of these two stories. There is nothing on the record to show, or from which it can be inferred, that prior to the date of the actual election anybody communicated either to Sadhukhan or to his agent that the voters in question were dead. That they both in fact were dead at the time of the election is common ground. Subsequently Sadhukhan made enquiries and ascertained this, but that does not affect the matter.

On the day of the election at the polling booth where these persons were required to vote, two persons came and asked for voting papers in the name of Lachman Tora and Jasoda Lal Roy respectively. According to the evidence Mr. Cohen challenged them. They were identified by Sadhukhan's agent N. K. Dutt. It is of no consequence whether Sadhukhan also participated in the identification or not, in any case he was present and saw what happened. Mr. Cohen spoke up and on each occasion when the application of a voting paper was made informed the presiding officer that the two alleged voters were dead. There lies before me with regard to the votes, of these persons a printed form headed 'list of challenged votes.' It contains the name of the voter and the name of the identifier. Then follows the order of the presiding officer in the words 'questioned and allowed' signed J. B. Ganguli, who was the presiding officer on the day in question. At the foot is a printed form in the following terms :

"I do hereby declare and undertake to prove the person applying for ballot paper under electoral roll serial no. has committed the offence of personation."



This is signed in each case by Mr. Cohen himself and the Fenwick Bazar polling station, Booth No. 3 is specified.

Mr. Cohen said that the presiding officer simply enquired of the alleged voter what his name was. But as Sadhukhan would be more interested in giving the fullest possible account of what occurred I questioned him myself and he said that what happened was that the presiding officer asked of each of these persons who they were. They gave their name as being those of the alleged voters. The presiding officer pointed out to them that Mr. Cohen challenged them and cautioned them that he said that the persons whom they professed to be were dead. They re-asserted that they were the persons whom they professed to be. The presiding officer warned them of the risks they ran if they did not tell the truth. They repeated their assertions and they were allowed to vote.

As regards Sadhu Charan Pal nothing need be said for there is nothing in any way to connect Sadhukhan with the alleged impersonation other than the formal identification by his agent. It may be that this case could have been carried further but on the evidence I cannot hold that A. K. Dutt knew that the voter was not Sadhu Charan Pal even should I hold that Radhanath Sett is not to be believed.

The question is whether on the evidence there has been a corrupt practice by Mr. Sadhukhan or by his agent. This depends upon the meaning of the section which defines the offence of personation. The section is somewhat difficult to construe. There must be an application by some person for the voting paper. That is the basis from which the rest proceeds. It is corrupt practice if that application is made in the name of a dead person and if the application is procured or abetted or attempted to be procured by a candidate or his agent or by any other person with the connivance of the candidate or his agent. If the words

"by any other person with the connivance of a candidate"

refer to the impostor himself, then the words, applying them to this case, refer to an application by an impostor, attempted to be procured by the impostor with the connivance of the candidate or his agent, which is not a very intelligible solution of the meaning of the section. In that view it is argued that I am not

concerned with the word connivance. I do not think it is necessary strictly to construe the section and it may be assumed that connivance of the candidate or his agent is material. Connivance in my judgment necessarily involves some degree of knowledge on the part of the candidate or his agent. The meaning of the word connivance according to Murray's Oxford Dictionary is

"the action of winking at, overlooking or ignoring an offence, fault etc. often implying secret sympathy or approval, tacit permission or sanction; encouragement by forbearing to condemn."

All these meanings in my opinion involve in some degree at least knowledge on the part of the person guilty of connivance. It has been argued—that even if Sadhukhan or his agent had reason to believe that there was no imposture at the time when the voters came forward, he nevertheless by standing by, and, in the case of the agent, by identifying the voters when Mr. Cohen had challenged them, connived at the imposture. I cannot take that view for that would involve that their belief should change upon Mr. Cohen challenging the identity of the voters. It is, I agree, a suspicious circumstance that N. K. Dutt, the agent, has made no affidavit in this case. But nevertheless taking the view that I have expressed, in order to bring Sadhukhan or his agent within the section, I must come to a finding that either he or his agent knew of the imposture or at least had reason to believe that there was imposture. It is therefore immaterial that N. K. Dutt has made no affidavit, for there is no evidence upon which I could find that as a fact, or from which I should be justified in drawing such an inference. The application therefore must fail.

Before I part with the case, I desire to make some observations, both generally and as affecting the question of costs. Certain very definite facts have emerged. It has been established, first, that there were dead men on the register of voters, secondly, that there were impostors at the municipal election, and that such impostors voted as representing the dead men whose names were on the register. Thirdly it emerges from the evidence that the enquiry by the presiding officer was of the most perfunctory nature. That this was any thing more than a brief interrogation is not the case, though there was a statement by a responsible person, name-



ly, Mr. Cohen that this voter himself was dead—a statement which he further more supported by signing at the foot of the list of challenged votes that he undertook to prove that the person applying for the ballot paper had committed the offence of personation. Further though the list of challenged votes contains a printed form at foot, which suggests from the mere fact of its existence in print that the offence is by no means a rare one, and though the presiding officer warned these persons that if they were not telling the truth they would be punished, so far as I have heard in the course of this case nothing further has occurred. These things have undoubtedly been established in the course of this case. It would be for the present purpose but unprofitable speculation to enquire to what extent this prevails in municipal elections in Calcutta. But on the evidence before me there is nothing to show that any serious attempt is made to prevent it. Whether any and what proceedings can be taken against impostures it is not my duty to enquire, nor is it my duty to say whether these abuses are due to defects in the law or to defects in the conduct of the municipal election. But so far as the applicant has made it clear that such impostures can and do take place, and can, it would appear, be achieved with comparative ease, he has in my opinion rendered a considerable service to the public. This is a matter which I propose to take into consideration on the question of costs. In his evidence he has been moderate in his statement of facts, he has confined himself to such facts as came to his knowledge, and made no attempt to stress them for the purpose of pressing his case. His error has been in taking a mistaken view as to the knowledge of his successful rival.

Having regard to these matters and having regard to the public service which the applicant has undoubtedly, in my opinion, performed by bringing these abuses to light, in my opinion and judgment he should not be mulcted in the costs of this application, and though it must fail I make no order as to costs.

M.N./R.K. *Application dismissed.*

## A. I. R. 1929 Calcutta 140

B. B. GHOSE AND BOSE, JJ.

*Daliluddi*—Defendant—Appellant.

v.

*Bakshi Bepari and others*—Plaintiffs—Respondents.

Appeal No. 397 of 1927, Decided on 1st June 1928, from appellate order of Offg. Sub-Judge, Barisal, D/- 16th May 1927.

**Bengal Tenancy Act, S. 66 (3) — Decree directing to pay within specified time — Extension of time is not one under S. 66 (3), Ben. Ten. Act — No appeal lies from such order—Only revision can set it right—Civil P. C., Ss. 47 and 115.**

When a decree is drawn up directing the judgment-debtor to pay the decretal amount within a specified time, the extension of time would not be an order under S. 66 (3), Ben. Ten. Act. It is an order varying the terms of the decree which the Court has no jurisdiction to vary.

Where the Court varies the terms of a decree by extending time which he has no jurisdiction to do, there is no appeal from that order but it can only be set right by an application for revision: 26 Cal. 639, Dist. [P 141 C 1]

*Jitendra Nath Sanyal*—for Appellant.

*Gunada Charan Sen and Prasanna Bhusan Gupta*—for Respondents.

**B. B. Ghose, J.**—This is a case arising out of an order passed by the Munsif under S. 66 (3), Ben. Ten. Act. A decree was made in a suit brought by the respondents for rent and ejectment of an under-raiyat. Under sub-S. (2), S. 66 of the Act a decree was passed in favour of the plaintiffs specifying the amount of the decree and the interest due. Under the second part of that sub-section it seems to me that it is not necessary to specify anything with reference to the execution of the decree, because the law provides that the decree should not be executed if the amount of the decree and the costs of the suit are paid into Court within 15 days or on the re-opening day, if the Court is closed on the fifteenth day. Under sub-S. (3) the Court may for special reasons extend the period of 15 days. The Munsif extended the time. On appeal to the Subordinate Judge he held that the time was wrongly extended and he set aside the order of the lower Court extending the time. From that order the present appeal is preferred by the judgment-debtor.

The first objection taken is that there is no appeal against the order of the Munsif to the lower appellate Court. It



is argued on behalf of the respondents relying upon the observations of the learned Judges in the case of *Bodh Narain v. Mahomed Moosa* (1), that there would be an appeal, as the order fell within the provisions of S. 47, Civil P. C. The decree in the present case stated the amount due to the plaintiffs and it further ordered that the judgment-debtor do pay the specified amount within 15 days and on failure to do that he would be liable to be ejected. As I read the provisions of sub-S. (2), S. 66, it does not contemplate the decree to be drawn up in that form. The decree would be an ordinary decree in ejectment stating the arrears of rent. But sub-S. (2), S. 66, prohibits the decree-holder from executing the decree if the amount is paid within the specified date. If the decree is properly drawn up and if the period within which the decree-holder is prohibited under the law from executing the decree is extended by sub-S. (3), S. 66, then I can understand very well that the order falls within S. 47, Civil P. C., because that would be an order relating to the execution of the decree, and then there would be an appeal from such an order. But when the decree is drawn up as in this case directing the judgment-debtor to pay the decretal amount within a specified time, the extension of the time would not be an order under sub-S. (3), S. 66 extending the time specified within which the decree-holder was prohibited from executing the decree. It is an order varying the terms of the decree. It seems to me at least doubtful whether the Court had any jurisdiction to vary the decree in that way.

The learned advocate for the respondents, however, points out that in the case above cited, reported as *Bodh Narain v. Mahomed Moosa* (1), the decree was apparently drawn up in the same terms as in this case, as is shown from the facts stated at the top of p. 640 (of 26 Cal.) of the report, and it is argued that in that case it was held by the learned Judges that the matter fell within S. 242 of the Code of 1882 (now S. 47). With some diffidence I think that there is some fallacy in the argument. If the Munsif had no jurisdiction to extend the time as I think he had not, then there would be no appeal to the Subordinate Judge from that order and it can only

be set right by an application for revision. But I may assume that there was an appeal. Assuming that to be so and although the defendant judgment-debtor does not seem to have acted with promptitude in this matter it seems to me that no sufficient ground has been made out for interfering with the order of the Munsif.

I would set aside the judgment of the Subordinate Judge and restore that of the Munsif. I understand that the amount of Rs. 15 odd has been deposited by the judgment-debtor. Having regard to the facts of this case the judgment-debtor is not entitled to any costs in any of the Courts.

**Bose, J.**—I agree.

W.S./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 141

MITTER, J.

*Gopal Chandra Biswas and others—*  
Plaintiffs—Petitioners.

v.

*Guru Charan Kirtania and others—*  
Opposite Parties.

Civil Rule No. 256 of 1927, Decided on 22nd June 1928.

(a) Bengal Tenancy Act, Ss. 105 (3) and 105-A—Application under S. 105 raising question regarding non-mokarari character of tenancy—Government notification under S. 105 (3) requiring ad valorem Court-fee stamp to be paid under Art. 1, Sch. 1, Court-fees Act, if question under S. 105-A be raised—Issue regarding non-mokarari right of tenancy is one under S. 105-A and ad valorem Court-fee is chargeable—S. 7 (4) of Court-fees Act is not applicable—Notification increasing Court-fee is not ultra vires as it incorporates only Art. 1, Sch. 1, Court-fees Act, and no other provision.

An application was made under S. 105 for settlement of fair and equitable rent and for a declaration that the rents of the assessed lands were liable to be enhanced and that the tenants were not mokararidars as recorded in the finally published record of rights. The application was treated as a plaint and the petitioners valued the claim for declaration at Rs. 5. Government notification under S. 105 (3), provided that if during the time of the hearing of application an issue is raised under S. 105-A, an additional stamp to the amount of an ad valorem fee chargeable under Art. 1, Sch. 1 Court fees Act would be payable.

*Held*, that the issue with regard to the declaration of the non-mokarari character of the tenancy was raised under S. 105-A and according to the notification a stamp to the amount of an ad valorem fee chargeable under Art. 1, Sch. 1, Court-fees Act, was payable. S. 7 (4) C of the Court-fees Act would not be applicable to this case. [P 143 C 1]

*Held further*: that the Government notification, although its effect is to increase the

(1) [1899] 26 Cal. 639,=3 C. W. N. 628.



Court-fees, is not ultra vires because it incorporates by reference only Art. 1, Sch. 1, Court-fees Act and no other provision of it.

[P 143 C 1]

(b) **Interpretation of Statutes—Intention of legislature clear from language—It has to be obeyed whatever may be Judge's opinion.**

The plain intention of the legislature as expressed by the language employed is invariably to be accepted and carried into effect whatever may be the opinion of the judicial interpreter of its wisdom or justice. If the language admits of no doubt or secondary meaning, it is to be obeyed.

[P 143 C 2]

*Sarat Chandra Roy Choudhury, Brojendra Nath Chatterjee, Srish Chandra Dutt and Nagendra Kumar Dutt*—for Petitioners.

*Surendra Nath Guha and Mukunda Behary Mullik*—for Opposite Parties.

*Biraj Mohan Majumdar*—for Deputy Registrar.

**Order.**—The question raised by this rule relates to the amount of Court-fees which is payable on an application under S. 105, Ben. Ten. Act, for settlement of fair and equitable rent and for a declaration that the rents of the assessed lands were liable to be enhanced and that the tenants are not mokararidars as recorded in the finally published Record-of-Rights. The said application was treated as a plaint and the petitioners before me valued the claim for declaration at Rs. 5 and the claim for enhancement of rent from Rs. 57-15-6 to 123-9 per year bore a stamp of annas twelve.

The Assistant Settlement Officer held that the application claiming enhancement bore the proper Court-fee but in regard to the declaration that the tenancy was not a mokarari one he demanded ad valorem Court-fee on the value of the subject matter in dispute. The value of the subject matter in dispute was directed to be ascertained by the Head Quarters Assistant Settlement Officer of the settlement after hearing the petitioners. This was the order which was made on the 26th October 1926. A review of that order was applied for and on 10th February 1927 the review was rejected, and the Settlement Officer directed that unless the deficit Court-fee was paid within a certain time the application would be dismissed. This rule was issued on the opposite parties and the Senior Government Pleader of the High Court to show cause why the order of 26th October 1926 should not be set aside and the Court-fee already paid be deemed

sufficient. I have heard the learned advocates for the petitioner and the Senior Government Pleader who showed cause against the rule.

The question turns on the construction to be put on S. 105, Cl. (3), Ben. Ten. Act, and on the notification of Government made under this Section No. 6954 dated 21st July 1923 published in the Calcutta Gazette and which is quoted below: The notification is as follows:

"In exercise of the powers conferred by S. 105, Sub-S. (3), Ben. Ten. Act, 1885 (8 of 1885), as amended by the Devolution Act, 1928 (38 of 1920, and in modification of the Government of India's notification No. 2254-F dated 8th August, 1918 published in the Gazette of India of 10th idem and republished at p. 465 part IA of the Calcutta Gazette of 14th idem, the Governor-in-Council is pleased to direct that an application made under the said section for a settlement of rent during the preparation of a Record-of-Rights under Chap. 10, Ben. Ten. Act, shall bear, (a) a stamp of 12 annas for each tenant making or joining or joined in an application, and, (b) if at any time during the hearing of the application, an issue is raised by the applicant under S. 105-A of the said Act, in addition a stamp to the amount of an ad valorem fee chargeable under Art. 1, Sch. 1, Court-fees Act 1870 (7 of 1870), as amended by the Bengal Court-fees (amendment) Act, 1922 (4 of 1922) subject to a maximum of Rs. 20."

Here the issue with regard to the declaration of the non-mokarari character of the tenancy is raised by the petitioners under S. 105-A, Ben. Ten. Act, and according to the notification which I have quoted above it seems to me clear that a stamp to the amount of an ad valorem fee chargeable under Art. 1, Sch. 1, Court-fees Act 1870 as amended by the Bengal Court-fees Amendment Act (No. 4 of 1922) subject to a maximum of Rs. 20 is payable. Art. 1, Sch. 1, of Court-fees Act enacts that the Court-fee payable on a plaint presented to any civil or revenue Court should bear an ad valorem fee according to the amount or value of the subject matter in dispute. In support of the rule the learned advocate for the petitioners has argued that the declaratory relief sought, and the consequential relief of enhancement prayed for in the application under S. 105-105-A bring the case within S. 7 (iv) C of Court-Fees Act and consequently the ad valorem Court-fee was payable on the amount at which the relief sought was valued in the application under S. 105-A which in this case amounts to Rs. 5. I do not think S. 7 (iv) C of Court-Fees Act can have any possible application to the pre-



sent case. The Court fees have to be paid according to the notification under S. 105 (3) which has been quoted above in extenso. The Court-fee payable is the ad valorem fee on the value of the subject matter of dispute. In the course of the argument a suggestion was made that the notification was ultra vires as it contravened the provisions of S. 35, Court-fees Act which gave authority to reduce the fees mentioned in the Act and it is said that as the effect of the notification is not to reduce or remit the Court-fees but to increase it, the notification is ultra vires. This argument, however, was not seriously pressed. There is also no substance in it as the Court-fees in respect of S. 105 proceedings have to be determined by S. 105 (3), Ben. Ten. Act and the notification under the said section. The notification incorporates by reference only Art. 1, Sch. 1, Court-fees Act and no other provisions of the said Act.

It is argued for the petitioners that it could not have been the intention of the legislature that an application under S. 105-A would bear a higher Court-fee than a plaint in a suit for same relief in the civil Court. But the intention of the legislature can only be gathered from the plain words of the notification under S. 105 (3) and it is not permissible to a Court while construing the plain words of a statute or a statutory rule to speculate whether the intention of the legislature was to impose a higher Court-fee than that provided for by the Court-fees Act in suits where similar reliefs are asked for in the civil Courts. In this connexion the following remarks of Maxwell in his book on the Interpretation of Statutes seem very apposite: see p. 94 Sixth Edition (1920).

"In a word then it is to be taken as a fundamental principle, standing as it were on the threshold of the whole subject of interpretation, that the plain intention of the legislature, as expressed by the language employed is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice. If the language admits of no doubt or secondary meaning it is to be obeyed."

The notification is clear and the Court-fee payable is the ad valorem fee on the subject-matter of dispute and the enquiry as to what the subject matter of dispute is, is still pending. This Rule is discharged. There will be no order as to costs.

S.N./R.K.

*Rule discharged.*

## A. I. R. 1929 Calcutta 143

DUVAL, J.

*Ajneswar Karmakar* — Defendant —  
Petitioner.

v.

*Kailash Chandra Ghose*—Plaintiff—  
Opposite Party.

Civil Rule No. 800 of 1927, Decided on  
10th November 1927.

**Limitation Act, Art. 145**—Deposit of gold  
for preparing ornaments—Suit for recovery  
of the same or its value—Article applies  
even though property is not recovered in  
species.

The plaintiff sued for refund of certain gold and silver kept in the custody of the defendant or in lieu of the price thereof. His case was that he handed over two tolas of gold and some silver ornaments to the defendant for making some ornaments but the defendant never made the ornaments and refused to return the gold and silver. The defendant pleaded limitation.

*Held:* that Art. 145 applied and the suit was not barred as Art. 145 merely applies even when property is not recovered in species.

*Held further:* that the mere fact of possession by the depository after demand becoming wrongful does not take the case out of Art. 145: 7 C.W.N. 476; 23 C.L.J. 145 and A.I.R. 1921 Cal. 416, *Foll.* [P 144 C 1]

*Prafulla Kamal Das*—for Petitioner.

*Hemendra Chandra Sen*—for Opposite  
Party.

**Judgment.**—In this case the plaintiff sued for refund of certain gold and silver kept in the custody of the defendant or in lieu of the price thereof. His case was that he handed over two tolas of gold and some silver ornaments to the defendant in 1923 for making some ornaments but the defendant never made the ornaments and refused to return the gold and silver. The defendant pleaded among other things limitation and denied receipt of these ornaments from the present plaintiff. The learned Small Cause Court Judge found as a matter of fact that the plaintiff did make over the gold and silver to the defendant but the defendant did not make the ornaments and did not carry out his share of the contract. He held further that Art. 145, Lim. Act, applied to the case.

A Rule has been obtained on behalf of the defendant and one point is whether Art. 145, Lim. Act, applies or whether there should be a shorter period of limitation under Arts. 49 or 115. It is argued that the handing over of the ornaments for making into other jewellery is not deposit at all. On the other hand I am bound by the authorities of this Court and it is perfectly clear that Art. 145 does



not merely apply even when property is not recovered in species. See the case of *Kristo Kamini Dassi v. Administrator-General of Bengal* (1). An exactly similar case to this appears to be also the case of *Gangahari Chakravarti v. Nabin Chandra Banikya* (2), where it was held that the case was one under Art. 145 of the Schedule. It is argued, however, that a time is fixed within which the new jewellery was to be delivered and that after that time expired the defendant ceased to be depository and became a person in wrongful possession and so Art. 145 will not apply. In this connexion I would only refer to the case of *Promotha Nath Mullick v. Prodyumno Kumar Mullick* (3), where the learned Judge points out that the mere fact of possession by the depository after demand becoming wrongful does not take the case out of Art. 145.

In this view, I hold that the proper Article under the Limitation Act has been applied and the suit is in time. The Rule is, therefore, discharged with costs, hearing-fee two gold mohurs.

N.K.

*Rule discharged.*

(1) [1903] 7 C.W.N. 476.

(2) [1916] 20 C.W.N. 232=34 I.C. 959=23 C.L.J. 145.

(3) A.I.R. 1921 Cal. 416.

### A. I. R. 1929 Calcutta 144

RANKIN, C. J., AND MITTER, J.

*Nagoremull Modi*—Appellant.

v.

*Lachmi Narain Gupta*—Respondents.

Appeal No. 31 of 1927, Decided on 7th July 1928.

**Presidency Towns Insolvency Act, S. 103—Scope—Presy. Towns Insol. Act S. 34 (1) B.**

A man who is adjudicated insolvent and whose property vests in the Official Assignee or receiver, need not be sent to jail in execution of a decree against him in which he has already furnished security for his appearance, although he might not have disclosed his books or might have been refused the protection order. For his not disclosing his books he can be dealt with under Insolvency Act.

[P 144, C 2]

*K. P. Khaitan*—for Appellant.*S. M. Bose*—for Respondents.

**Facts.**—There was a decree in December 1923 against one Lakshmi Narain and an order for arrest was passed in September 1925. He was adjudicated in-

solvent on a creditor's petition in January 1926. In March 1926 he was brought under arrest under the order made in September 1925 and on that occasion it was ordered that he should be released on furnishing security for his appearance. In June following he filed his schedule but he was unsuccessful after that in getting protection order. Another application on behalf of the decree-holder was made for the committal of Lakshmi Narain to prison. The allegation was that he had not produced his books in the insolvency proceedings. It was ordered that in these circumstances no further steps in execution in the way asked could be taken and against this order, the decree-holder appealed.

**Rankin, C. J.**—In my opinion there is no sufficient reason to interfere with the discretion exercised by the learned Judge. I would point out that in the circumstances such as the present one the law of India is extremely illogical and the position of the Court would appear to be very embarrassing. Here is a man who so long ago as 26th January of last year was adjudicated an insolvent and so far as we know all his properties would vest either in the Official Assignee or in the receiver who would be appointed by the Court. It is said that he has not disclosed his books and he has been refused the protection order. Nevertheless the object of sending a man to jail for non-payment of debts if he is under an obligation to hand over all his assets to the Court of insolvency does not appear to me very convincing; still less does it appear to be consistent with the principle that this should be done by one creditor while the assets are supposed to have been impounded on behalf of all creditors. There can be no doubt that the position in the circumstances of this case is very difficult but speaking for myself I am not at all satisfied that the learned Judge in leaving these various complaints to be dealt with in the insolvency jurisdiction did not take a wise course. In the circumstances I would refuse to interfere in this appeal. The appeal is dismissed with costs.

**Mitter, J.**—I agree.

S.N./R.K.

*Appeal dismissed.*



## A. I. R. 1929 Calcutta 145

MUKERJI AND BOSE, JJ.

*Satya Ranjan Roy and another—Defendants—Appellants.*

v.

*Annapurna Dasi—Plaintiff—Respondent.*

Appeal No. 1061 of 1926, Decided on 17th July 1928, from appellate decree of 2nd Sub-Judge, Sylhet, D/- 3rd November 1925.

(a) Government of India Act, (1919) S. 61—(Old Act S. 58)—Redistribution of territories.

Redistribution of territories does not by itself make an Act inapplicable in a place in which it was already in force. [P 146 C 2]

(b) Hindu Law—Will—Construction—Son created malik with power to gift or sell—Will providing further that if son died issue-less in testator's widow's lifetime, testator's nephews to get property—Son dying issueless in widow's lifetime—Son's interest if absolute, gift over was void as it was opposed to rule of succession under Hindu Law—Son's interest if not absolute even then gift over is void since contingency contemplated did not happen in his lifetime—Succession Act (1925), S. 124.

A testator by his will constituted his adopted son as malik of his property and provided that he would be entitled to the same in absolute right with powers of gift and sale. The will then stated that in case the son would die without leaving any other heirs in the lifetime of the testator's widow, the property would go to certain of the testator's nephews—The son died without leaving issue or without having disposed of the property by gift or sale in the lifetime of the testator's widow.

*Held:* that whether the interest created by the will in favour of the adopted son be taken to be absolute or not, in either case the gift over in favour of the nephews was void and inoperative. If it were intended by the testator that in case the adopted son, who would take an absolute interest, failed to dispose of the property and died issueless within the lifetime of the widow, the property should go to the nephews, the provision as to gift over is void as formulating a law of succession unknown to Hindu Law. If, however, the interest in favour of the son was not intended to be absolute, even then the gift over was inoperative for the will clearly showed that the intention of the testator was that the distribution of the funds bequeathed was to take place on his death. For the bequest to the nephews to take effect, the contemplated contingency of the son's dying issueless should have taken place before the testator's death: *Edwards v. Edwards*, (1852) 15 *Beav.* 357, *Appl.* A. I. R. 1915 P.C. 101; 19 C. W. N. 48; A. I. R. 1914 P. C. 60 and A. I. R. 1921 *Bom.* 261, *Dist.* [P 147 C 1, P 148 C 1]

1929 C/19 &amp; 20

*Gopal Chandra Das, Jajneswar Mazumdar and Nikunja Behary Roy—*for Appellants.

*Nares Chandra Sen Gupta and Jatin-dra Mohan Chaudhury—*for Respondent.

**Judgment.**—Kali Kishore Roy, Mathur Chandra Roy and Mukunda Chandra Roy were three brothers, each of them having a  $\frac{1}{3}$ rd share in their joint family properties. Kali Kishore died leaving five sons, namely the defendants 1 to 4 and one Rama Kanta Roy now deceased. Mathur Chandra then died leaving a son the defendant 5. Mukunda thereafter died leaving a widow, the plaintiff Annapurna and a female child then in arms.

Mukunda left a will. The preamble to the will recited that Kali Kishore in his lifetime had given permission to him to adopt as his son Kali Kishore's son Rama Kanta and he gave permission to his wife Annapurna to adopt after his death the said Rama Kanta as his son. The will then provided:

"Both of them (meaning Annapurna and Rama Kanta), do enjoy as my heirs and successors according to the terms and conditions of the achalpatra (meaning the will) as executed by me and as laid down in the paragraphs following, none of them shall be entitled to violate the same."

In para. 1 of the will it was provided that taking his  $\frac{1}{3}$ rd share as 16 annas Rama Kanta, on his death, would as "malik" get 12 annas, thereof and the other four sons of Kali Kishore would get the remaining 4 annas.

It is stated:

"On my death the said Sreemans (all the five sons of Kali Kishore had been described as Sreemans before) shall give and take their respective shares being entitled to the same in absolute right with powers of gift and sale according to the shares mentioned above."

In para. 2 it was enjoined that the adopted son Rama Kanta would have to maintain Annapurna out of his own share. Mathura Chandra evidently was alive at the date of the will and it was provided that the adopted son would perform the obsequies of the testator (para. 2) and give in marriage his daughter who was an infant (para. 3) according to the advice of Mathur Chandra.

Paragraph 4 expressed a hope that the testator himself would adopt the son, if possible, in his lifetime and it provided that so long as the said adopted son Rama Kanta or the other sons of Kali Kishore did not attain majority, Mathur



Chandra will act as manager on their behalf with full powers and his acts would be binding on the minors on their attaining majority.

Paragraph 5 ran thus:

"God forbid, if the said adopted son die during the lifetime of my wife without leaving any other heirs, then 11 annas out of the 12 annas moveable and immovable properties of my adopted son left by me as mentioned in the achalpatra shall go to my nephews (meaning the three sons of Kali Kishore and one of Mathur Chandra) in equal shares, and my wife the said Annapurna Dasi shall be entitled to a life-estate in respect of one anna share out of the 16 annas of the moveable and immovable properties left by me."

Paragraph 6 provided that if there was difference or disagreement between the widow and the adopted son the widow shall have

"power to enjoy, appropriate to herself, give away or sell one anna out of the 12 annas of the adopted son in lieu of her maintenance."

It has been found by both the Courts below that the adoption of Rama Kanta was made during the lifetime of Kali Kishore and Mukund by the formal giving and taking of the boy. Rama Kanta died in 1313 without any issue.

Certain properties having been sold for arrears of revenue there arose a dispute as regards the surplus sale-proceeds that were in desposit in the Collectorate. The plaintiff claimed that Rama Kanta had 12 annas out of the  $\frac{1}{3}$ rd share of Mukunda in joint properties, that is to say, an  $\frac{1}{4}$ th share in the said properties, and that Rama Kanta had also an  $\frac{1}{5}$ th share in the properties as a natural son of Kali Kishore, and that she as Rama Kanta's adoptive mother was entitled to both the said shares and she asked for certain reliefs on that footing. The Munsiff gave her a decree on the footing of her having a 4 annas share, as having inherited the same from Rama Kanta. The Subordinate Judge, on appeal, has affirmed that decision. The defendants have then appealed to this Court.

The controversy in the appeal centres round the question whether as contemplated in and provided for by para. 5 of the will Rama Kanta having died without any issue, the defendants are entitled to an 11 annas share out of Rama Kanta's 12 annas share. There was a minor contention urged on behalf of the appellants to the effect that the will relates to a place in the District of Sylhet which, though it was included in the Bengal Presidency in 1870 when the Hindu

Wills Act was passed, was transferred to the province of Assam before 1883 when the will was executed, and that therefore the Act will not apply to the will. This argument has no substance as the redistribution of the territories would not, by itself, make the Act inapplicable to a place in which it was already in force, vide S. 58, Government of India Act 24 and 25 Vic C. 67, S. 47.

An elaborate and learned argument has been presented before us based on S. 111 (now S. 124), Succession Act. Before dealing with it it is necessary to construe the will in order to see what was the interest that was bequeathed to Rama Kanta. The will constituted the adopted son malik of a 12 annas share on the death of the testator, entitled thereto in absolute right with powers of gift and sale (para. 1). The said 12 annas share was described as the share of Rama Kanta out of which on the happening of a contingency (namely his death without issue during Annapurna's lifetime) 11 annas would go to the defendants in equal shares and the remaining 1 anna to Annapurna as a life-estate (para. 5); or in the happening of another contingency during the lifetime of Rama Kanta (namely a difference or disagreement between Annapurna and (Rama Kanta) Annapurna would get an one anna share in lieu of her maintenance (para. 6). Leaving aside the one anna share which was to be dealt with in the event of a difference or disagreement between Rama Kanta and Annapurna under para. 6, or which would go to Annapurna as a life-estate in the event of Rama Kanta's death without issue during the lifetime of Annapurna under para. 5, the position seems to be that there is an apparent repugnancy, because para. 1 gives an absolute estate to Rama Kanta while para. 5 purports to dispose of it again. The rule of construction in such a case has been stated thus in Jarman on Wills, 6th edition, Vol. 1 pp. 565-566.

Mr. Jarman states the general rule thus:

"Doubt is sometimes cast upon the intention of the testator by the repugnancy or contradiction between the several parts of his will, though each part taken separately, is sufficiently definite and intelligible. In such cases the context (which is so often successfully resorted to for the purpose of throwing light on a doubtful passage) becomes itself the source of obscurity; and unless some principle of construction can be found authorising the



adoption of one, and the rejection of the other of the contrariant parts, both are necessarily void, each having the effect of neutralising and frustrating the other. With a view to prevent this most undesirable result, it has become an established rule in the construction of wills that where two clauses of gift are irreconcilable so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention. Hence it is obvious that a will can seldom be absolutely void by mere repugnancy . . . . It must be borne in mind, however, that the rule only applies where the latter gift shows with reasonable certainty that the testator did not mean the prior gift to take effect according to its terms. The simplest example of the general rule is where a gift to A apparently absolute, is cut down to a life-estate by a subsequent direction that on A's death the property is to go to B. There are numerous authorities to this effect. But the subsequent direction must be unambiguous. And where there is an absolute gift of property to A, with a gift to B, in the event of A dying without having disposed of it, or a gift to B of what remains at A's death the question of the effect of the words is often a difficult one, and the authorities, as might be expected, are not wholly consistent."

The question, therefore, is a pure question of construction, and treating it as such one has to read the whole will together and say whether the testator intended that Rama Kanta would not, merely because he might die issueless and within the lifetime of Annapurna, be competent to deal with the 11 annas share though he was constituted malik in respect of it with power of gift and sale from the time of testator's death. It is difficult to gather such an intention from the words of the will, or in other words, it cannot be said that the directions are at all unambiguous as showing that the absolute interest created in Rama Kanta by the first paragraph of the will was in any way cut down by the gift over provided for in paragraph 5. If this view is correct, then even if the testator meant that in the event of Rama Kanta, who would take an absolute interest, failing to dispose of it or part of it and dying issueless and within the lifetime of Annapurna, the 12 annas should be divided between Annapurna and the nephews the provision as to gift over is void as formulating a law of succession unknown to Hindu Law.

If, however, no absolute interest was created in Rama Kanta, the question would arise whether in view of S. 124, Succession Act, the gift over in favour of the defendants is void. The appel-

lants have argued that it is a contingent bequest which should take effect and that S. 124 will not affect it, while the respondent argues to the contrary. The section embodies what is known as Rule 4 in *Edwards v. Edwards* (1), and was enunciated by Sir John Romilly in these words :

"Where there is an absolute gift to vest in possession at a future time, and a gift over in case the legatee should die without issue living at his decease, this prima facie is to be taken to mean if he should die without issue before he is entitled to call for delivery as it would be very inconvenient that after delivery the subject of gift should be liable to go over."

This rule has been authoritatively modified by the House of Lords in the two cases of *O'Mahoney v. Burdett* (2) and *Ingram v. Souttan* (3). In the former case Lord Hatherley said :

"When the Court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as, it appears from the face of the will the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors the Courts have laid hold of that circumstance to say 'we hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those, who having it in their hands, will of course share it without further trust, and on the other hand that a subsequent event namely a certain person's dying childless after that distribution has taken place, should divest the properties, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he had paid in order to hand it over to those who took under the executing devise . . . the period to which the executing devise will be referred will be the period of the death of the first taker unless there are other circumstances and directions in the will which are inconsistent with that disposition."

Whatever consequences might follow from the application of the rule in *Edwards v. Edwards* (1), as modified by the House of Lords cases referred to above in cases to which the Hindu Wills Act and consequently the Indian Succession Act do not apply, in cases to which S. 124, Succession Act does apply, that section will have to be given its full effect. The Judicial Committee in the case of

(1) [1852] 15 Beav. 357 = 16 Jur. 259 = 21 L. J. Ch. 324.

(2) [1874] 7 H. L. 338 = 44 L. J. Ch. 56 (n) = 23 W. R. 361 = 31 L. T. 705.

(3) [1874] 7 H. L. 408 = 44 L. J. Ch. 55 = 23 W. R. 363 = 31 L. T. 215.



*Bhupendra Krishna Ghose v. Amarendra Nath Dey* (4) have said :

"Section 111 embodies the rule enunciated in *Edwards v. Edwards* (1). The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act has given it statutory force. Even in India as regards Hindus its application is confined to special tracts. . . . Their Lordships think that it should be applied only to cases coming strictly within its scope."

The question in these cases is to ascertain when the fund bequeathed is payable or distributable. That being ascertained, in a case where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event the legacy cannot take effect. Here the uncertain event for the happening of which no time is mentioned is the death of Rama Kanta during the lifetime of Annapurna and if the bequest is to take effect it should happen before the period of distribution. Reading the will it seems to be perfectly clear that the intention of the testator was that the distribution was to take place on his death. For the bequest to the defendants to take effect the contemplated contingency should have taken place before the testator's death.

It, however, remains to consider a few decisions to which our attention has been drawn on behalf of the appellants and all of which in our opinion are very different from the present case. In *Bhupendra Krishna Ghose v. Amarendra Nath Dey* (4), the wife was appointed sole executrix under the will, she was given authority to adopt five sons in succession and it was provided :

"If my said wife dies without adopting a son, or if such adopted son predeceases her without leaving any male issue in such case my estate after the death of my wife shall pass to the sons of my sister Binodini Dasi who may be living at the time of my death."

Their Lordships of the Judicial Committee held that on the death of the testator, the widow, who had obtained possession as executrix was not divested by the adoption of the son, and the period of distribution having been distinctly fixed by the will at the death of the widow and the adopted son having died before the widow's death which was the contingency contemplated, the gift in favour of the nephews was not affected

by S. 111 and took effect. In the case of *Durga Pershad v. Raghunandan Lal* (5) the testator had made his minor son the malik of the properties after his death and directed that he should succeed to and enter upon possession and also gave directions as to how the management was to be conducted during such minority, the mother of the minor and on her death some other person to act as his guardian, and finally directed :

"If after my death the said minor son dies the mother of the said son shall in his stead become the malik in possession and occupation when like myself the said Musammatt shall acquire all the proprietary powers and all kinds of properties moveable and immovable, and after the death of the widow the property was to go to the testator's two daughters in equal shares."

The mother died before the minor son and the question arose as to whether the gift over was valid. It was held relying upon S. 116, Succession Act, that the gift over should take effect on the failure of the prior bequest in favour of the widow although the failure may not have occurred in the manner contemplated by the testator, that is to say, though the widow died not after but before the adopted son. There is a reference to S. 111 in the judgment in that case but it is by no means clear what it exactly means. In any case the minor was not to acquire full proprietary rights until at least he attained majority and the period of distribution contemplated by the will was, at the earliest the point of time when the minor would be a major.

It has been argued on behalf of the appellants that in the present case also the testator had given directions in para. 4 of the will for the management of the properties during the minority of Rama Kanta and of the defendants but such directions appear to have been given not in derogation of the absolute right that was conferred by para. 1 and was to take effect immediately on the testator's death. The decision of the Judicial Committee in the case of *Chunilal Parvati Shankar v. Bai Samrath* (6) need not be discussed as it was not a decision with reference to S. 111, Succession Act, but in spite of it, the said Act not applying to the will in question in the case. So is the decision in *Bai*

(4) A. I. R. 1915 P. C. 101 = 43 Cal, 482 = 43 I. A. 12 (P.C.).

(5) [1914] 19 C. W. N. 439 = 23 I. C. 597.

(6) A. I. R. 1914 P. C. 60 = 33 Bom. 399 (P.C.).



*Dhanlaxmi v. Hariprasad Uttamram* (7) though one proposition that emerges from it may be usefully referred to, namely that a Hindu may create a life-estate or successive life-estates, but a series of absolute estate defeasible in succession on the happening of an uncertain event cannot be considered as a succession of life-estates; it can only be considered as an attempt to create an estate of inheritance which is not recognized by Hindu Law. From whatever point of view may the will be looked at, the gift over, in our opinion, cannot be regarded as operative and the appellant's arguments cannot possibly succeed. The appeal accordingly is dismissed with costs.

S.N./R.K.

*Appeal dismissed.*

(7) A. I. R. 1921 Bom. 262=45 Bom. 1038.

**A. I. R. 1929 Calcutta 149**

MUKERJI AND BOSE, JJ.

*Khantamoyee Debi and others*—Appellants.

v.

*Hridayananda Bhattacharjee and others*—Respondents.

Appeals Nos. 404 and 496 of 1926, Decided on 30th July 1928, from appellate decrees of 1st Addl. Dist. Judge, Dacca, D/- 17th August 1925.

(a) **Family Settlement** — **Compromise otherwise valid is binding even if one party was limited owner at the time.**

The circumstance that a party to a settlement was a limited owner at the time would not make it any the less binding if the other requisites of validity of the settlement are present. [P 152 C 1]

(b) **Family Settlement**—**For compromise to be binding persons should be parties to compromise, or claiming under them or should have derived benefit under it—Parties should further bona fide consider that there is question to be decided between them—There must also be honest settlement of existing dispute.**

For a compromise to be binding it is necessary that the parties should have been parties to the compromise or should claim under or through such parties or should have acted on it or derived some benefit under it. Further the parties to the compromise should bona fide consider that there is a question to be decided between them, for no compromise would be good if it ultimately turned out that there was no doubt upon the point which was made the subject of the compromise, and again it must be an honest settlement of an existing dispute which must not be manifestly ultra vires of the parties to settle: 2 M. I. A. 181 (P.C.); 13 M. I. A. 497 (P.C.); 7 M. I. A. 311 (P.C.); 14

M. I. A. 24 (P.C.); 20 Cal. 373 (P.C.); 26 Cal. 81 (P.C.) and 33 All. 356 (P.C.), *Ref.*

[P 152 C 1 &amp; 2]

(c) **Bengal Regulation 2 of 1805, S. 3 (1, 2, 3.)—12 years' rule would not apply only if acquisition is by means of "violence, fraud, or any other unjust or dishonest means whatever."**

Under Regulation 2 of 1805, the intention of the legislature was to look to the means by which the acquisition took place and not the merits of the acquisition itself. In order to be an exception to the 12 years' rule, possession should have been "by violence, fraud or any other unjust or dishonest means whatever." [P 153 C 1]

(d) **Limitation Act (14 of 1859), S. 18—Suits instituted before January 1862 were to be determined as if Act was not passed.**

By S. 18 of the Act of 1859 coupled with Act 11 of 1861, suits instituted before January 1862 were to be determined as if the Act had not been passed: 27 Cal. 1004 (P.C.), *Discussed.*

[P 153 C 2]

(e) **Limitation Act (1859), S. 28—Under Regulation 3 of 1793 read with Regulation 2 of 1805 and under Act 14 of 1859, adverse possession not only bars remedy but confers title—Bengal Regulation (2 of 1805)**

Regulation 3 of 1793 read with Regulation 2 of 1805, and Act 14 of 1859 have been always understood as meaning that adverse possession for the prescribed period not merely bars the remedy but gives title: (1854) 1 Boul Rep. 70; 11 M. I. A. 345 (P.C.); (1869) 12 W. R. 192; 20 W. R. 104; 1 M. I. A. 446 (P.C.) and 3 Cal. 224, *Foll.* [P 154 C 1]

*Jogesh Chunder Roy, Radha Benode Pal, Birendra Kumar De and Jitendra Mohan Banerjee*—for Appellants.

*Brojolal Chakravarty, Naresh Chandra Sen Gupta, Atul Chandra Gupta, Charu Chandra Chowdhury, Jatindra Nath Sanyal and Urukram Das Chakravarty*—for Respondents.

**Judgment.**—The following genealogy will serve to explain the relationship amongst the parties to this litigation: (Please see p. 150 for genealogy.)

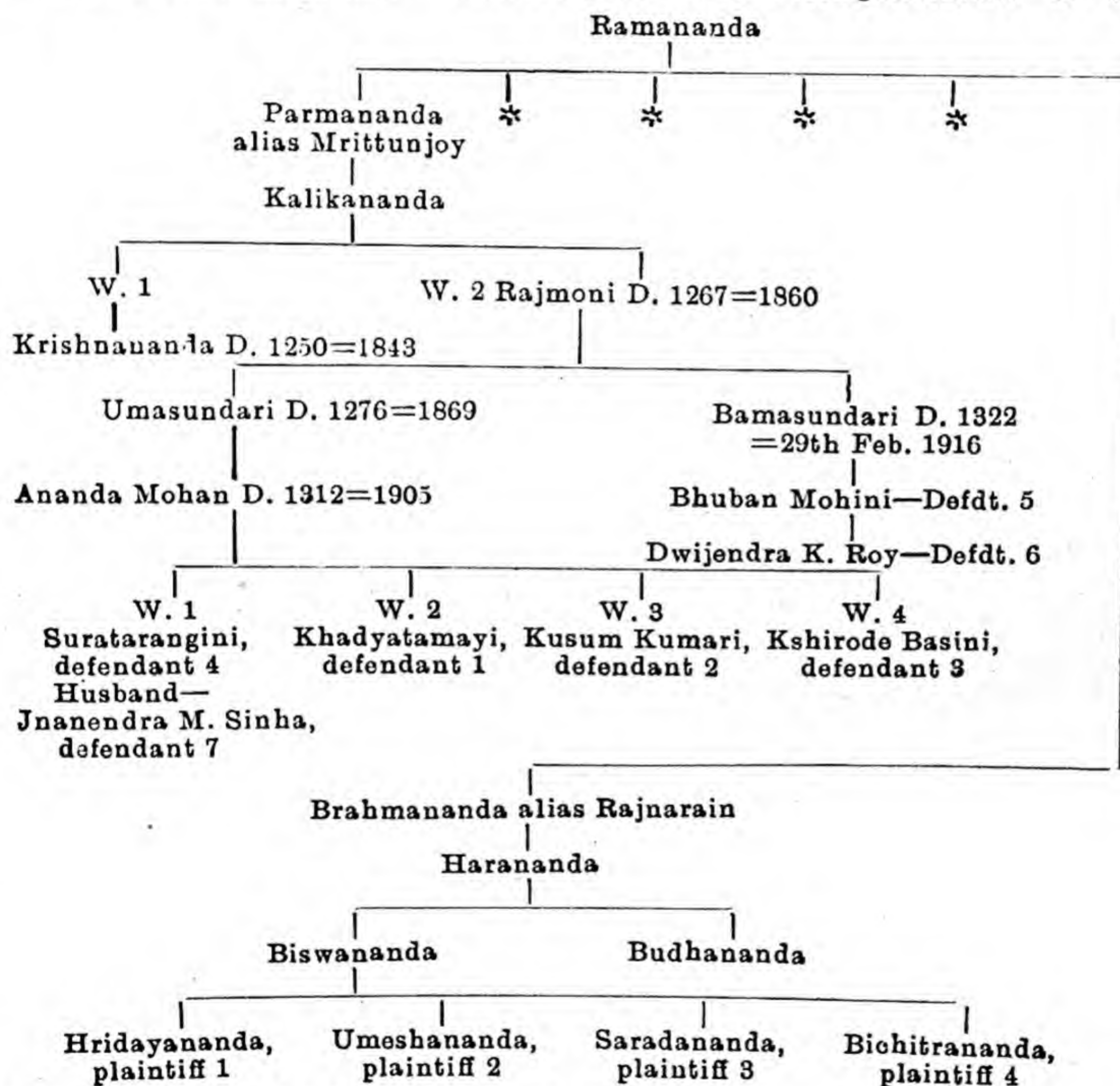
One Ramananda Bhattacharjya was the original owner of an 8-annas share in certain properties which is the share involved in the present suit. He left six sons of whom two were Paramananda alias Mrittunjoy and Brahmananda alias Rajnarain. Paramananda left a son Kalikananda. Kalikananda had two wives by the first of whom he had a son Krishnananda, who died in 1250 B.S. (=1843). By his second wife Rajmoni, Kalikananda had two daughters, Uma Sundari and Bama Sundari. Rajmoni died in 1267 B.S. (=1860). Uma Sundari died in 1276 B.C. (=1869) leaving a son Ananda Mohan who died in 1312 B.S. (=1905). De-



endants 1 to 3 are three of the widows of Ananda Mohan. Defendant 4 is a daughter of Ananda Mohan by another widow who is dead, and the husband of defendant 4 is defendant 7. Bama Sundari died in 1322 B. S. (1916) leaving a daughter who is defendant 5, and the daughter of the latter is defendant 6. Brahmananda's son was Harananda who left two sons, Biswananda and Bodhananda. The plaintiffs who are four in number are the sons of Biswananda.

The following facts have been found, and are not now disputed: The 8-annas

This suit ended in a compromise, and a decree based thereon, by which Uma Sundari and Bama Sundari relinquished their right to a 10 gandas share in favour of Bodhananda and Biswananda, the latter of whom, however, was not a plaintiff to the suit though he was a party defendant therein, and they retained the remaining 3-annas 10 gandas share of which they were in possession. In 1865 Uma Sundari's son Ananda Mohan instituted a suit against Biswananda and Bodhananda to set aside the aforesaid compromise and the relinquishment of the 10 gandas



share of Ramananda descended in halves to Krishnananda on the one hand and Harananda on the other, and on Harananda's death his 4-annas share was inherited by his sons Biswananda and Bodhananda. Since Krishnananda's death in 1843 his 4-annas share in the properties remained in the possession of Rajmoni till her death in 1860. In 1862, after Rajmoni's death, Bodhananda instituted a suit against Rajmoni's daughters Uma Sundari and Bama Sundari for recovery of possession of the said 4-annas share.

share. There was a compromise out of Court in that suit by which the relinquishment of the 10 gandas share was confirmed.

In 1918, that is to say about 18 months after the death of Bama Sundari, the plaintiffs instituted the present suit alleging that Rajmoni having been in adverse possession in respect of the said 4-annas share from 1250 B. S. (=1843), i. e., the death of her stepson Krishnananda down to her death in 1267 B. S. (=1860)—adversely to their



grand-father Harananda, and after Harananda's death to their father and uncle Biswananda and Bodhananda — had acquired an absolute interest therein as her ajautuka stridhan and the plaintiffs as the nearest reversioners on the death of Rajmoni's daughters Uma Sundari and Bama Sundari are entitled to the 3 annas 10 gandas which they were in possession. They prayed for declaration of title and recovery of possession of that share.

The defendant's case, on the merits, was that the 4 annas-share which Rajmoni possessed in her life time did not belong to her stepson Krishnananda alone, but also to Ratanmani and Gangamani the widows of two of the other sons of Ramananda, and that she possessed the said share with the permission of Harananda and, after Harananda's death, of Biswananda and Bodhananda and further that her possession did not extend for the statutory period necessary to confer title on her.

Two of the properties in suit namely Nos. 14 and 15 were given up in the course of the suit for reasons which do not concern us. The Munsif decreed the suit in respect of the remaining properties declaring the plaintiff's title to 3 annas therein and giving them possession thereof. The Subordinate Judge has on an appeal by the defendants reduced that decree by a moiety. From the decision of the Subordinate Judge two appeals have been preferred. S. A. No. 404 of 1926 has been preferred by defendants 1, 2, 5 and 8. S. A. No. 496 of 1926 has been preferred by plaintiffs 1, 2, 3.

The findings of the lower appellate Court on the merits are: that Rajmoni was in adverse possession from 1250 B.S. (=1843) to 1267 B. S. (=1860), that is to say for nearly 17 years; that the plea that she was in possession on behalf of Ratanmani and Gangamani and that such possession was with the permission of Harananda, and after him, of Biswananda and Bodhananda, was not true; that there is nothing to indicate that she was in possession of a limited interest and not of a full and absolute interest; that the adverse possession began when Harananda was alive but was suspended by reason of Harananda's death and his sons Biswananda and Bodhananda being minors, that it recommenced when they attained majority, and that on calculation such adverse possession was for a period of 12

years or more as regards the share of Biswananda but not as regards the share of Bodhananda. On these findings the learned Additional District Judge gave the plaintiffs a decree in respect of a half of 3 annas 10 gandas share.

The defendants who are the appellants in S. A. No. 404 of 1926 contend: first that the compromise in the suit of 1862 represents a bona fide family arrangement and the plaintiffs are not competent to go behind it; second, that under the law of limitation as contained in the regulations then in force the possession of Rajmoni cannot be regarded as adverse which could ever ripen into title; third, that the findings of the Subordinate Judge as regards the period over which Rajmoni's possession extended as against Biswananda are mere surmises and are not based on any real materials; and fourth, that in any case Rajmoni's possession was only that in respect of a limited interest and consequently she never acquired any share as ajautuka stridhan to which the plaintiffs can possibly succeed.

The plaintiffs who are the appellants in S. A. No. 496 of 1926, contend that Rajmoni acquired a title by adverse possession both against Biswananda and Bodhananda as at the date of Rajmoni's death a suit instituted by them would be governed by Act 14 of 1859 and under S.11 of that Act time which had begun to run against Harananda would not cease to run by reason of his death but would continue to run against Biswananda and Bodhananda even during their minority. It will be convenient to deal with the contentions of the appellants in S. A. No. 404 of 1926 in their order and to deal with the contention of the appellants in S. A. No. 496 of 1926 along with the second of the contentions in the former appeal.

As regards the first of these contentions, it cannot be disputed that a partition or a settlement of a disputed or doubtful claim is a valid and binding arrangement between the parties thereto and the parties themselves or those that claim under or through them are not permitted to deny, ignore or resile therefrom. On equitable principles such partition or settlement is also binding on persons, who, though they may not have been either parties thereto or have derived their interest from such parties, have acted upon it or have derived some benefit from it. The principles governing such



cases have been explained in a long series of decisions of the Judicial Committee: *Rajender Narain v. Bijoy Gobind* (1); *Hetnarain v. Modenarain* (2); *Gajapathi Radhika v. Gajapathi Nilamani* (3); *Mantappa v. Baswantrao* (4); *Greender Chunder v. Troylukho Nath* (5); *Muhammad Imam Ali v. Hossein Khan* (6); *Khuni Lal v. Gobinda Krishna* (7). There are numerous cases in which Courts in this country have or have not applied these principles and no useful purpose would be served by discussing them here as the facts of none of those cases are identical with the facts that we have to deal with.

On examining the principles it appears that the circumstance that Uma Sundari and Bama Sundari were limited owners at the time would not make the settlement any the less binding if the other requisites of validity of the settlement are present. One of the requisites to call this equitable doctrine into play is that the parties should have been parties to the settlement or should claim under or through such parties or should have acted on it or derived some benefit under it; but here the plaintiffs cannot be treated as coming under any of these categories at all as they are not claiming under their father or uncle but as reversionary heirs to Rajmoni and the 10 gandas share that they are in possession of, they say are entitled to, as such reversionary heirs. Then, as pointed out by Turner, L. J. in *Lucy's case* (8) the parties should bona fide consider that there is a question to be decided between them, for no compromise would be good if it ultimately turned out that there was no doubt upon the point which was made the subject of the compromise. This involves that there should have been a full disclosure of the facts; but in the present case it does not appear that the question whether Rajmoni

had or had not acquired the share as her ajautuka stridhan by adverse possession was at all raised, and if it is now found that she did, that would, in our opinion, affect the bona fide of the settlement. Moreover even if this question was raised, the settlement would be regarded as ultra vires of the parties because Biswananda and Bodhananda would not have any subsisting rights at the time and would offend against the dictum of Lord Westbury in *Dixon v. Evans* (9), that it should be an honest settlement of an existing dispute which must not be manifestly ultra vires of the parties to settle. For these reasons we are of opinion that the first contention of the appellant cannot be allowed to prevail.

In support of the second contention that adverse possession could not confer any title on Rajmoni reference has been made to Reg. 3 of 1793, S. 14 and Reg. 2 of 1805, S. 3, Cls. 1, 2 and 4, and it has been contended that the limitation of 12 years fixed by the former provisions was declared by the latter as not being applicable to private claims of right to immovable property if the person in possession shall have acquired possession by violence or fraud or by any other unjust or dishonest means whatever. It has been argued that upon the findings of the Subordinate Judge Rajmoni's possession was of this character and that therefore a suit by Biswananda or Bodhananda for recovery of possession would not be barred by the 12 years' rule. It has also been contended that under the Regulations so long as they were in force it was the remedy that would be barred by lapse of time; and that as the Limitation Act 14 of 1859 did not come into force till the 1st January 1862, by the combined operation of S. 18 of that Act and S. 1 of Act 11 of 1861, on the death of Rajmoni in 1860, the remedy of Biswananda and Bodhananda would not have been barred. Against all this the plaintiffs have contended (and that is also their substantive contention as appellants in S. A. No. 496 of 1926) that at the time of Rajmoni's death in 1860, it was Act 14 of 1859, that was in force, and as time had already begun to run against Harananda, it should, under S. 11 of the Act, be regarded as having continued to run notwithstanding Harananda's death.

(1) [1839] 2 M. I. A. 181=1 Sar. 175 (P.C.).

(2) [1859] 7 M. I. A. 311=3 W. R. 51=1 Suther 355=1 Sar. 678 (P.C.).

(3) [1870] 13 M. I. A. 497=14 W. R. 33=2 Suther 365 (P.C.).

(4) [1871] 14 M. I. A. 24=15 W. R. 32=2 Suther 407=2 Sar. 648 (P.C.).

(5) [1892] 20 Cal. 373=21 I. A. 35=6 Sar. 267 (P. C.).

(6) [1895] 26 Cal. 81=25 I. A. 161=2 C.W.N. 737 (P.C.).

(7) [1911] 33 All. 356=10 I. C. 477=38 I. A. 87 (P.C.).

(8) [1873] 4 Deg. M. & G. 356=17 Jur. 1143=22 L. J. Ch. 732.

(9) [1872] 5 H. L. 606=42 L. J. Ch. 139.



Now Reg. 2 of 1805 makes a distinction between bona fide and mala fide possession—a distinction borrowed from the Roman law and the prevailing law of Continental Europe as well as to some extent of America and possibly also from the Hindu law. In dealing with this matter it is necessary to bear in mind the difference between possession founded on title, and possession founded on a claim of title. Possession to be adverse must be founded on a claim of title because possession without a claim of title would in law be treated as the possession of the true owner and not as adverse to him. What is meant by the terms used namely :

“possession acquired by violence, fraud or by any other unjust or dishonest means or that the property claimed had been so acquired by any other person from whom the actual occupant derived his title and was not subsequently held for 12 years under a fair title believed to convey a right to possession and property”

is sufficiently explained by the preamble to that Regulation. Under the Regulation so far as the original acquisition of the possession is concerned it is necessary in order to take it out of the 12 year's rule that the acquisition should have been “by violence, fraud or any other unjust or dishonest means whatever.” The intention of the legislature was to look to the means by which the acquisition took place and not the merits of the acquisition itself. Rajmoni may not have had a title,—indeed no trespasser will have any,—but if she acquired possession by adopting any of the methods contemplated by the expression aforesaid, the case will be excepted from the rule. The findings of the Subordinate Judge go nowhere near such a position. In our opinion, the 12 year rule would apply and it will of course be open to show that any body who was entitled to sue had been precluded from obtaining redress either from minority or other good and sufficient cause: S. 14, Reg. 3 of 1793. As regards the applicability of Act 14 of 1859 we are not inclined to accept the plaintiff's contention that its provisions could have any bearing upon the present case. The question is what were the rights of Biswananda and Bodhananda at the time when Rajmoni died in 1860. Now in 1860, the position was that if a suit instituted within 2 years from 5th May 1859, it would have to be tried and de-

termined as if the Act had not been passed : vide S. 18 of Act 14 of 1859 and consequently it would have to be tried and determined upon the Regulations. Before the two years elapsed and on 1st May 1861, was passed Act 11 of 1861 which suspended the operation of Act 14 of 1859 till 1st January 1862. Consequently Biswananda or Bodhananda's remedy, as at Rajmoni's death in 1860, was not affected by Act 14 of 1859. In support of the contention that it is Act 14 of 1859 that should govern the question, we have been referred to the decision of the Judicial Committee in the case of *Falima-zulnissa Begum v. Sundar Das* (10) and the passage in the decision which runs in these words :

“According to the terms of this law (meaning Act 14 of 1859) suits by the mortgagors of 1788 were barred on 17th October 1848 unless in the meantime the required acknowledgment was given. The right to sue was kept alive till 1862 ; but as they did not sue, the Act remains unqualified by that proviso.”

The question that arose in that case was, in our opinion, entirely different from the question before us. The suit in that case was by mortgagors to recover the mortgaged property. Their Lordships pointed out that the earliest law which placed a limit of time upon such suits was Act 14 of 1859 which remained in force till repealed by Act 9 of 1871. Act 14 of 1859, S. 1, Cl. 15, gave 60 years to the mortgagor to institute a suit for recovery of possession from the time of the mortgage unless there was acknowledgment, in which case it would be 60 years from such acknowledgment. Their Lordships pointed out that by S. 18 of the Act of 1859 coupled with Act 11 of 1861, suits instituted before January 1862 were to be determined as if the Act had not been passed. Act 9 of 1871 provided the same limits of time for suits of this kind and it added a provision (S. 29) which laid down that at the expiration of the period thereby limited to any person for instituting a suit for possession of any land, his right to such land shall be extinguished. In this connexion their Lordships made the observations quoted above and further observed that the period limited by the Act of 1871 was 17th October 1848, and the title of the mortgagors was extinguished on that day unless they could show a previous acknowledgment.

(10) [1900] 27 Cal. 1004 = 27 I. A. 108 = 4 C. W. N. 565 (P.C.).



ment in writing. The reason why their Lordships said that the right to sue was kept alive till 1862 was because there was no law prior to Act 14 of 1859 which had barred that right. In the present case the whole question is, had Biswananda or Bodhananda or both of them the right to sue in 1860 at the time when Rajmoni died, and it is a different question altogether as the Regulations which were then in force had provided for a suit of that character and would govern that right. The question whether the Regulations merely barred the remedy or also extinguished the primary right itself is a vexed question but as regards possession and dispossession of immovable property in the absence of any statutory provision fixing a longer period of prescription, the law of limitation is practically a law of prescription. That Regn. 3 of 1793 read with Regn. 2 of 1805 has been always understood as meaning that adverse possession for the prescribed period not merely bars the remedy but gives title was said by Peel, C. J., in *Shib Chunder v. Sib Kissen Bannerji* (11), and the limitation Regulations and Act 14 of 1859 have been understood and interpreted in that way in a large number of authoritative decisions, (e. g. *Golam Rusool v. Mt. Mughlo* (12) *Gunga Gobind Mundal v. The Collector of 24 Parganas* (13); *Raja Barada Kant Roy v. Pran Krishna* (14), *Ram Lochan Chakravarti v. Ram Soonder Chakravarti* (15), *Gossain Dass Chunder v. Issur Chunder Nath* (16). The contention of either of the parties noted above, in our opinion, cannot be allowed to prevail. The view taken by the Courts below in our opinion, is right.

The third contention which is to the effect that the findings of the Additional District Judge as regards the period over which Rajmoni's adverse possession extended as against Biswananda are mere surmises and are not based on any real materials. The Additional District Judge was right in finding that Harananda died about the year 1254. Taking the date as fairly against both the parties as possible, Rajmoni should be taken to have completed only four years of adverse posses-

sion by the time that Harananda died. The question, therefore, is whether Biswananda or Bodhananda or both were majors for at least a period of eight years at the time when Rajmoni died in 1267 B. S. (1860). As regards Bodhananda having remained a minor till long after Rajmoni's death the finding is clear and the evidence sufficient. But as regards the year in which Biswananda attained majority, the Additional District Judge has put it down as 1256 B. S. or soon after. This finding, in our opinion is not based on any accurate process of reasoning but is more or less a piece of unwarranted surmise. The only materials to which he has referred as safe guides are, on the one hand an am-mukhtearnama (Ex. 12) dated 13th Jaista 1256 B. S. which describes Biswananda as a minor and certain documents (Exs. 18, 20 and 21) dated 1255 B. S. which also show him as a minor, and on the other hand a chitta (Ex 13) of 1262 B. S. which is said to show Biswananda as a major and a registered kabuliati dated 29th Chaitra 1263 B. S. which also shows him as such. From these data he has come to the conclusion that Biswananda attained majority "soon after the year 1256." We are unable to follow how that conclusion is arrived at. It is true that the defendants in their written statement did not specifically put the plaintiffs to the proof of the approximate date of Biswananda's attaining majority, and the plaintiffs may justly complain that they were misled by the nature of the defence that was set up as regards the character of Rajmoni's possession; but after all it is the plaintiffs who have undertaken in this suit to prove that Rajmoni's adverse possession extended against proper persons and for the statutory period. It is clear that the parties should be allowed to give further evidence on this matter should they desire to do so, but the finding of the Additional District Judge so far as this matter is concerned cannot possibly be allowed to stand.

The last contention is to the effect that in any view Rajmoni's adverse possession should be taken to be that in respect of a limited interest. The Additional District Judge has gone very fully into this matter and so also the trial Court and they have unhesitatingly come to the definite conclusion upon proper and sufficient materials that her possession was

(11) [1854] 1 Boul. Rep. 70.

(12) [1887] 1 M. I. A. 446.

(13) [1867] 11 M. I. A. 345=7 W. R. 21 (P.C.).

(14) [1869] 12 W. R. 192=3 B. L. R. 343.

(15) [1873] 20 W. R. 104.

(16) [1877] 3 Cal. 224.



in its character that of a malik and absolute owner. This contention therefore should be overruled.

The result is that S. A. No. 496 of 1926 should be dismissed, and S. A. No. 404 of 1926 should be allowed and the case sent down to the lower appellate Court with directions to rehear the appeal after allowing the parties to bring such further materials on the record as they may desire to do, on the only question that now remains to be retried, namely as regards the date when Biswananda attained majority. If the Court comes to the conclusion that Rajmoni lived for at least eight years after that date, the decree of the lower appellate Court will stand, and that decree will be affirmed with costs in this Court and in the lower appellate Court and if it holds otherwise, the plaintiff's suit should be dismissed with costs in all the Courts.

S.N./R.K. *Order accordingly.*

### \* A. I. R. 1929 Calcutta 155

RANKIN, C. J.

*Amulya Charan Sur*—Petitioner.  
v.

*Coral Engineering Works Ltd.* —  
Opposite Party.

Civil Revn. Appln. No. 971 of 1928,  
Decided on 27th November 1928, from  
decision of Small Cause Court Judge,  
Sealdah, D/- 10th May 1928.

\* **Limitation Act, S. 19—Acknowledgment signed by one director only in the ordinary conduct of the business is sufficient.**

An acknowledgment signed by a director, who is acting as a manager to do the ordinary acts necessary in the conduct of business of the company, is a sufficient acknowledgment within the meaning of S. 19. [P 155 C 2]

*Jagat Chandra Bose*—for Petitioner.

*Susil Chandra Dutt* for *Krishnalal Banerjee*—for Opposite Party.

**Judgment.**—This is a case in which a company was registered under the Indian Companies Act and it appears that the plaintiff supplied certain goods to the company. Certain sums became due from the company and the company found it inconvenient to pay in full. Accordingly what happened was that the plaintiff got the bill made out showing how the accounts stood. Certain payments had been made and certain sums were due on a given date, namely 23rd

August 1924. There was a debt which was at one time Rs. 372 which had been reduced to Rs. 35-12-0 and there was another, namely, a sum of Rs. 48 of which nothing was paid at all. The document sets out this sum of Rs. 83-12-0 described in this way: "The above amount Rs. 83-12-0 Eighty three and annas twelve stands as nett dues this day." Below this there is a one anna stamp upon which the date is put 25th August 1924. By the side of this stamp it is written "Correct." Then in a rubber stamp the words "The Coral Engineering Works Ltd." and "director" appear and between these two lines of the rubber stamp comes the signature of a gentleman Mr. S. C. Aich who is admittedly one of the three directors of the company. When the plaintiff brings his suit against the company and produces this document it is contended and successfully contended that this is not a sufficient acknowledgment within S. 19, Lim. Act, because Mr. S. C. Aich was only one of the three directors and had not got the authority of the other two directors to do anything in the matter. There was evidence on the part of the plaintiff that this Mr. S. C. Aich was the man who had made payments on behalf of the company and had given orders and had received money on behalf of the company and although the company's rubber stamp with room for the name of one director only had been employed, the defendants succeeded. The directors and the Judge seem to have got confused between the company's seal and an ordinary rubber stamp.

The present question has nothing to do with the seal of the company. Apart altogether from things which require a formal resolution of a Board of Directors most companies who conduct business have to employ one of their directors as manager to do the ordinary acts necessary in the conduct of the business. No one can conduct business by having everything signed by three directors. There is ample evidence that in the course of business carried on, this company could not manage to pay the money which was to have been paid and got time by acknowledging that the amount was due.

In my judgment the Rule must be made absolute and judgment must be entered for the full amount of the claim.



with costs both in this Court and in the Court below. Hearing fee in this Court is assessed at one gold mohur.

M.N./R.K. *Rule made absolute.*

**\* A. I. R. 1929 Calcutta 156**

SUHRAWARDY AND GARLICK, JJ.

*Surendra Chandra Ray Choudhuri*—  
Plaintiff—Appellant.

v.

*Kedareswar Choudhuri* — Defendant—  
Respondent.

Appeals Nos. 1378 to 1382 of 1926, Decided on 31st July 1928, from appellate decrees of Sub-Judge, Rajshahi, D/- 25th January 1926.

(a) **Bengal Tenancy Act, S. 105**—Word "land" includes share of tenant in holding and can form subject of proceedings under S. 105.

The word "land" as used in S. 105 may include a share of a cosharer landlord and may therefore include a share of a tenant in a holding. Therefore the land in the occupation of a tenant need not be an entire holding to form the subject of proceedings under S. 105: 21 C. L. J. 592, *Foll*; 25 Cal. 917 notes; 19 Cal 610 and 7 C. W. N. 670, *Ref.* [P 157 C 1]

\* (b) **Civil P. C., S. 11**—Prior decision though based on error of law can be res judicata.

An error of law is not a ground for setting aside a previous decree as passed without jurisdiction or for a declaration that it must never operate as res judicata. [P 157 C 2]

*Krishna Kamal Maitra*—for Appellant.

*Jatindra Mohan Chaudhuri* for *Bireswar Bagchi*—for Respondent.

**Suhrawardy, J.**—These five appeals arise out of suits for recovery of rent. They have been decreed by the lower appellate Court at the admitted rate. The plaintiff claims that he is entitled to enhanced rent as fixed by the Settlement Officer under S. 105, Ben. Ten. Act. It appears that the plaintiff had several cosharers in the mehal. There were batwara proceedings and certain lands were allotted to the plaintiff in his Saham. After the publication of the Record-of-Rights he applied for settlement of fair and equitable rent under S. 105, Ben. Ten. Act on the grounds which are covered by S. 30, Ben. Ten. Act. These applications were fought by the defendants and partially allowed. The plaintiff in these suits now claims rent as fixed by the Settlement Officer. The defence with

which we are now concerned is that the Settlement Officer had no jurisdiction to try the matter under S. 105, Ben. Ten. Act and, therefore, his decree is a nullity and cannot have legal effect. This objection is based upon the ground that the settlement khatians show that they include several plots and with reference to one plot in some of them the defendants' interest in the holding as a raiyat is noted as fractional, the plots in occupation of the defendants together with the share in one plot did not constitute a holding within the meaning of S. 30, Ben. Ten. Act and accordingly the Settlement Officer had no jurisdiction to enhance the rent of the lands in the occupation of the defendants. The learned Subordinate Judge has given effect to this contention and held that the word 'land' used in S. 105 does not mean and include a parcel or undivided share of a tenancy and hence the Settlement Officer had no jurisdiction to enhance the rent under S. 105 and his decision is ultra vires and inoperative.

The question raised is a serious one as it is directed to nullify the effect of the solemn act of a Court of justice. We have therefore carefully looked into the matter and the law as it at present stands and we are unable to say that the decree of the revenue officer was without jurisdiction and ultra vires. The meaning of the term 'land' came up for consideration in the case of *Safaruddi v. A. K. Fazal Huq* (1). The case was tried by D. Chatterjee, J. sitting singly and his decision was affirmed by a Bench consisting of Jenkins, C. J., and N. R. Chatterjee, J. The report of the case as it appears in the Calcutta Law Journal leads one to suppose that there was a division between the cosharers of the land and the tenants; had executed separate kabuliats in favour of the cosharers. If that were so, the decision would be in consonance with the decisions of case under S. 30, Ben. Ten. Act. But we have looked into the record of the case and find that as a matter of fact there was no division of the land but the tenants executed kabuliats in favour of different cosharers in respect of their share in the holding. The learned Judge there considered as to what meaning should be attached to the word 'land' in S. 105, Ben. Ten. Act and the

(1) [1914] 21 C. L. J. 592=30 I. C. 414.



observation made by him on this point may be quoted here with advantage :

"The next question that arises is whether the share of the land covered by each kabuliati can be said to be the land held by the tenant. It has been held in respect of holdings that a share of an undivided holding cannot be called a holding : see *Hurry Churn v. Raja Runjit Singh* (2). The word 'holding' does not occur in S. 105. The word occurring there is 'land held by the tenant.' The word 'land' has not been defined in the Bengal Tenancy Act. I do not see any reason why the share of the land held under particular landlord should not come within the purview of the word 'land' used in the section. In this view of the case I think that S. 188, Ben. Ten. Act is no bar to the maintenance of this application."

In that case the objection was that one of the landlords who wanted to enhance the rent under S. 52, Ben. Ten. Act could not apply for settlement of fair rent. In the Letters Patent appeal *Jenkins, C. J.* remarked:

"This case has been decided favourably to the plaintiffs by *Digambar Chatterjee, J.* on the footing that there were separate tenancies and we think that if there were separate tenancies then in the circumstances of this case there was a compliance with the provisions of S. 105, Ben. Ten. Act."

This case, so far as I know, has not been dissented from subsequently and it carries with it high authority of three learned Judges of this Court. The result of the decision is that though the land in occupation of the tenant may not be an entire holding, it may form the subject of proceedings under S. 105. The result may appear to be incongruous if not quite absurd because under the law as it stands at present an application under S. 30, Ben. Ten. Act, by a cosharer landlord is not competent ; but if he applies under S. 105 for enhancement of rent under S. 30 he gets the right to do so, even if his claim refers to a share of a holding. There are cases which lay down that where a tenant executes a separate kabuliati in favour of a cosharer landlord proceedings against him for enhancement of rent are maintainable: *Panchanan v. Raj Kumar* (3) and *Go-binda v. Hamidulla* (4). But it is not necessary to go so far as we have got direct authority on the point that the word 'land' as used in S. 105 may include a share of a cosharer landlord and may therefore include the share of a tenant in a holding.

The question as regards the decree of

(2) [1898] 25 Cal. 917 note=1 C. W. N. 521.

(3) [1892] 19 Cal. 610.

(4) [1903] 7 C.W.N. 670.

the revenue officer being without jurisdiction and ultra vires may be looked at from a different point of view. Under S. 81, Estates Partition Act, the Deputy Collector has the right to split up a holding which accordingly forms a separate tenancy under a particular landlord. The mere fact that in one of the plots the tenant has been given a share does not take away the effect of S. 81, Partition Act. I must note here that in the proceedings before the Settlement Officer which were contested no objection was taken on this ground. It was virtually admitted that the plaintiff was competent to ask for enhancement under the law. It does not therefore lie in the mouth of the defendants to turn round now and say that the decision of the Settlement Officer was without jurisdiction in view of certain decisions of this Court which held that proceedings under S. 30 for enhancement of rent must relate to an entire tenancy. The law as understood by the Settlement Officer was laid down in the case reported in *Safaruddi v. Fazal Huq* (1). If there has been any subsequent divergence from that view and even if the latter view is correct, an error of law is not a ground for setting aside a previous decree as passed without jurisdiction or for a declaration that it must never operate as res judicata. In view of the observations made above I am of opinion that these appeals must succeed; the decrees of the Courts below are set aside and the plaintiff's suits decreed with costs both here and in the Courts below. In Appeals Nos. 1379 and 1380 of 1926 the respondents have not appeared. I accordingly make no order for costs in this Court in these cases but the plaintiff will be entitled to his costs in the Courts below.

**Garlick, J.**—I agree.

M.N./R.K.

*Appeals allowed.*

### A. I. R. 1929 Calcutta 157

CAMMIADE AND S. K. GHOSE, JJ.

*Srish Chandra Bhaduri and others* —  
Defendants—Appellants.

v.

*Brojobashi Pramanik*—Plaintiff—Respondent.

Appeal No. 2206 of 1926, Decided on 24th August 1928, from appellate decree of 2nd Sub-Judge, Zilla Pabna, D/- 2nd July 1926.



**Bengal Tenancy Act, Sch. (3), Art. (3)—Widow selling her widow's estate in occupancy holding to landlord — Suit by reversioner to recover possession will not be governed by Art. 3, Sch. 3.**

A widow sold to the landlord the occupancy holding which she possessed as her widow's estate. Just six years after widow's death her reversioner brought a suit for possession of the holding.

*Held:* that although the landlord remained in possession after widow's death, it could not be said that there was any dispossession by the landlord so as to apply two years' rule of limitation contained in Art. 3, Sch. 3.

[P 158 C 2]

*Charu Chandra Biswas and Rabindra Nath Chowdhury*—for Appellants.

*Radha Benode Pal and Jitendra Mohan Banerjee*—for Respondent.

**Judgment.**—This appeal is by the defendants in a suit for recovery of possession of certain lands as belonging to an occupancy holding. The land had belonged to two brothers, Kashinath and Shibnath, and the plaintiff is Shibnath's reversionary heir. It is found by the learned Courts below that Shibnath had predeceased his brother Kashinath and, therefore, the plaintiff was only entitled to recover a half share of the tenancy. The property in suit had been sold by Shibnath's widow, Tushta Bewa, to the defendants, who are some of the cosharer landlords. Tushta died in Chaitra 1324, and the suit was instituted just after six years after her death.

The question which is raised before us is the question of limitation. The defendants, who are the appellants before us, contend that the special rule of limitation contained in Art. 3, Sch. 3, Ben. Ten. Act applies, and that the period of limitation for the suit is two years from Tushta's death. Art. 3, Sch. 3, Ben. Ten. Act, declares the period of limitation in suits by a raiyat or under-raiyat, where dispossession is by the landlord. The defendants are certainly landlords, but the question is whether there was any dispossession. The defendants contend that by their retention of possession after Tushta's death they dispossessed the plaintiff. This contention is not sound. In order that there should be dispossession, there should first have been possession. Had the plaintiff had possession at any time prior to the sale by Tushta or prior to the occupation of the land by the defendants, then the defendants might have dispossessed the plaintiff; but where, as in the present case, the plain-

tiff had never been in possession and he had never had the right to possess, the fact that the defendants had continued in possession after Tushta's death does not amount to dispossession during Tushta's life time; the defendants were entitled to possess the land, because it was open to Tushta to part with her widow's interest in the property. The defendants' right expired at the time of Tushta's death. But that in itself will not constitute their continuance of possession into an act of dispossession, for the purpose of the rule of limitation laid down in the article referred to above. The appeal, therefore, fails and is dismissed with costs.

S.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 158

C. C. GHOSE AND BUCKLAND, JJ.

*Umesh Chandra Manna*—Defendant—Petitioner.

v.

*Amar Nath Jana*—Plaintiff—Opposite Party.

Civil Revn. Appln. No. 1000 of 1927, Decided on 5th December 1927, from order of Offg. Sub-Judge, Midnapur, D/- 7th April 1927.

**Civil P. C., S. 151 — Court cannot invoke S. 151 to restore dismissed suit.**

A Court invoking the aid of the provisions of S. 151 for the purpose of restoring a suit which had been dismissed is exercising a jurisdiction not vested in it by law. [P 159 C 1]

*Rama Prasad Mukhopadhyay* for *Promotho Nath Bandopadhyay* — for Petitioner.

*Gopendra Nath Das* — for Opposite Party.

**C. C. Ghose, J.**—In this case which was a suit for recovery of mesne-profits, an order was made by the learned Subordinate Judge on 9th July 1925 by which he directed that the suit should stand dismissed "for the present without adjudication." Thereafter, there was an application under O. 47, R. 1 and S. 151, Civil P. C. The learned Subordinate Judge came to the conclusion that O. 47, R. 1, Civil P. C., had no application but that the suit which had been dismissed on 9th July 1925 could be restored under the provisions of S. 151, Civil P. C. It is against that order that the present rule has been obtained. Now, if as a matter of fact the suit had not come to a termi-



nation by reason of the order of 9th July 1925, then no application was entertainable under O. 47, R. 1, Civil P. C. But the application under O. 47, R. 1, Civil P. C., was entertained and disposed of on its merits, the learned Subordinate Judge coming to the conclusion that, on the facts. O. 47, R. 1, Civil P. C., did not apply. He, however, made a mistake in invoking in aid the provision of S. 151, Civil P. C. It is quite clear that S. 151, Civil P. C., cannot be invoked for the purpose of restoring to the file a suit which has been dismissed. In my opinion, the learned Subordinate Judge in invoking in aid the provisions of S. 151, Civil P. C., for the purpose of restoring the suit which had been dismissed on 9th July 1925 exercised a jurisdiction which was not vested in him by law. It follows, therefore, that the order of the Subordinate Judge restoring the suit under S. 151, Civil P. C., must be set aside. The rule is accordingly made absolute with costs hearing fee one gold mohur.

**Buckland, J.**—I agree.

M.N./R.K. *Rule made absolute.*

### A. I. R. 1929 Calcutta 159 (1)

C. C. GHOSE, J.

*Raj Kumar Dutta*—Defendant—Petitioner.

v.

*Jadu Nath Gupta*—Plaintiff—Opposite Party.

Civil Rule No. 1612 of 1927, Decided on 20th March 1928, from order of 2nd Munsiff, Sealdah, D/- 1st December 1927.

**Civil P. C., S. 115—Interlocutory order—Suit wrongly tried by Court having no jurisdiction—High Court can interfere.**

The High Court will not ordinarily interfere with interlocutory orders unless it is apparent that such an interference is called for in the interests of justice, but each case must depend upon its own facts, and so where the lower Court decided wrongly the question of jurisdiction and on such wrong decision gave itself jurisdiction the High Court will interfere.

[P C]  
**Order.**—In this case, the plaintiff sued to enforce specific performance of a contract to execute a conveyance in respect of the free-hold of the property mentioned in the plaint. Such a suit was and is a suit for enforcement of a contract for an interest in immovable property. There cannot be any doubt that such a suit must be brought in a forum within whose jurisdiction the property in question is situate. *Ex consesio*, the Sealdah Court

has no jurisdiction, in this view of the matter, to try a suit for specific performance of a contract for a conveyance of the free-hold in a property which is situate outside the jurisdiction of that Court. It follows, therefore, that the Sealdah Court by deciding that it has jurisdiction cannot give itself jurisdiction to try the suit. It further follows that there has been an exercise of jurisdiction by the Sealdah Court where it has no such jurisdiction. The question then arises whether this Court should interfere in the matter. It is argued by Dr. Basak who appears for the plaintiff-opposite party that what has been decided is only with respect to an issue which arises in the suit, that is, with respect to a portion or part of the case itself, and that, that being so, this Court will not interfere under S. 115, Civil P. C. with an interlocutory order of this description. No doubt, in the abstract, it is well-settled that this Court will not ordinarily interfere with interlocutory orders unless it is apparent that such an interference is called for in the interests of justice. But each case must depend upon its own facts and it would be extraordinary if, in a case of this description and on the facts referred to above, it was held that this Court was powerless under S. 115, Civil P. C. to set the Court, which decided wrongly the question of jurisdiction and on such wrong decision gave itself jurisdiction right. In my view, there is abundant authority in support of the contention that this Court will interfere in a case of this description.

The rule is accordingly made absolute with costs. The decision complained of is set aside and the case is sent back to the Court below in order that Court may return the plaint to the plaintiff to be presented in the proper Court. The hearing-fee in this Court is assessed at two gold mohurs.

S.J./R.K.

*Case sent back.*

### \* A. I. R. 1929 Calcutta 159 (2)

B. B. GHOSE AND BOSE, JJ.

*Krishna Chandra Das*—Judgment-debtor—Appellant.

v.

*Jotindra Nath Porial and another*—Respondents.

Appeal No. 205 of 1928, Decided on 16th September 1928.



\* Provincial Insolvency Act (1920), S. 78—Insolvent acknowledging debt to decree-holder in insolvency proceedings—It is sufficient proof of debt within proviso to S. 78.

Section 49 only specifies a simple mode of proof of the debt but does not exclude any other mode of proof, and where, therefore, the debt to the decree-holder was proved in the insolvency proceedings, according to the statement of the insolvent that a decree had been obtained against him, the debt must be taken to have been proved within the proviso to S. 78. [P 160, C 1]

*Abinas Chandra Ghose*—for Appellant.  
*Nasim Ali*—for Respondents.

**Judgment.**—In this case the question is whether the application for execution is barred by limitation. Both the Courts below have held that the decree-holder is entitled to exclude the time during which the insolvency proceedings were pending, that is between the period of 9th April 1924 when the judgment-debtor was adjudicated an insolvent and the 27th August 1925 when the adjudication was annulled. During the course of the execution of the decree the judgment-debtor applied for being adjudicated an insolvent. He entered in his schedule the decree-holder as the only person who was his creditor, and apparently he stated that the decree-holder had obtained the decree. Upon that the executing Court stayed the execution and it appears that the Court directed the decree-holder to produce a copy of the insolvency proceedings. The decree-holder apparently failed to produce a copy of the insolvency proceeding within the time allowed and the execution case was thereupon struck off. Now the judgment-debtor says that S. 78 does not apply because the debt was provable under the Insolvency Act but was not proved under the Act, and reference is made by his advocate to S. 33, Provincial Insolvency Act, under which he says that the creditor was bound to prove his debt again. Reference has also been made to S. 49 as to the mode of proof of the debt. In this case the insolvent admitted the debt of the creditor decree-holder. S. 49 only specifies a simple mode of proof of the debt, and I agree with the observation of the learned Munsiff in this case which has been affirmed by the learned Judge that S. 49 does not exclude any other mode of proof. In this case the debt to the decree-holder was proved in the insolvency proceedings according to the statement of the insolvent that he had obtained a decree against

the insolvent; therefore he was on the facts of this case entitled to exclude the period under S. 78 of the Act. This appeal is therefore dismissed with costs. We assess the hearing fee at three gold mohurs.

S.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 160

CUMING AND LORT-WILLIAMS, JJ.

*Kali Kumar Das*—Accused—Petitioner.

v.

*Nawabali Dhali*—Complainant—Opposite Party.

Criminal Revn. Petn. No. 1315 of 1927, Decided on 22nd March 1928.

(a) Criminal P. C., S. 239 (d)—Persons may be tried together although charge is alternative or distinct.

It is sufficient for purposes of S. 239 (d) that the offences were committed in the course of the same transaction. Whether the charge is an alternative one or is a distinct charge is obviously immaterial. [P 161, C 1]

(b) Criminal P. C., S. 239 (d)—All offences, whether substantive or abetment can be tried together, if committed in course of same transaction.

Sub-Cl. (d) contemplates all the offences committed by persons, whether substantive offences or abetment of those offences, being tried together provided they were committed by the persons in the course of the same transaction. [P 161, C 1]

(c) Criminal trial—Joint trial.

The legality of the joint trial depends upon the accusation and not on the trial: *A.I.R.* 1922 Cal. 107, *Rel. on.* [P 161 C 2]

*Debendra Narayan Bhattacharji* and *Tarapada Banerji*—for Petitioner.

*Mritunjoy Chattopadhyaya* and *Debrata Mukerji*—for Opposite Party.

**Cuming, J.**—The present petitioner *Kali Kumar Das* was tried jointly with one *Rahimuddi* on the following charges: first of all that they conspired to commit criminal breach of trust with regard to a certain sum of money about Rs. 2,000 odd and thereby committed an offence punishable under S. 408 read with S. 120-B; and secondly that they misappropriated a sum of Rs. 2,000 odd and so committed an offence under S. 403, I. P. C. Against the present petitioner there was also a further charge that he committed criminal breach of trust as a servant with regard to the same sum of money Rs. 2,000 odd. These charges were drawn up on 30th July 1927. On 13th September 1927 the



Magistrate added what he has described as alternative charges, namely, three charges against the present petitioner of falsifying the accounts, each of these charges dealt with one specific item in the account and also against the other accused Rahimuddi of abetting the same falsification of accounts.

It is unnecessary to state in detail the facts of the case at length. They are briefly these: The petitioner was a servant of the complainant Nawab Ali who is a jute broker at Poran bazar Chandpore. Rahimuddi was a customer. The case is that by means of falsification of certain books of account they defrauded or attempted to defraud the complainant of the sum of Rs. 2,000 odd.

The first argument that has been put forward by the petitioner is that S. 239, Criminal P. C. does not contemplate what are described as alternative charges being tried together with the original charges. I admit I do not see the force of this contention. S. 239 (d) provides that persons accused of different offences committed in the course of the same transaction may be tried together. It is sufficient that the offences were committed in the course of the same transaction. Whether the charge is an alternative one as provided by S. 236 or is a distinct charge is obviously immaterial.

The learned vakil has next argued that the two persons cannot be jointly tried on three substantive charges and one of them Rahimuddi of abetting these three offences. As far as I can see this is also covered by sub-Cl. (d), S. 239. No doubt sub-Cl. (c) does not cover this case, but sub-Cl. (d) most certainly does. Sub-Cl. (d) contemplates all the offences committed by these persons, whether substantive offences or abetment of those offences, being tried together provided they were committed by these persons in the course of the same transaction.

Then the learned vakil has argued that S. 222, sub-Cl. (2) has no application to the present case and that hence the accused was really tried on some 10 or 20 charges of falsification. He contends that S. 234, Criminal P. C. would be a bar to this procedure. But S. 234 refers to offences of the same kind though in other respects entirely distinct from each other and not necessarily forming part of the same transaction. The section which governs the case, however, is S. 235,

Criminal P. C. which provides that any number of offences may be tried together if they form part of the same transaction. That is equally clear from the wording of S. 239 (d) which clearly to my mind contemplates that all offences committed in the course of the same transaction may be tried together and that the accused persons concerned in this offence may be jointly tried though they are concerned in different offences. The criterion as to whether they can or cannot be tried together is whether these offences were committed by them in the course of the same transaction. It is no doubt always open to the Court if it appears that the accused persons would be embarrassed by such a joint trial to try the accused persons or even the charges separately. S. 239 is only an enabling section. It does not, however, appear that the petitioner ever suggested that he would be embarrassed by a joint trial with his co-accused Rahimuddi or ever asked for a separate trial.

It was then contended that S. 234 is not applicable when several persons were tried jointly under S. 239, and we were referred to the case of *Budhai Sheik v. Emperor* (1). I admit that I do not see the applicability of S. 234 to the present case. This is not a question of different offences of the same kind though otherwise nonconnected with each other committed within the space of one year. This is a case of number of offences so connected as to form one transaction which case is dealt with under S. 235, and also under S. 239 (d).

The only question really to be decided is whether all the offences of which these persons have been tried were committed in the course of the same transaction. As contended by the learned vakil for the petitioner and also by the learned vakil who appears for the complainant the legality of the joint trial depends upon the accusation and not on the result of the trial: see the case of *Abdul Salem v. Emperor* (2). The case for the prosecution in this case was that between certain dates the two accused conspired together to defraud the complainant of a sum of money roughly Rs. 2,000. All the various means that were used to carry out this conspiracy, namely, falsification of accounts and misappropriating various

(1) [1905] 33 Cal. 292=10 C.W.N. 32.

(2) A.I.R. 1922 Cal. 107=49 Cal. 573.



sums during the period all formed part of the same transaction which was a conspiracy to defraud the complainant. All the offences with which the present petitioner and Rahimuddi who was tried jointly with him had been charged and convicted were committed in the course of this one transaction. The rule therefore stands discharged. The petitioner, if on bail, must surrender to serve out the remaining portion of the sentence,

**Lort-Williams, J.**—I agree.

S.N./R.K.

*Rule discharged.*

### \* A. I. R. 1929 Calcutta 162

MITTER, J.

*Sashi Dulal Pyne and others*—Decree-holders—Petitioners.

v.

*Nanda Lal Das and others*—Opposite Party.

Civil Revn. Appln. No. 630 of 1928, Decided on 30th July 1928, from order of 3rd Munsif, Alipur, D/- 20-3-1928.

\* (a) Civil P. C., S. 151 — Court cannot set aside in review its order passed without considering certain provision of law.

A Court cannot set aside in review its order passed without taking into consideration certain provision of law because to do so would amount to set aside an order passed on a misconception of law, which is not competent. [P 162 C 2]

(b) Civil P. C., O. 38, R. 10—Person having no interest in properties attached, nor possessing them at time of attachment cannot proceed under O. 38, R. 10.

The procedure to be followed in investigation of claims under the provisions of O. 38, is the same as the procedure to be followed under O. 21, R. 58. So when at the date of attachment a person had no interest in nor was possessed of the properties attached, he cannot proceed under O. 38, R. 10.

[P 162 C 2]

*Satindra Nath Mukerji* — for Petitioners.

*Hemendra Chandra Sen* — for Opposite Party.

**Judgment.**—This rule must be made absolute. It appears that the opposite party preferred a claim under the provisions of O. 38, Civil P. C., to an attachment of the disputed properties before judgment. On 14th March 1928 that claim was rejected by the Munsif as untimely and on the further ground that the decree-holder's attachment preceded the auction-sale of the opposite party. On 20th March 1928 an application was

made by the opposite party before the Munsif under S. 151, Civil P. C., and that application was allowed by the Munsif on the ground that he had rejected the application summarily on 14th March 1928, not taking into consideration the provisions of O. 38, R. 10, Civil P. C. The Munsif really set aside the previous order on the ground that he had passed the previous order on a misconception of the law. That certainly was not a ground which justified him in setting aside the order purported to have been made by way of review under S. 151 of the Code. His order under S. 151 was made without jurisdiction and must be set aside. It is argued however, by the learned advocate for the opposite party that even if the order is made without jurisdiction, this Court is not bound to interfere, seeing that his client had purchased these properties in execution of a decree subsequent to the attachment. There is, however, no force in this contention for if that is his case, he is not a person who can put in a claim under O. 21, R. 58, Civil P. C., or under the provisions of O. 38 of the Code. The procedure to be followed in investigation of claims under the provisions of, O. 38 is the same as the procedure to be followed under O. 21, R. 58 and the subsequent sections of the Code. O. 21, R. 59 of the Code indicates the scope of the enquiry under O. 21, R. 58, and it limits the enquiry to this, that the claimant must show that at the date of attachment he had some interest in or was possessed of the properties attached.

Now on the claimant opposite party's own showing, at the date of attachment he had no interest in or was not possessed of the properties attached for the claimant had only then a decree against the judgment-debtor whose properties were attached. There had been no sale in execution of that decree and consequently it cannot be said that the claimant opposite party had at the date of the attachment any interest in or that he had possession in the properties attached, so, on the claimant's own case he is not a person who can come in under O. 21, R. 58. He may have other remedies. All that order O. 38, R. 10, says is that the rights of such a purchaser as the claimant is, will not be affected by reason of any order



of attachment before judgment that might have properly been made. The order made by the Munsif is clearly without jurisdiction and must be set aside. The petitioner is entitled to the costs of this rule. I assess the hearing fee at one gold mohur.

S.N./R.K.

*Rule made absolute.*

**\* A. I. R. 1929 Calcutta 163**

SUHWARDY AND GARLICK, JJ.

*Rajani Kumar Mitra and others—Defendants—Appellants.*

v.

*Ajmaddin Bhuiya—Plaintiff—Respondent.*

Appeal No. 1913 of 1926, Decided on 23rd August 1928, from appellate decree of 2nd Sub-Judge, Tipperah, D/- 21st April 1926.

**\* (a) Civil P. C., S. 11—Res judicata does not affect jurisdiction but is plea which party can waive.**

The bar of res judicata is one which does not affect the jurisdiction of the Court but is a plea in bar, which a party is at liberty to waive. [P 164 C 1]

**\* (b) Civil P. C., S. 11—Out of two conflicting decrees last should prevail.**

When there are two conflicting decrees, the last should prevail on the ground that in the eye of law it is binding between the parties and the previous decree should be taken as pleaded in the latter suit and not given effect to, or must henceforth be regarded as dead: 31 *M. L. J.* 219; 37 *All.* 531; *A. I. R.* 1921 *Mad.* 612 and 1 *A. L. J.* 416, *Rel. on.* [P 164 C 2]

*Prokash Chandra Majumdar—for Appellants.*

*Upendra Kumar Roy—for Respondent.*

**Judgment.**—This is an appeal by the defendants in a suit by the plaintiff for declaration of title and confirmation of possession on the ground that he has an occupancy raiyati right in the two jamas mentioned in the schedules *ka* and *kha* of the plaint and is not liable to be evicted therefrom. The facts which have led up to this suit are that a suit was brought in 1909 by the defendants for ejectment of the plaintiff from the lands in this suit alleging him to be an under-raiyat and that suit was dismissed. In 1918 the defendants brought a suit against the plaintiff under S. 66, Ben. Ten. Act, alleging that the plaintiff was his korfa tenant, for arrears of rent and in default of payment for ejectment. That suit was decreed ex parte but the plaintiff in this suit appeared at a later stage and depo-

sited a portion of the decretal amount. It appears that he did not deposit the entire amount and, therefore, the defendant took out execution of the decree and obtained formal delivery of possession through Court. The tenant not having vacated the land the defendants brought a suit in 1921 for recovery of possession. This suit was decreed after contest up to the appellate Court. That decree was for khas possession of the lands with mesne profits against the plaintiff. Thereafter in 1924 the plaintiff instituted this suit for declaration of his occupancy right in the land and for confirmation of possession. The trial Court dismissed the plaintiff's suit in respect of schedule *ka* and decreed the suit in respect of schedule *kha*.

The plaintiff appealed and the learned Subordinate Judge in the appellate Court decreed the suit in respect of both these plots. The defendants have appealed before us but they have confined their appeal only to plot *ka*. The point taken in appeal is that the lower appellate Court was wrong in not giving effect to the decree passed in their favour in 1918 and 1921. The learned Subordinate Judge holds that the decree passed in 1909 in which the plaintiff was held to be an occupancy raiyat should operate as res judicata and accordingly the subsequent decrees in 1918 and 1921 must be treated as without jurisdiction and nullities. This view is clearly wrong. The plaintiff should have pleaded that the decree of 1909 had operated as res judicata in the suit in 1918. But he omitted to do so; and the result was that the Court passed a decree holding that the plaintiff was an under-raiyat, for that is the effect of the decree which was passed under S. 66, Ben. Ten. Act. In the suit of 1921 which was based upon the suit of 1918 the plaintiff again failed to bring to the notice of the Court the decree of 1909 with the result that the defendant's suit for khas possession and mesne profits was decreed against the plaintiff. The present suit on the face of the decree passed in 1921 is incompetent. Instead of taking the defence which the plaintiff now pleads in his plaint he brings another suit for the purpose of agitating the matters which were involved in the suits of 1918 and 1921. There is no procedure in law which entitles him to do it. The plaintiff cannot be permitted to attack a



decree passed by a Court of competent jurisdiction not vitiated by fraud or inoperative in a subsequent suit. The only mode of assailing a decree by a separate suit is to attack it on the ground of fraud for which period of limitation is prescribed in the Limitation Act. On the general law, therefore, the plaintiff is precluded from maintaining this suit. Also on the rule of estoppel by judgment the plaintiff is not entitled to the relief he claims.

The position at the worst in this case is that there are two conflicting decrees. By one decree the plaintiff's right as occupancy raiyat was established. By another decree that right was negatived. The point that arises in these circumstances is as to which decree should prevail. The trend of authorities is that the last decree ought to prevail. If finality is not given to the last decree there would be no end of the litigation which it is the object of S. 11, Civil P. C., to secure. The defendants in this suit may again bring a suit and base their claim on the decree of 1918 or 1921. If in such a suit the plaintiff can put forward the decree in this suit operating as *res judicata* in that it is the last decree between the parties, why should not the same ground be available to the defendants in the present suit? As has been observed by the learned Judges of the Madras High Court in *Seshayya v. Venkatadri Appa Row* (1) the effect of not pleading the previous decree in answer to the plaintiff's claim in a suit stands on the same footing as if the defence was raised by the defendant and disallowed by the Court. It cannot be placed on a higher footing on any reasoning based upon common sense or law. The bar of *res judicata* is one which does not affect the jurisdiction of the Court but is a plea in bar which a party is at liberty to waive. If a party does not put forward his plea of *res judicata* in a suit he must be taken to have waived it or it must be taken to be a matter which ought to have been made a ground of attack and deemed to have been a matter directly and substantially in issue in the suit under Expl. (4), S. 11, Civil P. C. The party omitting to plead *res judicata* intentionally invites the Court to decide the case on the merits and having failed to

secure a decision in his favour he should not be allowed to go behind the last adjudication and ask for the trial of an issue which he could have raised at the previous trial.

The view that the last decision between the parties ought to prevail has been accepted in *Mallu Mal v. Jhamman Lall* (2); *Dambar Singh v. Munawar Ali Khan* (3); and recently in a Madras case reported in *Rukmani Ammal v. Narasimha Iyer* (4). Apart from the authorities it seems to me on common sense and on application of the accepted principles of law that a party being defeated in a suit should not be allowed to attack the decree in a subsequent suit merely on the ground that he had a very good defence in the previous suit which he had omitted to take. The decree of 1921 was passed by a competent Court with jurisdiction and is not vitiated by fraud as is found by the learned Munsif. There is, therefore, no ground on which the plaintiff can get rid of that decree by a subsequent suit on the ground that there was a previous decision in his favour which was not brought to the notice of the Court in the suits of 1918 and 1921. The fact that the decree in 1909 was not brought to the notice of the Court in 1918 and 1921 does not render the decrees passed by the Courts which were competent to pass them without jurisdiction and nullities as has been held by the learned Subordinate Judge. The plaintiff has slept over his right and he cannot now take advantage of his own remissness. I am quite clear in my mind that as a broad proposition of law when there are two conflicting decrees the last should prevail on the ground that in the eye of law it is binding between the parties and the previous decree should be taken as pleaded in the latter suit and not given effect to, or must henceforth be regarded as dead.

For the above reasons, in my judgment, this appeal should be allowed, the decree of the lower appellate Court set aside and that of the trial Court restored with costs. As the appellants have abandoned in this case their claim to the land in schedule *kha*, they will be entitled to proportionate costs in this appeal and of the hearing in the Court of appeal below.

S.N./R.K.

*Decree set aside.*

(1) [1916] 31 M.L.J. 219=36 I. C. 289=(1916) 2 M.W.N. 219.

(2) [1904] 1 A. L. J. 416.

(3) [1915] 37 All. 531=30 I.C. 775=13 A.L.J. 764.

(4) A. I. R. 1921 Mad. 612.



**A. I. R. 1929 Calcutta 165**

CAMMIADE AND S. K. GHOSE, JJ.

*Asutosh Ghose and another*—Plaintiffs  
—Appellants.

v.

*Sashi Mohan Roy and others*—Defendants—Respondents.

Appeal No. 109 of 1926. Decided on 18th June 1928, from appellate decree of 2nd Addl. Dist. Judge, Dacca, D/- 17th July 1925.

**Limitation Act, S. 7—Plaintiffs belonging to joint Hindu family—One being minor—Other plaintiff manager of family and also minor plaintiff's certificated guardian—Elder plaintiff could give valid discharge—No extension of time was available.**

Time cannot be extended under S. 7 in a suit for accounts where, although one of the plaintiffs is a minor, the other can give a valid discharge on behalf of both.

Plaintiffs formed a joint Hindu family. One of them was a minor but the other was the manager of the family as well as his certificated guardian.

*Held:* that the elder plaintiff could give valid discharge in either of his capacities and no time could, therefore, be extended: *A.I.R.* 1916 P. C. 148 and 6 C. L. J. 383, *Dist.*

[P 165 C 2]

*H.D. Bose, Bhupendra Chandra Guha and Surya Kumar Aich*—for Appellants.

*Surat Chandra Roy Chowdhury and Suresh Chandra Talukdar*—for Respondents.

**Cammiale, J.**—This appeal is by the plaintiffs against the dismissal of their suit in part. The suit was one for accounts in connexion with a business that had belonged to the father of the plaintiffs who died in October 1915. The defendant was the gomastha in charge of the business from time of the father of the plaintiffs. No accounts had been called for from him at any time prior to the beginning of the year 1327 B. S., that is to say, some time in April 1920 when defendant was dismissed. The accounts prayed for are for the whole of the period of the defendant's service. The Courts below found that the claim so far as it relates to the period prior to the death of the plaintiffs' father is barred by limitation. The plaintiffs have appealed. Plaintiff 1 is an adult and the second was a minor even at the time of the hearing of the appeal in the Courts below, and the plaintiffs have sought to take advantage of the provisions of S. 7, Lim. Act in order to obtain extension of time

for their suit. Both the learned Courts below have held that as plaintiffs 1 and 2 were members of a joint Hindu family of which plaintiff 1 was the karta, no extension of time could be availed of under the provisions of S. 7 because plaintiff 1 had authority to give a discharge not only for himself but also for plaintiff 2.

The appellants relied on a passage at the end of the decision of the Judicial Committee in the case of *Nobin Chandra Barua v. Chandra Madhab Barua* (1) where their Lordships say that "as two of the appellants were minors and could not give a discharge the suit was maintainable by them."

Obviously if there was no one capable of giving a discharge, S. 7, Lim. Act would give the appellant-plaintiff who was a minor a right to extension of time.

Reliance is also placed on the decision of this Court in the case of *Harihar Pershad v. Bholi Pershad* (2). That was also a suit for accounts. In that suit also there were two plaintiffs one of whom was a minor; but the elder of the two plaintiffs was not the karta of the family; and it was held, that the elder plaintiff could not give a discharge to the defendant not only because he was not the karta of the family but also because a certificated guardian had been appointed to have charge of the person and properties of the minor plaintiff. In that case the fact that there was a certificated guardian who was capable of giving a discharge was not pressed and was not considered. In the present case the elder plaintiff held two positions in which he had the right to give a discharge on behalf of the minor plaintiff. He not only was the karta of the family but also was the certificated guardian. In both these capacities he could have given a discharge to the defendant, and, therefore, the Courts below were right in the view they have taken of the suit. The appeal, accordingly, fails and is dismissed with costs.

**S. K. Ghose, J.**—I agree.

S.N./R.K.

*Appeal dismissed.*

(1) *A. I. R.* 1916 P. C. 148=44 Cal. 1 (P.C.).  
(2) [1907] 6 C. L. J. 383.



**A. I. R. 1929 Calcutta 166**

B. B. GHOSE AND BOSE, JJ.

*Sarajubala Debi and others*—Plaintiffs—Appellants.

v.

*Jyotirmoyee Debi and others*—Defendants—Respondents.

Appeal No. 166 of 1926, Decided on 1st July 1928, from decree of 5th Sub-Judge, Dacca, D/-7th June 1926.

**(a) Deed—Construction—Construction put on similar document is no guide.**A document is not to be construed with reference to authorities as to how a similar document was construed : *Aspden v. Seddon*, (1875) 10 Ch. 394, *Ref.* [P 167 C 1]**(b) Deed—Construction—Person granting patni talukdari patta to his daughter—She, her sons, sons' sons, and her daughters to continue to possess as malik—But her other heirs not to have any right—Absolute estate was granted to daughter—Direction regarding succession was not limited to what happened at her death but was for indefinite period of time, and it being against law of succession was void—Daughter was entitled to deal with it as she liked.**

A person executed a patni talukdari patta of his taluk in favour of his daughter. She and her sons born of her womb and sons born of their loins in succession and the daughters of her womb were to continue to possess the same and were to be malik in possession by right of miras talukdari. But except for these her other heirs such as her daughters' descendants or her husband were to have no right to it.

*Held* : that the donor in this case desired to grant an estate of inheritance but directed that the succession should take place in a specified manner. It was not limited to what should happen at her death but gave directions for an indefinite period of time or, in other words, he intended to alter the rule of succession. The provisions restricting succession, therefore, were void, and the daughter was entitled to deal with the property as she liked. 9 M. I. A. 123, *not Foll.*; I. A. Sup. Vol. 47 at 65; 6 M. I. A. 526 and 38 Cal. 603 (P.C.), *Rel. on.* [P 168 C 2]

N. Sircar, Surendra Nath Guha, Nasim Ali and Kiran Mohan Sarkar—for Appellants.

B. L. Mitter, Naresh Ch. Sen Gupta, Bhupendra Chandra Guha, Jitendra Kumar Sen Gupta, Upendra Lal Roy, Rajendra Chandra Guha, Hari Prasanno Mukerjee, Kiran Kumar Roy, Jitendra Mohan Banerjee and Nirmal Kumar Sen—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the plaintiffs against the judgment and decree of the Subordinate Judge, Fifth Court, Decca, dated 7th June 1926 dismissing their suit. The suit was for re-

covery of possession of a taluk on the allegation that the plaintiffs were the heirs under the Hindu Law of Raja Kali Narayan Roy who was the original owner of the property. The allegations of the plaintiffs were that the Raja granted a sub-lease of the taluk to his daughter Kripamoyee Devi on certain conditions. The Raja died in 1878, Kripamoyee died on 27th April 1920, without leaving any issue. Under the terms of the lease, Kripamoyee got only a life-interest and on her death without issue, the leasehold interest lapsed and the property has reverted to the estate of Kali Narayan and the plaintiffs are entitled to recover possession of it as his heirs. The defendants claim the property under a will said to have been executed by Kripamoyee and they allege that Kripamoyee had an absolute interest in the property in question and the provisions in the lease on which the plaintiffs purport to base their claim are void. They also raised other questions in defence which it is not necessary to relate now. It is admitted that the plaintiffs can succeed only if after the death of Kripamoyee, the disputed leasehold property reverted to and became part of the estate left by Raja Kali Narayan. The Subordinate Judge, therefore, took up that question only for decision first and decided it against the plaintiffs. If the conclusion of the learned Subordinate Judge is right then the suit will stand dismissed, otherwise the case must be remitted for decision of the other questions raised in the suit.

The question in controversy depends entirely upon the true construction of the patta granted to Kripamoyee and the validity or otherwise of certain provisions contained in it. There were three documents executed by Kali Narayan in her favour. They are more or less on the same terms. It will be sufficient to take into consideration the last of them dated 5th March 1877. The deed is described as a miras talukdari patta. The relevant portion of it runs thus :

"I give you patni talukdari patta in respect of my purchased taluk . . . . . total annual sadar jama being fixed at Rs. 4,840, without any selami on account of my affection for you. You and your sons born of your womb and sons born of their loins in succession, and the daughters born of your womb, shall continue to possess (the same) . . . . . being malak in possession by right of miras talukdari in all the lands and the jamas relating to the whole taluk written in the patta by cutting and fil-



ling up, by making homestead and orchards, and by being entitled to the right of transfer by sale and gift. Excepting the above, the descendants of your daughters, and the adopted sons, etc., in your family, your husband or his wife or the descendants born of her womb or your daughter's husband, etc., or any other heir of any kind will have no right or title to this taluk . . . . God forbid, if you or your heirs aforesaid be ever under the necessity of making a sale or giving in mortgage by way of conditional sale or of giving ijara of kaimi miras patta, etc., or of making transfer in any way of the whole or any portion of this taluk then you or they will have to sell the same to me or my heirs at the value often times the amount of the realizable rent that may remain after deducting the sadar rent of grant kaimi miras patta in respect thereof and if it be necessary, to give in mortgage by way of conditional sale or grant ijara patta, you will have to do it according to rule; but you will not be able to sell or transfer, as aforesaid, in any way, or mortgage by way of conditional sale or grant ijara or kaimi miras patta, to any other persons; if you or they do or give, the same will be rejected. It I or my heir on being requested, fail to purchase, etc., as aforesaid, or do not take in mortgage by way of conditional sale or ijara or kaimi miras lease then you or your heirs, as aforesaid, will be able to put in a petition in Court, by mentioning the terms of this patta, and on the expiry of three months from the date of that petition, to sell or give in mortgage by conditional sale or grant ijara or kaimi miras patta, or transfer in any other way; to that no objection on my part or on the part of my heirs will avail. Further, if you or your heirs, as aforesaid, ever willingly give up your residence in Joydevpur, and, God forbid, if the particular heirs of you, whose rights have been mentioned in the lands of this patta, cease to exist then the terms written in this patta will become inoperative and the taluk will revert to the right of me and my heirs. Finis Dated 23rd Falgoun 1283, B. S."

It is argued on behalf of the appellants that the effect of the words in this document is that at best on absolute estate was given to Kripamoyee defeasible in the event of her dying without issue and in that event the property was to revert to the donor and his heirs. Reliance is placed in support of this contention on the case of *Bhoobun Mohini Debia v. Hurrish Chundar Chowdhry* (1) and it is contended that the words in the patta in the present case bear a close resemblance to the words in the sanad in the above case and the present patta should be construed in the same manner. I am always reluctant to construe a document with reference to authorities as to how a similar document was construed. The well-known remarks of Sir G. Jessel, M. R.,

may be referred to in this connexion. Says the Master of the Rolls:

"I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the Judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have in fact, no guide whatever, and the result especially in some cases of Wills, has been remarkable. *Aspden v. Seddon* (2)."

I shall, therefore, endeavour to interpret the patta according to my own judgment.

Although by the use of the word "patni" there was no grant in this case of a patni taluk properly so-called, there is no doubt that the donor meant to grant a permanent heritable lease at a fixed rent to Kripomoyee, and the use of the words "patni talukdari patta, miras taluqdari patta, miras taluk, miras talukdari" in various portions of the document are quite apt to convey such a right. The grant of the interest was to her as malik and not to any other person designated after her death. It is not necessary to consider at present whether the restrictions on the right of alienation are valid or not. Nor is it necessary to consider whether the stipulation giving the right to purchase the leasehold interest on certain terms by the donor and his heirs offends against the rule against perpetuity. It may, however, be noticed that on the refusal of the donor or his heirs to purchase, the lessee and her heirs were entitled to transfer their interest to any person whatsoever. Evidently, an estate of inheritance was conferred on Kripamoyee subject to certain restrictions as to the persons who would be entitled to inherit. The words "your sons born of your womb, etc.," refer to succession to the property as also the prohibition clause commencing with

(1) [1879] 4 Cal. 23=5 I. A. 138=2 O.L.R. 339=3 Suther 537=3 Sar. 815 (P.C.).

(2) [1875] 10 Ch. 304 at. 307 (n)=44 L.J.Ch. 359=23 W. R. 530=44 L.J. Ch. 359.



"excepting the above, etc." It seems to me clear that on a true construction of the grant the donor desired to give a permanent heritable right to his daughter Kripamoyee subject in certain restrictions on the course of succession which he desired should follow in a particular manner, with which I shall deal next.

The question then is whether the provisions as to succession are valid or not. The question depends on the true meaning of the clause relating to succession, whether the donor intended an indefinite failure of issue or failure of issue at the time of the death of Kripamoyee. If the words relate only to the time of the death of Kripamoyee then their effect would be to make the absolute estate defeasible in the event of failure of issue at that time. The case would then fall under *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullik* (3) where the will was held not to point to an indefinite failure of male issue. See also *Bhooban Mohini Debia v. Hurrish Chunder Chowdhry* (1). If the intention of the donor was to control the succession to the property for all time, then the question must be decided according to the observations of their Lordships in *Jotendramohun Tagore v. Ganendromohun Tagore* (4). Their Lordships say :

"A private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullik* (5) : "A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

"Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts inter vivos) is, that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows."

"Accordingly, if the gift confers an estate upon a man with words imperfectly describ-

(3) [1861-63] 9 M.I.A. 123=1 Sar. 837 (P.C.).

(4) I. A. Sup. Vol. 47 at 65=18 W. R. 359=9 B. L. R. 377=2 Suther 692=3 Sar. 82 (P.C.).

(5) [1854-57] 6 M. I. A. 526=4 W. R. 114=1 Suther 291=1 Sar. 588 (P.C.).

ing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance the language would be read as conferring an estate inheritable as the law directs."

In my opinion, the donor in this case desired to grant an estate of inheritance to Kripamoyee, but directed that the succession should take place in a specified manner. It was not limited to what should happen at the death of Kripamoyee, but gave directions for an indefinite period of time, or, in other words, he intended to alter the rule of succession under the Hindu law. This, the donor had no power to do, and those provisions are, therefore, void. As their Lordships observed in *Purna Sash Battacharji v. Kalidhan Rai* (6) :

"If the attempt to interfere with the course of descent according to law is to be regarded as a condition of defeasance it was applicable not merely to the case of Ananda, but to the case of every male descendant who happened to leave no male issue; and its application might have been postponed for an indefinite period. Their Lordships are not aware of any authority to warrant such a provision."

In my judgment, the limitation as to the right of succession to the property is void, but the grant to Kripamoyee being one of inheritance she got an absolute title as a permanent tenure-holder and was entitled to deal with the property as she liked. The estate did not revert to the donor or his heirs after Kripamoyee's death and, therefore, assuming that the plaintiffs are heirs of Raja Kali Narayan they are not entitled to the property. In the view I have taken, it is not necessary to express an opinion on the question whether a defeasance clause and a right of re-entry of the lessor provided in a lease may or may not be void for remoteness, as in this case I think the defeasance clause is void being contrary to the general law of inheritance. The result is that this appeal will stand dismissed with costs to be divided equally among the different sets of respondents appearing in this Court.

**Bose, J.**—I agree.

S.N./R.K.

*Appeal dismissed.*

(6) [1911] 38 Cal. 603=38 I. A. 112=15 C. W. N. 693=8 A. L. J. 681=13 Bom. L. R. 451=14 C. L. J. 1=21 M. J. J. 1119=(1911) 2 M. W. N. 403=11 I. C. 412=10 M. L. T. 361 (P.C.).



## \* A. I. R. 1929 Calcutta 169

MUKERJI AND GRAHAM, JJ.

*Dabiraddi Naskar*—Complainant.

v.

*Sakat Moola*—Accused.

Criminal Ref. No. 193 of 1928, Decided on 19th December 1928, made by Addl. Sess. Judge, 24 Parganas.

\* Criminal P. C., S. 438—Reference on acquittal entirely on merits, Sessions Judge having been inclined to take view of evidence different from that taken by Magistrate—High Court should not interfere because powers under S. 438 are to be sparingly used.

A reference under S. 438 recommending revision of orders of acquittal stands on no higher footing than applications of private prosecutors for such revision. So just as in the case of revision at the instance of private persons, so also in the case of reference under S. 438, revisional powers of the High Court are to be sparingly used. [P 169 C 2]

Where the reference is entirely on the merits, the Sessions Judge having been inclined to take a view of the evidence different from that of the Magistrate, the High Court should not interfere under S. 438: 42 Cal. 612; 47 Cal. 818; 41 Bom. 560; A. I. R. 1922 Mad. 502 (F.B.); A. I. R. 1926 Pat. 176, Cons.; 44 Cal. 703, Foll.; 24 All. 346; 25 All. 128; 38 Mad. 1028 and A. I. R. 1924 Lah. 451, Rel. on. [P 169 C 2]

*Anil Chandra Roy Chowdhury*—for Complainant.*Asaruzzaman* and *A. Quasim*—for Accused.**Mukerji, J.**—This is a Reference made by the Additional Sessions Judge of 24 Parganas under S. 438, Criminal P. C., recommending that an appellate order of acquittal passed by the Additional District Magistrate of that district should be set aside and the appeal ordered to be reheard.It has been laid down in a long series of cases what should be the guiding principle to be acted upon by the High Court in dealing with applications for revision of orders of acquittal. The principle has been very clearly laid down by Jenkins, C. J., upon a review of the practice in almost all the High Courts in India, in the case of *Faujdar Thakur v. Kasi Chowdhury* (1). He observed:

“The pronouncements of the High Courts of Madras, Bombay and Allahabad consistently support the view that as a general rule it is expedient not to interfere, on revision, at the instance of a private person, with an acquittal after trial by a proper tribunal, and that applications for that purpose should be discouraged on public grounds.”

(1) [1915] 42 Cal. 612=19 C. W. N. 184=27 I. C. 186=21 C. L. J. 53.

He further observed:

“I am not prepared to say the Court has no jurisdiction to interfere in revision with an acquittal, but I hold it should ordinarily exercise that jurisdiction sparingly and only where it is urgently demanded in the interests of public justice.”

Since this proposition was laid down by that learned Chief Justice it has, I find, been followed by all the High Courts (e. g., *Pramatha Nath Barat v. P. C. Lahiri* (2), *In re Faredoon Cawasji Parbhu* (3), *Sankaralinga Mudaliar v. Narayana Mudaliar* (4) and *Siban Rai v. Bhagwat Dass* (5). A reference under S. 438, Criminal P. C., recommending revision of orders of acquittal, in my opinion, stands on no higher footing than applications of private prosecutors for such revision. In the case of *Hrishikesh Mandal v. Abadhut Mandal* (6) it was said by this Court that in the case of an acquittal when the Local Government has not preferred an appeal under S. 417, Criminal P. C., the High Court ought not to interfere in revision, on a reference under S. 438 where it cannot do so without practically hearing the case on the evidence as an appeal in order to satisfy itself that the opinion of the referring Court is correct, though it has jurisdiction to intervene in such cases. It is true that in a few instances there has recently been some departure from the practice intended to be laid down in the aforesaid decisions of this Court, but on an examination of the papers of such of the cases as are available it appears that either the reference was not opposed or that the acquittal was not on the merits or was based on a palpable error of law. The present reference is entirely on the merits, the Additional Sessions Judge having been inclined to take a view of the evidence different from that of the Additional District Magistrate. That this is a very reasonable and convenient practice is clear from the fact that other High Courts have also set their face against references of this character. In the matter of *Shaikh Aminuddin* (7), *Emperor v. Madar*

(2) [1920] 47 Cal. 818=59 I. C. 37=22 Cr. L. J. 5.

(3) [1917] 41 Bom. 560=40 I. C. 316=19 Bom. L. R. 354.

(4) A. I. R. 1922 Mad. 502=45 Mad. 913 (F.B.).

(5) A. I. R. 1926 Pat. 176=5 Pat. 25.

(6) [1917] 44 Cal. 703=38 I. C. 421=21 C. W. N. 250.

(7) [1902] 24 All. 346=(1902) A. W. N. 89.



*Baksh* (8), *In re Sinnu Goundan* (9) and *Emperor v. Acchar Singh* (10). In my opinion this reference should not be entertained and I would accordingly discharge it.

**Graham, J.**—I agree.

S.N./R.K. *Reference discharged.*

(8) [1902] 25 All. 128=(1902) A. W. N. 200.

(9) [1914] 38 Mad. 1028=26 M. L. J. 160=23 I. C. 188=(1914) M. W. N. 273.

(10) A. I. R. 1924 Lah. 451=5 Lah. 16.

## A. I. R. 1929 Calcutta 170

C. C. GHOSE AND JACK, JJ.

*Dwarka Das Bairagi and others*—Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeals Nos. 253 and 288 of 1928, Decided on 8th August 1928, from order of Addl. Sess. Judge, Burdwan, D/- 10th March 1928.

Criminal P. C., S. 297—Charge to jury—Explanation of law meagre—Summing up of evidence being barest possible skeleton of evidence on record—Important points not brought to notice of jury—There is non-direction to jury and case should be sent for retrial.

Where in a charge to the jury the explanation of the law bearing on the subject is drastically meagre, and the summing up is no more than the barest possible skeleton of the evidence on the record, so that it is very doubtful whether the jury were afforded any real assistance by the Judge when he proceeded to sum up the case to the jury; and where from the record it is clear that important points which should have been brought to the notice of the jury were not brought to their notice, there is non-direction to the jury and such case is fit for ordering retrial: 31 C.W.N. 387 and 34 Cal. 698, *Ref.* [P 171 C 1]

*Mritunjoy Chattopadhyaya and Sachindra Nath Banerji*—for Appellants.

*Khundkar*—for the Crown.

**C. C. Ghose, J.**—This case comes from Burdwan where the accused in the present appeal and the accused in Criminal Appeal No. 253 of 1928 were tried along with four others before the then learned Additional Sessions Judge of Burdwan and a jury on a charge under S. 395, I. P. C. The jury found the present appellants and the appellants in Appeal No. 253 of 1928 guilty of having committed on offence punishable under S. 395, I. P. C. The learned Judge agreeing with the verdict of the jury sentenced each of the accused to suffer rigorous imprisonment

for a period of seven years. In the present appeal the appellant Hencia alias Niranjana Ghose has been represented before us by Mr. Mritunjoy Chattopadhyaya. The appellants in appeal No. 253 of 1928 preferred the appeal from jail and the two appeals have been heard together before us. For the reasons which we are about to give we must set aside the verdict of the jury and the conviction and sentence and direct retrial of the accused in these two appeals according to law.

This course has been forced upon us and we have had no other alternative than to direct retrial.

Mr. Chatterji has argued on behalf of his client that from the charge of the learned Judge to the jury as it appears on the record before us it could not be said with certainty what was the view on the facts appearing on the evidence which was placed before the jury and that it could not be called a proper summing up within the meaning of S. 297, Criminal P. C. He further contends that the summing up by the learned Judge after the close of the evidence in the case should be a full and a distinct statement of the evidence on the record with such advice as to the legal bearing of that evidence and the weight which should attach to the several parts of it as sound judicial discretion would suggest and in so far as the present summing up violates the conditions indicated above it amounts to a misdirection within which expression are included also matters of non-direction. It is not necessary to set out herein the charge itself of the learned Judge for the purpose of indicating what that charge is. The charge itself must be referred to in order to fully understand the observations which follow. In our opinion this charge is one which is animadverted upon in the judgment of this Court reported in 31 Calcutta Weekly. Notes at p. 387 and in Indian Law Reports 34 Calcutta at p. 698. It no doubt appears on the face of it to be heads of charge to the jury and in so far as it consists of heads of charge to the jury it may be said that there is a technical compliance with the provisions of S. 297, Criminal P. C. It is not however, a charge in such a form as to enable this Court as the final Court of appeal in cases of trial by a jury to be satisfied that it was delivered with sufficient fulness as regards the evidence on the record or that it is such as to en-



able this Court as a Court of appeal to say for itself that all points of law and fact were clearly and correctly explained to the jury having regard to the evidence adduced in the case. Now the explanation of the law bearing on the subject, if it can at all be called an explanation, is drastically meagre and we have not been afforded any assistance whatsoever by the learned Judge in the portion of the charge relating to the explanation of the law bearing on the case for the purpose of finding out for ourselves whether the sections were properly explained to the jury or not. Leaving that aside and confining ourselves to the observations in the charge and the summing up of the evidence on the record it seems to us that the summing up is no more than the barest possible skeleton of the evidence on the record. It is not as indicated above a summing up at all. It is doubtful whether the jury were afforded any real assistance by the learned Judge when he proceeded to sum up the case to the jury. The names of the witnesses are mentioned no doubt in the charge. But the interdependence of the evidence given by these witnesses bearing on the charge framed against the accused has not been made clear nor does the summing up of the evidence appear to us in any way connected with the several parts thereof as a whole, as a summing up made with ordinary care would certainly show. But we need not pause here because from the record it has been shown that important points which should have been brought to the notice of the jury have not been brought to their notice. In our opinion, the circumstances to which our attention has been drawn imperatively demand that the accused should have an opportunity of having the case against them placed before the jury by another officer and at a second trial.

In the first place it is pointed out that there is an important discrepancy between the facts stated in the first information report and the evidence of the persons who lodged the first information in Court and that such discrepancy has not been placed before the jury. It is pointed out that in the first information report lodged at the thana the witness Upendra had stated that even up to the time when the first information was lodged the names of the dacoits had not been ascertained

whereas in his evidence in Court he stated that his elder brother Rajani, witness No. 3 had informed him about the names of the dacoits before he proceeded to the thana to lodge the first information.

In the second place it is pointed out that in the first information it was stated that the dacoits who had committed the dacoity in question had worn pieces of cloth ordinarily called galpatta. But so far as it can be ascertained from the evidence of Rajani in Court it was clear that none of the dacoits had worn galpatta. It is further pointed out that if one looks at the evidence of Upendra and Rajani together while Upendra says that galpattas were worn by the dacoits, Rajani on the contrary is positive that no galpatta was so worn. Rajani is equally positive that he did not furnish the names of the dacoits except perhaps of Dwarka brother of Upendra.

In the third place it is pointed out that there is no mention whatsoever in the learned Judge's charge to the jury of the names of the several persons who appeared in the first information as being the persons who had either chased the dacoits or who had come immediately to the place of occurrence after the occurrence itself and had heard from Rajani witness 3 the names of the persons who had taken part in the dacoity nor is it pointed out in the charge itself that most of these persons last referred to had not been called as witnesses in the trial, their names being Surendra Chakraburty, Jyotish Pal, Girija Nath Chatterji, Kalyan Babu, Dhuli Babu, Pran Kristo Chakraburty and Govinda Chakraburty.

In the fourth place it is contended that the learned Judge was wrong in stating to the jury that witness 5 corroborates witness 4. Witness 5 does not speak to the fact of the accused persons meeting together in the house of Niranjana in the evening of the day of occurrence and in so far as witness 5 does not speak to that, there is no corroboration of witness 4.

In the next place complaint is made that the learned Judge told the jury in clear and unequivocal language that the identification was a genuine one thereby indicating to the jury that there was very little left of the case for the accused inasmuch as the dacoits had been identified in a satisfactory manner. The learned Judge was not entitled to express his



opinion on the question of identification in that forcible and dogmatic manner in which he did because it is clear from the evidence of witnesses 1, 3, 8 and 13 that the persons accused of having committed the dacoity in question had been taken after their arrest to the village where the occurrence took place and had been kept for a day near the baitakhana of the complainant before they had been sent up for trial. These are some of the circumstances to which our attention has been drawn showing that there has been non-direction by the Judge—non-direction as regards important points to which the attention of the jury should undoubtedly have been drawn. In the circumstances, we think on the plainest consideration of justice that we should interfere in this matter, set aside the verdict of the jury and order retrial and we, accordingly, do so and direct that the accused, that is, the appellants in the two appeals mentioned above be retried before the present Sessions Judge of Burdwan and a jury in accordance with law.

**Jack, J.**—I agree.

S.N./R.K.

*Retrial ordered.*

**\* A. I. R. 1929 Calcutta 172**

MUKERJI ARD GRAHAM, JJ.

*Mohim Chandra Nath Bhowmick*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 894 of 1928, Decided on 10th December 1928.

**(a) Criminal P. C., S. 476-B — Order under S. 476-B is not appealable.**

No appeal lies against an order made by Court directing complaint to be lodged under S. 476-B: *A.I.R. 1928 Cal. 281, Foll.* [P 173 C 1]

**\* (b) Criminal P. C., amended (1923), S. 195 (3)—Even under amended Code District Magistrate and not Magistrate empowered to hear appeals is a Court to which appeals ordinarily lie.**

The omission of the word: "only," in sub-S. (3) does not imply any change in the law as it existed before the amended Code. A Magistrate empowered under S. 407 (2) cannot be regarded as a Court "to which appeals ordinarily lie," the Court of the District Magistrate being the Court to which appeals ordinarily lie: 30 *Cal. 394*; 26 *Mad. 656 (F.B.)*, *Foll.*; 18 *Mad. 487 Dist.* and not *Followed*. [P 173 C 2]

**\* (c) Criminal P. C., S. 537—Absence of complaint is not covered by S. 537.**

What S. 537 provides is an error, omission or irregularity in the complaint and not the

entire absence of the complaint without which no cognizance of the offence can be taken under the law. [P 174 C 1]

*Akhil Chandra Dutt*—for Petitioner.

*Debendra Narain Bhattacharjee*—for the Crown.

**Mukerji, J.**—The facts necessary to be stated for the purpose of this rule are these: One Naimuddin was the complainant in a case under S. 426, I. P. C., against one Hanif and others, which was tried by Maulvi Mir Hossain, a Magistrate of the Third Class. The accused persons pleaded that the land concerned had been purchased by them and that the complainant Naimuddin was himself an attesting witness to the deed of purchase. The petitioner Mohim Chandra Nath Bhowmik gave evidence in support of the defence proving the execution of the deed and the signature of Naimuddin therein. Naimuddin, while the trial was pending, denied his signature in the deed and applied to the trying Magistrate for the prosecution of all concerned in the forgery. The accused persons were acquitted, the trying Magistrate being doubtful as to the forgery. After the case was over Naimuddin pressed his aforesaid application. The trying Magistrate instead of dealing with the matter himself, as he should have done, forwarded the papers to the Sadar Sub-Divisional Officer for necessary action. The Sadar Sub-Divisional Officer returned the papers to the trial Magistrate with the following remarks:

"The only materials are the denial of execution by the complainant, and the dissimilarity of the left thumb impression of the complainant from those on the document Ex. 1. The Court too did not on the judgment come to any finding that it is forged. As such I would leave to complainant to move in the matter if the left thumb impression be really forged."

What other action on the part of the complainant was contemplated by these remarks it is difficult to see: evidently the learned Sub-Divisional Magistrate was thinking of sanction under S. 195 as distinguished from order for prosecution under S. 476, Criminal P. C., forgetting for the moment the changes effected by the amendments of 1923. As the trying Magistrate did not pass any final order in the matter the complainant moved Mr. L. B. Das, a Deputy Magistrate who had powers under S. 407 (2), Criminal P. C. and that officer asked the trying Magistrate to pass such orders. When the said order of Mr. L. B. Das arrived before the



trying Magistrate, he rejected the complainant's prayer in these words:

"Read the order of the appellate Court. Looked into the connected record including the petition of Naimuddi. I have not been personally convinced about the guilt of the accused party and I do not think it quite proper to proceed under S. 476, Criminal P. C."

The complainant then preferred an appeal which was admitted by the Joint Magistrate, and on the latter vacating his office Mr. L. B. Das, who it is said, succeeded him, dealt with the appeal and being of opinion that the acquittal of the accused persons Hanif and others was wrong and that a prima facie case was made out against the petitioner directed under S. 476-B, Criminal P. C. a complaint to be lodged against the petitioner for offences under Ss. 193 and 465 read with 109 I. P. C. On that complaint the petitioner has been put upon his trial. He impugned at his trial the validity of the proceeding taken against him on the ground that Mr. L. B. Das though he had power under S. 407 (2), Criminal P. C. was not competent to pass the order under S. 476 B, Criminal P. C., and that consequently the proceedings taken on that complaint cannot stand. The objection has been overruled by the Court in which the trial is going on and the Sessions Judge on being moved to make a reference to this Court has declined to interfere. The petitioner has then moved this Court and obtained the present Rule.

One of the grounds upon which the Sessions Judge has declined to make a reference to this Court is that the petitioner not having appealed from the order passed by Mr. L. B. Das under S. 476-B, is precluded by reason of S. 439 (b), Criminal P. C., from invoking the revisional powers of this Court. This ground has no substance as, apart from other reasons, no appeal lay from Mr. L. B. Das' order: *Ahamadar Rahman v. Dwip Chand Chowdhury* (1).

In support of the contention that Mr. L. B. Das, though empowered under S. 407, sub-S. (2), Criminal P. C., to hear appeals from the sentence of the Court of Moulvi Mir Hossein, was not the presiding officer of a Court to which appeals from the Court of Moulvi Mir Hosain ordinarily lay within the meaning of S. 195, sub-S. (3), Criminal P. C., so as to be competent to hear the appeal under S. 476 B, Criminal P. C., the petitioner

has relied upon the decision of this Court in the case of *Sadhu Lall v. Ram Churn Pasi* (2). On the other hand, the Crown has in the first place relied upon the contention urged in the Magistrate's explanation which seeks to make out that the decision is no longer of any force because of the alteration in S. 195 by the Amending Act of 1923. The alteration to which reference has been made in this behalf is the omission of the word 'only' from sub-S. (7) of that section as it stood in the Act of 1898: vide Sub-S. (3) of S. 195 as it stands at present. It has been urged that because the word 'only' is no longer in the sub-section, there is nothing to prevent two Courts namely that of the District Magistrate as well as that of the Deputy Magistrate empowered under S. 407, sub-S. (2) being regarded as Courts to which appeals ordinarily lay from the Court of Moulvi Mir Hosain and that if that be the position then under proviso (a) to the sub-section the Court of Mr. L. B. Das would be the only Court to which the Court of Moulvi Mir Hosain would be subordinate within the meaning of S. 195. In my opinion the omission of the word 'only' has no such significance, and the words "to which appeals ordinarily lie" should still be understood in the sense attributed to them in the decision aforesaid. The wording of S. 407 has not undergone any change and the decision aforesaid appears to have been followed by almost all the superior Courts in this country, and no dissent against it has been expressed anywhere except in the dissentient judgment of Benson, J. who was in the minority in the Full Bench case of *Eroma Variar v. Emperor* (3). The Crown has, in the next place, relied upon the decision in the case of *Queen-Empress v. Subbaraya Pillai* (4). That case, however, was decided under the Code of 1882 in which the wording of S. 407 was materially different as has been pointed out by White, C. J. in the case of *Eroma Variar v. Emperor* (3) and in any event I do not see any good reason to depart from the view which our own Court has taken of the meaning of the words "to which appeals ordinarily lie."

Finally it has been contended on behalf of the Crown that if Mr. L. B. Das

(2) [1903] 30 Cal. 394=7 C. W. N. 114.

(3) [1903] 26 Mad. 656 (F.B.).

(4) [1895] 18 Mad. 487=5 M. L. J. 125.

(1) A. I. R. 1928 Cal. 281=55 Cal. 765.



had no jurisdiction to make a complaint under S. 476 B, it should be held that the case has been instituted without a proper complaint and an omission of this character is curable by S. 537, Criminal P. C. This argument overlooks the bar which S. 195 imposes. It also overlooks that what S. 537 provides for is an error, omission or irregularity in the complaint and not the entire absence of a complaint without which no cognizance of the offence can be taken under the law.

The result is that the proceedings instituted upon the basis of Mr. L. B. Das' order which purports to have been made under S. 476, Criminal P. C., cannot go on. They are accordingly quashed.

We should observe that in the view that we take the complainant's appeals from the order of Moulvi Mir Hossein refusing to make a complaint under S. 476, Criminal P. C., has not yet been disposed of by a Court competent to deal with it. It follows, therefore, that if the complainant desires to proceed with that appeal any further, it will necessarily have to be heard by the District Magistrate and disposed of by him in accordance with law and in the light of those well-established principles which govern appeals of this description. The rule is made absolute.

**Graham, J.**—The true construction of the words "Court to which appeals ordinarily lie" in S. 195 (3), Criminal P. C., seems to be not free from doubt. But on the whole I see no reason to differ from the view taken by my learned brother and I agree that we should follow the decision of this Court in *Sadhu Lal v. Ram Charan Pasi* (2) and that the Rule should be made absolute.

S.N./R.K. *Rule made absolute.*

### A. I. R. 1929 Calcutta 174

RANKIN, C. J. AND BUCKLAND, J.

*Superintendent and Remembrancer of Legal Affairs, Bengal*—Appellant.

v.

*Darbesh Ali and others*—Accused—Respondents.

Government Criminal Appeals Nos. 11 and 12 of 1928, Decided on 11th December 1928 from acquittal judgment of Addl. Sess. Judge, Noakhali.

**Criminal P. C., S. 80**—Non-fulfilment of provisions of S. 80 may be justified by S. 46 (2).

A Police Officer who has made an arrest without having observed the provisions of S. 80, may be able to justify his action under the provisions of S. 46 (2). [P 175 C 1]

*D. N. Bhattacharjee*—for the Crown.

*Mohendra Nath Ghose*—for Respondents.

**Buckland, J.**—These are two appeals preferred by the Local Government against the acquittal on appeal of seven persons who had been convicted by the Sub-Divisional Officer at Feni of offences under Ss. 147 and 225 (B), I. P. C. and sentenced each to six months rigorous imprisonment three months under each section. The facts of the case, which I take from the judgment of the Sub-Divisional Officer, were that a police officer had been entrusted with a warrant for the arrest of a witness. He found her in the house of a man named Yusab and he stated the object for which he had come. Yusab asked him to wait and after going away returned with the other accused persons and endeavoured to remove the witness. Then as she was being removed the police officer seized her. The accused persons thereupon assaulted him and rescued the person who was required as a witness from the custody of the police officer. The accused persons were put on their trial before the Sub-Divisional Magistrate at Feni with the result which I have stated. On appeal before the Additional Sessions Judge at Noakhali they have been acquitted, the ground being that the provisions of S. 80, Criminal P. C., had not been complied with. The learned Judge observes:

"There is absolutely no evidence to show that the substance of the warrant of arrest was notified to Nasibonessa or that the warrant was shown to her."

Consequently he held that the arrest was illegal and that she was not in the legal custody of the police officer and, therefore, there could not be and, in fact, there was not any offence under S. 225 (B), I. P. C. The common object under S. 147, I. P. C. being to commit an offence under S. 225 (B), as, according to the learned Judge, there was no offence committed under that section and their object was not to commit any such offence, he acquitted the accused of any offence under S. 147. In support of the view he has taken of S. 80, Criminal P. C., he has relied



on the judgment of this Court in *Abdul Gafur v. Queen-Empress* (1). Our attention has also been drawn on behalf of the respondents to another decision of this Court, *Satish Chandra Rai v. Jadu Nandan Singh* (2). These cases are clearly distinguishable upon the facts. For the determination of this appeal reference must be made to S. 46, Criminal P. C. That is to be found in Ch. 5 of the Code, in the part which deals with arrest generally, and says :

"If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest."

Now, it is obvious and indeed only common sense that to an occasion within that section, S. 225 (B), I. P. C. also applies. Omitting so much as is unnecessary for the present purpose,

"whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished etc."

To say that the apprehension or custody is unlawful in a case where efforts have been made to evade or prevent the arrest and rescue the prisoners because of the provisions of S. 80, Criminal P. C., would bring the law into ridicule. So to insist would merely give more time and opportunity to the obstructionists to effect their purpose. A police officer who has made an arrest without having observed the provisions of S. 80, Criminal P. C., may be able to justify his action under the provisions of S. 46 (2), Criminal P. C. I must not be taken as expressing any opinion on the facts of these cases. The learned Additional Sessions Judge, overlooking S. 46, appears to have thought that no arrest can be lawfully made without compliance with the provisions of S. 80. In my judgment the Additional Sessions Judge was wrong in the view he took of the law and I would set aside his judgment and direct that the cases be remitted to the Sessions Judge to rehear the appeals himself on the merits.

**Rankin, C. J.**—I agree.

M.N./R.K.

*Case remitted.*

## A. I. R. 1929 Calcutta 175

MUKERJI AND GRAHAM, J.J.

*Anil Krista Das*—Accused—Petitioner.

*Badam Santra* — Complainant — Opposite Party.

Criminal Revn. No. 930 of 1928, Decided on 5th December 1928.

(a) Criminal P. C., S. 200—Complainant not examined before issuing summons—No prejudice to accused—Irregularity does not vitiate trial.

Non-examination of complainant before issuing summons against the accused is an irregularity which does not vitiate trial in the absence of any prejudice to the accused.

[P 175 C 2]

(b) Criminal P. C., S. 222 (2)—Scope.

Trial involving offences under S. 406, I.P.C., committed on five distinct dates is not bad.

[P 175 C 2]

*Bireswar Chatterjee*—for Petitioner.

**Judgment.**—The petitioner has been convicted under S. 406/75, I. P. C. and has been sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 35.

The two grounds upon which this Rule was issued are (1) that the proceedings are illegal as the Sub-Divisional Officer issued summons against the petitioner without examining the complainant under S. 200, Criminal P. C.; and (2) that the trial was bad involving as it did offences committed on five distinct dates.

As regards the first of these grounds it is true that the Court which issued summons against the petitioner did not examine the complainant *Badam Santra* before issuing such process, but this defect in our opinion amounts only to an irregularity which cannot be held to have vitiated the trial in the absence of any prejudice having been caused to the petitioner. We find also that the said complainant *Badam Santra* has been examined as a witness for the prosecution in the case itself. As regards the second ground the learned advocate appearing in support of the Rule is unable to support it in view of the provisions of S. 222 (2), Criminal P. C. The two grounds upon which the Rule was issued therefore fail. We have been asked to consider the question of the sentence. But having given the matter our best consideration we are unable to hold that the sentence is in any way too severe. The Rule is accordingly discharged.

S.N./R.K.

*Rule discharged.*

(1) [1896] 23 Cal. 896.

(2) [1899] 26 Cal. 748=3 C. W. N. 741.



## A. I. R. 1929 Calcutta 176

MUKERJI AND GRAHAM, JJ.

*Ajoy Krishna Sarkar*—Petitioner.

v.

*S. G. Bose*—Opposite Party.

Criminal Revn. No. 1004 of 1928, Decided on 19th December 1928, from orders of Ch. Presy. Magistrate, D/- 10th and 13th September 1928 respectively.

(a) Criminal P. C., S. 96—Application disclosing commission of offence — Issue of search warrant after taking cognizance, is legal.

Where a search warrant is issued upon an application in which certain offences are disclosed as having been committed by the accused after cognizance of those offences has been taken by the Magistrate, he is quite within his power in issuing search warrant under S. 96.

[P 176 C 2]

(b) Criminal P. C., S. 96—Complainant may be allowed inspection of articles produced.

*Per Mukerji, J.*—Once articles are brought before the Court in execution of a search warrant, inspection thereof may be allowed to the complainant; 15 Cal. 103, *Rel. on.* [P 176 C 2]

(c) Criminal P. C., S. 202—Failure to record reasons for postponing issue of process is mere irregularity.

*Per Graham, J.*—Section 202 requires that reasons should be given when the issue of process is postponed. But the failure to do so would at most be an irregularity and would not justify the setting aside of an order for issue of search warrant.

[P 177 C 1]

*N. K. Basu, Rishindra Nath Sarkar and Sukumar Dey*—for Petitioner

*B. C. Chatterji, D. K. Basu, Mohendra Kumar Ghosh and Satyendra Kumar Ghose*—for Opposite Party.

**Mukerji, J.**—This rule has been issued to show cause why two orders passed on 10th September 1928 and the other on 13th September 1928 by the Chief Presidency Magistrate should not be set aside. By the former, he ordered a search warrant to issue for certain documents and by the latter he allowed inspection thereof to the complainant, who is the opposite party in this rule.

The validity of these orders is challenged in this rule mainly upon two grounds, one questioning its legality and the other its propriety.

The legality of the orders would depend primarily on the question whether S. 96, Criminal P. C. would warrant the issue of the search warrant in this particular case. Now the documents in respect of which the search warrant was

asked for were "challans, counterfoil books, bill books and account books for 1927" of the firm of Messrs. Sarkar Brothers, the petitioners. What was seized in execution of the warrant were "2 Account books, 2 Challan counterfoil books, 1 Second part of Challan, 2 Challans with 2nd and 3rd parts, 1 Bill book and 1 Challan, all of Messrs. Sarkar Bros.: vide petition of motion, para. 10."

It is not complained that what was seized was not justified by the warrant, but that the issue of the warrant itself was illegal.

It would appear that this search warrant was issued upon an application in which certain offences, to wit forgery and forgery for the purpose of cheating, were disclosed as having been committed by the petitioners, though no very definite particulars of the offences were given and the sections of the Penal Code under which the said offences would come were not mentioned, and the prayer was for the issue of a search warrant and for an order upon the C. I. D. Police to investigate into the matter. The application contained allegations of offences, and asked for an order to be passed without which, by reason of sub-S. (2), S. 155 the police would be incompetent to hold an investigation. Before passing that order the Magistrate necessarily would have to take cognizance of the offence, and this he did in the regular way on examining the complainant. Once he took cognizance of the offence, he was quite within his powers in issuing the search warrant under S. 96 of the Code. The articles recovered on the search are evidently necessary for the inquiry or trial that the learned Magistrate is contemplating to hold. It is not material to consider whether he will eventually decide to make an order for investigation by the Police or whether he will call upon the petitioner to stand his trial or whether he will dismiss the complaint. It is clear, however, that once the articles are brought before the Court in execution of the search warrant, inspection thereof may be allowed to the complainant: vide *Mahomed Jackariah & Co. v. Ahmed Makomed* (1).

A further argument has been advanced namely on the question of the propriety of the proceedings in the criminal Court in view of the result of the suit in the Court of Small Causes. I think it is too

(1) [1888] 15 Cal. 103.



early now to pronounce any opinion on this matter, seeing that the offences in respect of which the trial may have to take place, have not yet been definitely specified.

**Graham, J.**—I do not think there is any substance whatever in the contention that the order of the learned C. P. is illegal or without jurisdiction.

The facts shortly stated are that the opposite party S. G. Bose, a builder and contractor filed a complaint making certain allegations amounting to the commission of offences under S. 468 and 477-A, I. P. C., against the petitioner Ajoy Krishna Sarkar. The Magistrate thereupon examined the complainant and issued a search warrant under S. 96, Criminal P. C., for the production of certain books of account. The procedure adopted was according to law and it is difficult to understand how it can be said to be contrary to law or without jurisdiction.

The examination of the complainant was obviously made under S. 190 (a), Criminal P. C. The Magistrate then having taken cognizance of the complaint, as he was bound to do, issued the search warrant and ordered that the complaint should be put up with the counter-petition. Three courses were open to the Magistrate. He could (1). Issue summons to the accused or (2). Hold an inquiry, or direct inquiry to be made or (3). Dismiss the complaint.

It seems to be clear that the Magistrate adopted the second of these alternatives. S. 202, Criminal P. C., requires that reasons should be given when the issue of process is postponed. But the failure to do so would at most be an irregularity and would not justify the setting aside of the order. Moreover, the order which was made directing that the case should be put up with the counter-case, is in itself a reason for postponement of process. It seems clear that the learned Magistrate desired to have both versions before him, and also such assistance as he could get from the books of account before taking further action.

In my opinion the grounds on which the rule was issued are without any substance and I agree that the rule should be discharged.

M.N./R.K.

*Rule discharged.*

**\*\* A. I. R. 1929 Calcutta 177**

C. C. GHOSE AND BUCKLAND, JJ.

*General Electric Trading Co.—Appellants.*

v.

*Siemens (India) Ltd.—Respondents.*

Appeal No. 29 of 1928, Decided on 14th December 1928, from original order of Pearson, J., D/- 16th March 1928, in Suit No. 2721 of 1927.

**\*\* Arbitration Act (1890), S. 8 (1) (b)—Joint submission to two arbitrators—One refusing to act—‘An appointed arbitrator’ can mean one of two such arbitrators—Court can fill vacancy.**

There was a mutual agreement to refer to two arbitrators, specified and named in the clause of agreement itself. One of these appointed arbitrators refused to act. The submission did not show that the place of the arbitrator who refused to act should not be filled up. It was clear that the parties had not cared to fill up the vacant place.

*Held:* S. 8 (1) (b) applies, as the expression “an appointed arbitrator” can mean one of two appointed arbitrators: 43 *Bom.* 809, *Diss. from; Yeates v. Caruth*, (1895) 2 *Ir. R.* 146, *Dist.; Smith & Service v. Nelsons & Sons.* (1890) 25 *Q. B. D.* 545; *The Manchester Ship Canal Co. v. S. Pearson & Son Ltd.* (1900) 2 *Q. B.* 606 and *A. I. R.* 1921 *Bom.* 185, *Dist.* [P 179 C 2, P 180 C 1]

*B. C. Mitter, S. Ghose and B. B. Sircar—for Appellants.*

*W. W. K. Page and J. A. Clough—for Respondents.*

**C. C. Ghose, J.**—This appeal arises out of an application made by the appellant firm under S. 19, Arbitration Act 1899, for an order for stay of the proceedings in suit No. 2721 of 1927 instituted by the respondent company against the appellant firm on 22nd December 1927 in this Court. The application came on for hearing before my learned brother Pearson, J. on or about 16th March 1928, when by his judgment and order dated 16th March 1928, he dismissed the same.

The facts involved in this appeal, shortly stated, are as follows: It appears that on 22nd December 1923, an agreement was entered into between a company known as Gorio, Limited and the appellant firm whereby the latter were appointed distributors of the goods of the Siemens Schuckart Manufacturing Works for Sind and Baluchistan. In January 1925 the respondent company succeeded to the interest of Gorio Limited in its Electrical Department including the benefit of the agreement between Gorio Limi.



ted and the appellant firm. Thereafter here were various transactions between the respondent company and the appellant firm, the agreement in question being varied from time to time. In January 1926, the appellant firm instituted a suit against the respondent company in the Court of the Judicial Commissioner of Sind praying for a decree on accounts being taken between the parties. That suit was not proceeded with as a result of a certain settlement being arrived at between the parties, the terms of which were embodied in an agreement bearing date 29th June 1926. Cl. 3 (f) of that agreement ran as follows:

"That accounts so far not settled will be settled as soon as possible and all such matters on which Siemens (India) Limited disagree with the General Electric Trading Company will be referred to Mr. Haug and Dharamdas for final decision and if they also disagree they will both appoint a third person to decide the matter finally."

On 1st October 1927, the respondent company gave a letter of authority to Messrs. Haug and Juerges authorizing them to refer matters in difference between the respondent company and the appellant firm to arbitration in terms of the clause above recited. It is alleged that thereafter there were certain meetings between the representatives of the respondent company and the appellant firm, but no final settlement was arrived at, nor was there an award made by the arbitrators named in the said clause. The appellant firm contended and contends that the respondent company is not entitled to institute the said suit inasmuch as the agreement for reference to arbitration still subsists and as the matters covered by this suit were within the scope of the said submission.

In answer to the application under S. 19, Arbitration Act, the respondent company filed an affidavit sworn to by one Noordea, a Director of the said company which contained among other things the following:

"Accordingly for the purpose of the said arbitration on the defendant firm's refusal to accept any other person in his place, the plaintiff company at considerable expense and inconvenience brought out the said George Haug from Norway to Karachi and I was informed by the said George Haug that several sittings lasting many days were in fact held by the said George Haug and Dharamdas in their capacity as arbitrators at Karachi. I was further informed by the said George Haug and say that during such sittings certain items out of those in dispute were definitely settled and

agreed by the said arbitration. At the time the said George Haug came out to India to act as arbitrator as aforesaid he had ceased to be in the employ of the plaintiff company and he was brought out at the expense of the plaintiff company as stated above.

"In order to assist the arbitrators in the matter the plaintiff company at considerable expense also sent their Chief Accountant Paul Juerges from their Berlin office who was in India at the time to Karachi to explain to the arbitrators any matters that they might refer to him. "I was also informed by the said George Haug that the said Dharamdas Lilaram having verbally agreed in his capacity as arbitrator to the said settlements and decisions and to the figures of account therein contained and having taken away certain documents on the express promise that he would return the said documents duly signed by him, he refused to put his signature to any one of the said settlements, decisions or agreed figures.

"Owing to such misconduct on the part of the said Dharamdas Lilaram as such arbitrator as aforesaid and also owing to the obstructive attitude of the defendant firm it became impossible for the said arbitration to continue. I was informed by the said George Haug that the said Dharamdas Lilaram refused to meet him to sit as arbitrator and continue the arbitration. I was also informed by the said George Haug and Paul Juerges that at the meetings which took place of themselves and the said Dharamdas in or about September 1927, there was discussion about the pro- notes, but the said Dharamdas was of opinion that payment under the agreement was only to be made after settlement of all claims in detail and he persistently refused to go into details at the time although pressed for it.

"In the circumstances aforesaid the said George Haug notwithstanding his best endeavours in that behalf was unable to continue to act alone or carry on the said arbitration and the same came to an end. The said George Haug consequently left for Europe about the end, of November 1927 and the said Paul Juerges is now in Burmah and will come back about the end of this month on his way to Europe where his presence is urgently required in connexion with the plaintiff company's business."

The respondent company also filed an affidavit by Paul Juerges supporting the last-mentioned affidavit of Noordea. There is thereafter an affidavit in reply by Dharamdas. At the hearing before Pearson, J. various points were gone into. He held inter alia that the reliefs claimed in the suit were substantially within the scope of the agreement to refer to arbitration, but that having regard to the fact that Mr. Haug had refused to act as an arbitrator and that the arbitrators appointed in this case being two in number who had been nominated by mutual agreement, S. 8 (1) (b), Arbitration Act, did not apply and that



there was no machinery, in the events that had happened, to give effect to the submission. Pearson, J. therefore held that the suit ought not to be stayed because the arbitration would be infructuous and he accordingly dismissed the application.

On appeal it has been contended before us by Sir Benode Mitter that the construction put upon S. 8 (1) (b), Arbitration Act, by Pearson, J. is wrong and that there is nothing in the Arbitration Act which prevents the Courts from stepping in and appointing an arbitrator in place of Mr. Haug, and secondly, that the considerations which may arise on a construction of S. 8 (1) (b), Arbitration Act, should not have been taken into account in dealing with an application under S. 19, Arbitration Act.

In dealing with Sir Benode Mitter's contentions it may be useful to set out here under the exact language of Pearson, J. He observed as follows :

"It is to be observed that the reference here is not to two arbitrators one to be appointed by each party to which the provisions of S. 9 of the Act would apply for supplying a vacancy. It is here a case of a mutual agreement to refer to two arbitrators' nomination, that is, specified and named in the clause of agreement itself. The only provision which is cited as applicable to such a case is S. 8 (b) of the Act. Taking that sub-section by itself, it may be that the language is wide enough to cover the present case, but clearly it must be read in conjunction with the rest of the section and the scheme of the Act. In *Gopalji v. Morarji* (1), it is said at p. 830 that S. 8 (1) (b) only applies in terms to the case of a single vacancy to be supplied by the parties so far, that would be the case here in filling Mr. Haug's vacancy. But the judgment goes the length of saying that clause (b) like clause (a) relates to the case where the submission provides for the reference to be to a single arbitrator. So, Hayward, J., at p. 833 says that it is not open to the Court to interfere where the reference is to two arbitrators to be appointed not one by each party but the two jointly, by the two parties. Again in *Russell on Arbitration* (11th Edition) in dealing with the meaning of "an appointed arbitrator" under the corresponding S. 5, English Act, it is said at p. 126 that the expression must mean a single arbitrator and not one of the two appointed arbitrators, because in the concluding words of the section it is provided that the arbitrator appointed shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties. I am not prepared to hold that the reasoning or the construction of the section given in the above cited case is erroneous particularly because to hold otherwise would

seem to make S. 8 (b) in certain cases an alternative procedure to that provided by S. 9, which I do not think was intended."

Now, in this case two arbitrators have been mutually agreed upon and they have been appointed as such by the parties. Therefore S. 9, Arbitration Act, has no application, because the language used therein has reference to a case where the submission is to two arbitrators one to be appointed by each party. Let us next see whether there is anything in the language used in S. 8, Arbitration Act, which prevents the application of S. 8 to this case, having regard to the events that have happened. S. 8 (1) (a) obviously has no application because it deals with the case of reference to a single arbitrator. Turning to 8 (1) (b), there is nothing, in my opinion, in the language used therein which would render it inapplicable to this case. To start with, the arbitrator who has refused to act, etc. is an appointed arbitrator. In the second place, the submission does not show that the place of the arbitrator who has refused to act etc., should not be filled up. In the third place, it is clear that the parties have not cared to fill up the vacant place. Therefore I do not see why S. 8 (1) (b) should not apply. This is the conclusion I come to on the language used in the section.

It is said, however, that the matter is concluded by authority and that it is no longer possible to hold that the expression "an appointed arbitrator" can mean one of two appointed arbitrators. The case that is referred to in support of this proposition is that of *Gopalji Kuverji v. Morarji Jeram* (1). It was an appeal from the decision of Marten, J. as he then was ; therein he held that the expression an "appointed arbitrator" in S. 8 (1) (b), Arbitration Act, was not confined to the case of an appointed sole arbitrator, but that it could apply to the case of two or more arbitrators appointed by the parties jointly. The Court of appeal (Scott, C. J. and Hayward, J.) were, however, of opinion that S. 8 (1) (b) could not apply to the case of two or more appointed arbitrators. Scott, C. J., observed as follows :

"Section 8 (1) (b) does not apply to the case of independent appointments of two arbitrators. In such case when a vacancy occurs it would ordinarily be filled by the original appointer as contemplated in S. 9. S. 8 (1) (b) only applies in terms to

(1) [1919] 43 Bom. 809=50; I. O. 411=21 Bom. L. R. 308.



a single vacancy to be supplied by the parties S. 8 nowhere seems to contemplate the case of two original arbitrators appointed jointly by the parties plus a third of the same class appointed by the two already jointly appointed or by the parties. In short, S. 8 only applies to certain cases of failure to appoint jointly. Where choosers should but do not concur the Court is enabled to assist them by the selection and appointment of an individual falling in one of the following categories—an (i. e., one) arbitrator; an umpire; a third arbitrator in the special sense in which the term is used. It follows that in my opinion Cl. (b) must be read with Cl. (a) and Cl. (d) with Cl. (c), S. 8. The Court is not at liberty to take upon itself to select an individual where the selection is by the submission reserved for one of two disputing parties. The Act does not attempt to provide for every case. It only gives assistance in the commoner cases where joint appointment cannot be arrived at. It is said that the present case is not of joint appointment of three arbitrators. That is probably correct but it is not one of the common cases of joint appointment contemplated by the section. It is unusual, except perhaps in references in the course of a suit, to have a triangular submission and the joint appointment of three. In *Russell on Awards*, Part 2, Ch. 3, S. 3 in the Edns. of 1870, 1882 and 1906 it is said:

"In cases of death, refusal to act, or incapacity of a single arbitrator. . . . a Judge may appoint a new one if the parties do not; and. . . . where one of two arbitrators fails for the like causes, unless the party appointing him appoints a fresh arbitrator the remaining arbitrator may be appointed to act alone. The authority given for this statement is until 1889 the Common Law Procedure Act, 1854, Ss. 12 and 13, and after that date the Arbitration Act, Ss. 5 and 6 (S. 8 and 9, Indian Act) which reproduced Ss. 12 and 13 of the Act of 1854. "This, as the pronouncement of the standard text book on Arbitration unaltered through a period of thirty-five years, is a good indication of the understanding of the profession as the scope of these sections."

With great respect I am unable to agree with Scott, C. J., in his construction of S. 8 (1) (b), Arbitration Act. In my opinion the reasoning of Marten, J., is more correct and the construction put by him on the section should be followed. The basis of Scott, C. J.'s judgment is the passage in *Russell on Awards*: see in this connexion, 11th Edn. p. 126, and the English cases which are referred to on p. 832 of *I. L. R. 43 Bombay*. If, however, the matter is scrutinized with some degree of care, it would seem that the passage in *Russell on Awards* was originally based on the words used in the English Common Law Procedure Act of 1854 (17 & 18 Vic. C. 125, S. 12) and has been continued in the later editions of *Russell* without the change brought about by the English Arbitra-

tion Act of 1889 being noticed. S. 12, English Common Law Procedure Act of 1854, is identical in all respects with S. 15, Irish Common Law Procedure Act of 1856 and as appears from the decision of Walker C., Palles, C. B., and Fitz Gibbon and Barry, Lord-Justices in the case of *Yeates v. Caruth* (2), there were good grounds for holding, on the words used in the English and Irish Statutes referred to above, that where the parties referred all matters in dispute to the arbitration of two arbitrators and one of them declined to act, the Court had no power to appoint an arbitrator in place of the arbitrator who had declined. Walker, C., observed as follows:

"It is clear the case does not come within S. 16, Common Law Procedure Act of 1856, because though the consent was to refer the matters in dispute to two arbitrators, the arbitrators here are not such as are mentioned in that section, viz. "one appointed by each party." Does the case fall within S. 15 of the same Act? "If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all parties do not after differences have arisen concur in the appointment of an arbitrator." So far the clause deals only with a case where no arbitrator has been appointed but it next proceeds to deal with cases where there has been an arbitrator appointed. "Or if any appointed arbitrator refuse to act or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one." This is the branch of the section which is said by the appellant to include the present case. However, I cannot so read it. The words, "such document" give us the key to the true construction of the sentence; these words must refer to the "document authorizing the reference" in the first branch of the clause and that document is a document authorizing a reference to a single arbitrator. So far, therefore, the section only deals with cases where there is a single arbitrator to be appointed, or a single arbitrator actually appointed."

Let us now see what the language of S. 5, English Arbitration Act is. S. 5 runs as follows:

"In any of the following cases: (a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator. (b) If an appointed arbitrator refuses to act, or is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy: (c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him. (d) Where an appointed umpire or third



arbitrator refuses to act, or is incapable of acting, or dies and the submission does not show that it was intended that the vacancy should not be supplied and the parties or arbitrators do not supply the vacancy,

any party may serve the other parties or to arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire or third arbitrator. If the appointment is not made within seven clear days after the service of the notice, the Court or Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

It is not necessary to pursue the matter further but it is sufficient to observe that the language used in Ss. 5 and 6, English Arbitration Act is different from the language used in Ss. 12 and 13, English Common Law Procedure Act of 1854. As regards the English cases referred to above, the case of *Smith & Service v. Nelson & Sons* (3), was not a case of named arbitrators at all. In my opinion that case has no application to the facts of the present case. Nor does the case of *Manchester Ship Canal Co. v. S. Pearson & Son Ltd.* (4), assist the respondent company at all. The only matter for consideration in that case was whether there was refusal or incapacity so far as the arbitrator was concerned. The case *In re Baballdas* (5), is not really in point. There the submission provided for a reference to three arbitrators. Pratt, J., referred to the case *Gopalji v. Morarji* (1) which was binding on him, and observed that though it had been decided in the Bombay High Court that S. 8 or 9 did not apply to the case of a reference to three arbitrators, yet if the Court could not give direct assistance by nominating an arbitrator, it could do so indirectly on an application under S. 19 of the Act by staying a suit filed in defiance of the submission.

On all these considerations I am of opinion that the construction put by Pearson, J., on S. (8) (1) (b) of the Act cannot be supported and ought not to be followed. I am not prepared to say that in dealing with an application under S. 19, Arbitration Act, the Court is not entitled to take into consideration the

effect which the other sections of the Act may have on the facts of a particular case brought before the Court. I desire to reserve this point for fuller and further consideration. The point, however, is immaterial in view of the final conclusion on the present application under S. 19, Arbitration Act, to which I have come and which is referred to hereinafter. In my opinion there is no substance whatsoever in the point taken by Mr. Page on behalf of the respondent company, namely, that the respondent company have accepted the repudiation of the contract in question (which includes the submission to arbitration) and, therefore in the events that have happened the arbitration would be infructuous and that the Court should not interfere. This point is referred to in paras. 12 and 13 of the plaint filed by the respondent company. In my opinion, the facts stated in those paragraphs do not conclude the matter at all and can have no bearing on matters which had taken place before 7th December 1927.

The appellants, however, are in very great difficulty on this application. It is true that Pearson, J., mainly proceeded on the view taken by him of S. 8 (1) (b) of the Act, but on appeal before us the entire matter is open and we have been taken by learned counsel on both sides through the merits of the application itself. No doubt, the matter is one entirely in the discretion of the Court. The discretion again has to be judicially exercised in accordance with the ordinary rules of law and I am not unmindful of what has been laid down by eminent Judges from time to time that where the parties have agreed to refer a dispute to arbitration and one of them notwithstanding that agreement commences an action to have the dispute determined by the Court, the *prima facie* leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed. It is unnecessary for me to re-iterate the facts in this case once more. In my view the record discloses a state of things in which in the exercise of my discretion I do not feel called upon to stay the suit commenced by the respondent company. I have carefully considered the merits of the present application but in view of the order I propose to make, I refrain from going into the matter in detail and expressing an opinion on

(3) [1890] 25 Q. B. D. 545=59 L. J. Q. B. 533=39 W. R. 117=68 L. T. 475=6 Asp. M. C. 555.

(4) [1900] 2 Q. B. 606=48 W. R. 689=69 L. J. Q. B. 852=83 L. T. 45.

(5) A.I.R. 1921 Bom. 185=45 Bom. 1.



the merits because such a course may be embarrassing to the parties when the suit comes on for trial. The result, therefore, is that in my judgment the appeal fails and must be dismissed with costs.

**Buckland, J.**—I agree.

M.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 182

RANKIN, C. J. AND BUCKLAND, J.

*Babarali Sardar and others*—Appellants.

v.

*Emperor*

Criminal Appeal No. 549 of 1928, Decided on 11th December 1928, from decision of Addl. Sess.-Judge, Faridpur.

(a) **Criminal P. C., S. 162**—Accused applying for copies of statements made by prosecution witness to police officer—Magistrate ordering grant of such copies at commencement of each witness's cross-examination—Defence counsel not filing any folios or doing necessary acts to get copies saying that it would be inconvenient to file folios at that stage and it was no use getting copies at subsequent time—Grievance of defence, that they were not given their rights under S. 162, was groundless.

At the trial the accused applied for copies of statements made by the witnesses for the prosecution and it was ordered by the trying Magistrate that the copies should be granted at the commencement of the cross-examination of each witness. But the pleader for the defence did not file any folios and did not do the necessary acts to get the copies, saying that it would be inconvenient for him to file folios at that stage and it was no use to get copies at a subsequent time.

**Held:** that the grievance of the defence that they were not given their rights under S. 162 was groundless and under the circumstances it was needless to consider whether the proper time for granting the copies was at the commencement of the cross-examination or at the time when the witness enters the witness-box. [P 183 C 2, P 184 C 1]

(b) **Criminal P. C., S. 162**—Accused not applying for copies of statements before Committing Magistrate—Their only right then is to ask trial Judge for such copies.

If the accused have not availed themselves of the opportunity of asking for the copies of the statements during the Committing Magistrate's enquiry, they have no further right under S. 162 than to go to the Judge at the time of the trial and ask him to grant such copies. [P 184 C 1]

(c) **Criminal P. C., S. 297**—Scope.

The charge cannot be said to be bad unless it is really insufficient. [P 185 C 1]

(d) **Criminal P. C. (amended 1923), S. 162**—Amended section does not intend that

**Judge should consider whether foundation has been laid in cross-examination.**

*Per Rankin, C. J.*—It is not the intention of the amended section that the Judge should consider whether a foundation has been laid by way of cross-examination before copies of statements can be granted: (*Obiter*) A. I. R. 1927 Cal. 514, Doubled. [P 184 C 1]

*N. K. Bose and Asitaranjan Ghosh*—for Appellants.

*Probode Ch. Chatterjee*—for Complainant.

*D. N. Bhattacharjee*—for the Crown.

**Rankin, C. J.**—In this there are 10 appellants who have been tried before the learned Addl. Sessions Judge of Faridpur and a jury who heard 27 witnesses for the prosecution and a large number of witnesses for the defence. The jury have unanimously found the 10 appellants guilty of the charges of which they stand convicted. The nature of the case is that the deceased one Nawabali Matbar was a member of certain society (Samaj) in the village and that for various reasons he became unpopular with some of his neighbours owing to social friction showing itself in various ways, extraordinary petty ways to all appearance, but really important from the point of view of the accused and the deceased. The character of the crime alleged, shortly speaking, was this that at 6 o'clock in the morning of Sunday 5th February 1928, when the deceased and certain ploughmen were tilling the field the accused bent upon revenging their grudge came running up armed with lathis and certain small spears to make a determined attempt to cause hurt to the deceased. They were doing this in concert and had a common object in view. That, in point of fact, as so often happens when a number of people band together for such a purpose, one of them Hashu Bepari, accused 5, killed the deceased and two others inflicted grievous hurt upon the deceased, namely accused 9 and 10. Accordingly accused 5 was put on his trial and was convicted under S. 304 read with S. 148. The remaining of the first 8 accused were convicted under S. 147 of rioting and under S. 304 read with S. 149. As regards the second charge of which these persons have been convicted the case under S. 149 is of a very ordinary character. The charge against them is not that all of them set out to commit murder or homicide at all but that they set out with others to cause hurt in circumstances which they well



knew rendered it probable that some one or other of their party would go further and would deal a blow to the deceased which would result in his death.

It is a matter of most common experience based on elementary reasons that when a number of people attempt to carry out an object of that kind one or other goes further than he originally intended. I regard the charge against these persons as exactly of the type intended to be covered by the alternative clause of S. 149. As regards the accused 9 and 10 they have been convicted not only under S. 148 and under S. 304 read with S. 149 but under S. 324 also. The objection that has been taken on the part of the appellants to the proceedings in the lower Court has reference to the question whether they were given their rights under S. 162, Criminal P. C. We have not heard the Deputy Legal Remembrancer on this point and I will take the statement made in the appellants' own affidavit. This was a case which was tried after commitment and after an enquiry held before the Committing Magistrate. I shall assume, indeed I see no reason to refuse to assume, that had these appellants when before the Committing Magistrate asked for a copy of the statement made by any one of the witnesses then called for the prosecution they would have been entitled at that stage to a copy of the statements on the terms of the section. No such application was made. The Committing Magistrate finished his enquiry and committed the case and it left his Court altogether. Then it was that an application was made to him and it is conceded that he had no other course but to refuse it. An application was made to the learned Sessions Judge of Faridpur before the case came on for trial. At that time it was by no means certain which judicial officer would try this case. The learned Sessions Judge thought it was a case for the Judge at the trial and left the matter with him. Nothing happened in the meantime but at the trial a petition for copies was filed and after making the order for granting copies the Judge found that the Government Pleader was contending that the proper time to make the order was before the cross-examination of each witness had begun. That was quite true as laid down in the case in *Madari Sikdar v. Emperor* (1). A case to the contrary was cited

from Patna which held that copies should be asked for when a witness entered the witness-box and the learned Sessions Judge very properly thought himself bound by the rulings of his own High Court. But in truth and in fact the position was this that copies were ordered to be granted at the commencement of the cross-examination. The order was then made. The position was, therefore, that if it was desirable to see the statements in order to know whether there would be any cross-examination upon them or not, opportunity was given to the defendants at that stage to apply at the commencement of the cross-examination. As regards the present case it is most important to observe what followed, for in my judgment in this case nothing requires to be decided as to the time when copies are to be asked for, that is whether the true view is that the application should be made the moment the witness enters the box or at the close of his evidence in chief.

Let us assume for the sake of argument though I am far from holding so, that the order for the supply of the copies should have been made a couple of hours earlier than it was in fact made. The position then was this that the accused were to get reasonable facility given by the section. They had to file stamp papers upon which the copies could be made. If they did not get their copies in time their duty was to ask the learned Judge in the circumstances to adjourn the cross-examination till the next day or, at all events not to formally conclude the cross-examination in case the statements when furnished might lead the learned pleader for the defence to cross-examine further. What in fact was done smacks too much to my mind of an attempt to make a grievance. What was done was that the pleader for the defence said that it was very inconvenient for him to file folios at that stage and it was no use to get copies at a subsequent time. So he did not file any folios and did not do the necessary to get the copies. That seems to me to put this grievance out of Court altogether. I quite agree that that if in the circumstances the learned Judge had insisted on closing the cross-examination of the witnesses without giving reasonable facilities to the pleader to give his client the benefit that S. 162 confers that would have been a good

(1) A. I. R. 1927 Cal. 514=54 Cal. 307.



ground for objecting to the fairness of the trial. In this particular case it is evident to me that the defence preferred their grievance to their copies and I do not think that we are called upon to interfere with this trial and to have it held over again because of that ground. The question has been raised in this Court as to whether at any time after the witnesses were called before the Committing Magistrate the defendant has not the right to apply to the Court to get an order for copy. I am very far from so holding.

It seems to me that in this case the defence had one opportunity during the Committing Magistrate's enquiry to get a copy if they wanted. They did not avail themselves of it. I am by no means satisfied that by any construction of this section they have any further right than to go to the Judge at the time of the trial and ask that officer in that way. If this case had turned upon the question whether the learned Judges, Mr. Justice Chotzner and Mr. Justice Duval were right in the Calcutta case to which I have referred in saying that there must be a foundation laid by way of cross-examination showing that the statements are wanted to contradict the witnesses I should have thought it necessary to refer this case a to Full Bench to have that question decided. As at present advised I am not prepared to accept that as a possible interpretation of this section. I do not think that it was any part of the intention of the amended section that the Judge has to consider whether a foundation has been laid. In my judgment that part of that decision is open to criticism. That question, however, it is unnecessary to determine for the purpose of the present case. Another question of some difficulty is whether the right time to apply for copies is when a witness enters the box or when his evidence-in-chief is concluded. That question again as I have already shown it is unnecessary to determine now in view of the course taken by the learned pleader for the defence.

There is a good deal to be said in favour of the view which appears to be the view of the Bombay and other High Courts that an application is to be made at the commencement of the cross-examination. There is also a good deal to be said in favour of the

view that the wording of the section points to the time when the witness appears in the box. Which of these two views is the better is a matter which no doubt needs consideration. For the present purpose it is not necessary that we should endeavour to deal with that question.

The second objection taken in the case was that the charge against 7 of the accused that they were guilty under S. 304 read with S. 149 was bad but it appeared that certain words following the alternative given by S. 149 had not been inserted in the learned advocate's copy of the charge. It is clear that what the accused were charged with and what the jury was directed upon was the question whether the homicide committed by the accused 5 was of such a character that the others knew that it was likely to be committed in prosecution of the common object. I see no objection to the charge.

It is said with regard to appellants 9 and 10 who were given the additional two years on the ground that they had themselves committed grievous hurt upon the deceased that they should only have been convicted of one offence, namely, of the offence under S. 304 read with S. 149 and not of S. 324, in addition. I cannot say that on the facts of this case the objection is made out but it matters little to the appellant whether they are given five years on one charge and two years more on another or whether their sentences are raised from five years on the first charge to seven years on the first charge. It is entirely unnecessary to interfere with the conviction on that matter. In my opinion they thoroughly deserve the sentences of seven years which have been passed on them.

Coming to the charge various points have been taken by way of criticism. In a case like this where there are many witnesses on either side it is almost inevitable that the charge should be long and it is more than lucky if it is not confusing. It is necessary that the charge should be long because there are many points to be considered and unless the law is laid down fully the labour of the learned Judge is apt to be in vain. The particular charge before us seems to me to be a very good charge. It is logical in method and it is in my opinion wonderfully accurate in detail. If one fastens



upon a single point one can always find room for the wish that something more elaborate had been given. It is to be remembered that when each point has been further elaborated the charge has neither become less long nor less confusing. After all the constitution in this matter puts faith in the jury and the charge cannot be said to be bad unless it is really insufficient. I think the main complaint is that in some matters where the learned Judge has correctly laid down the law he has laid it down rather in an abstract way. One or two references to specific matters have been made as to which it is said that there is a suggestion which is unwarranted and to the prejudice of the defence. One refers to the observation that there is no direct evidence of forgery as regards the post-marks. Another is with reference to a witness who says that the Sub-Inspector at another place took a statement from him. Another is with reference to the fact that a defence witness said that a certain man was ill and the fees for the doctor were paid by his firm and that the entries were in the firm's books, which were not produced. Another has reference to one Afi Durain who is mentioned in the first information report and who according to the prosecution witnesses including the first informant came just after the occurrence and was said not to be a useful witness. Mr. N. K. Bose has taken us through all the points in his usual reasonable and succinct manner. I cannot say that they amount to any successful criticism of this charge. In most cases the learned Judge's observation is entirely justified and it is not possible to make out from a plain statement of facts that the charge is bad. I am quite satisfied that this is a thorough and careful charge. In these circumstances the appeal must be dismissed.

**Buckland, J.**—I agree, but I desire to add a few words with reference to the point which has been argued under S. 162, Criminal P. C. The learned Sessions Judge, to whom an application was made between the commitment order and the trial, in my opinion very properly said that the matter was one to be dealt with by the Judge at the trial. The words of the first proviso to the section, "when any witness is called for the prosecution in such enquiry or trial" must refer to a

time when an enquiry or trial in which such a witness is called is in progress. This excludes the possibility of an order being made either by a Committing Magistrate after he has dealt with a case by committing it to the Sessions, or by a Sessions Judge in anticipation. An order may only be made "when any witness is called". The opportunity before the Committing Magistrate has gone and that before the Sessions Judge will only arrive on that point being reached.

A further reason in support of this view is that as soon as a request for copies of the statements is made the Court shall refer such writing, and do so before allowing copies to be furnished. The object of this is to be found in the second proviso to the section, which requires the Court first to satisfy itself whether any part of any such statement is not relevant to the subject matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice or is inexpedient in the public interest. Clearly the Court to satisfy itself on a question of relevancy is that before which the enquiry or trial is in progress.

The learned Chief Justice has said that it is not necessary to lay down for the purpose of deciding this appeal at what point the application for copies may first be made, whether directly the witness is called or after the cross-examination has begun. I may, however, add to what the learned Chief Justice has said with reference to the decision of this Court, which the learned Sessions Judge was bound to follow, that it appears to me that there is a certain amount of confusion between what the section says the Court shall do and what it says later as to the object with which that shall be done, which has tended to obscure the question as to the point of time at which an order for copies shall be made under the section.

Whatever may be decided in a case where the correct view to be taken of the section can be authoritatively and finally laid down I can see that with a trial going on from day to day there may be practical difficulties in the way of applying the section without delaying the proceedings or embarrassing the defence. I feel confident, however, that such difficulties will disappear as Courts and practitioners become accustomed to the provi-



sions of this section. In this case it has been sought to derive from such difficulties a somewhat meretricious tactical advantage but in this I am satisfied there is no substance. There is no need for me to add anything more to what has already been said about the facts of this case and I agree that the appeal should be dismissed.

S.N./K.K.

*Appeal dismissed.*

### \* \* A. I. R. 1929 Calcutta 186

MALLIK AND GARLICK, JJ.

*Kanti Chandra Ghose and others—*  
Plaintiffs—Appellants.

v.

*Brojendra Mohan Goswami and others—*  
Defendants—Respondents.

Appeal No. 484 of 1926, Decided on 5th July 1928, from appellate decree of Sub-Judge, 3rd Court, Hooghly, D/- 18th August 1925.

\* \* (a) Registration Act, S. 17 (d)—  
Agreement to lease after measurement of land and transferring possession for facilitating measurement — Agreement does not require registration — Registration Act, S. 2 (7).

A written agreement to grant a lease after calculation of the area of the land and giving the lessee permission to take possession, not for his immediate use but for clearing the jungle in order that the land might be measured is not a present demise of the land and does not require to be registered. [P 187 C 1, 2]

(b) Part-performance — Agreement to lease — Lessee using land without paying agreed rent—Suit for rent—Specific performance not barred then — Lessor's part-performance entitles him to specific performance.

The proposed lessee entered on the land in pursuance of an agreement to grant a lease and not only cleared the jungle but also made bricks for over a year without any other lease. He enjoyed the full the profits of the land without paying the lease money.

*Held*: in a suit for rent that there has certainly been part-performance by the lessor of the contract and it is a contract fit to be specifically enforced, especially when a suit for specific performance was not time barred at the time when the suit was instituted.

[P 187 C 1, 2]

*Nanda Gopal Banerjee —* for Appellants.

*Mritunjoy Chattopadhyaya and Biraj Mohan Roy—*for Respondents.

**Garlick, J.** — Plaintiffs-appellants agreed to let a piece of garden land to defendant 1 (respondent) for a period of

nine years for the making of bricks. A written agreement was executed but not registered. Defendant 1 entered on the land, cleared the jungle and began making bricks. After he had used the land for 15 months, the superior landlord of his lessors sued for a permanent injunction to prevent the use of the land as a brickfield. He obtained a temporary injunction and it was in force for some 15 months and then the zemindar came to terms with the lessors, and recognized their right to use the land as they liked, and the temporary injunction was withdrawn. The plaintiffs in the meantime had filed this suit against defendant 1 for rent of the land and for selami. They claimed rent at the rate of Rs. 20 a bigha and selami at Rs. 100 a bigha for 8 bighas 18 cottas of land. The defence was that by the terms of the written agreement the rent was only Rs. 15 a bigha and the area only 4½ bighas. It was admitted that selami of Rs. 100 a bigha was to be paid, but it was contended that it was not payable until the lessors should execute a formal lease.

The written agreement was admitted in evidence by the first Court and marked Ex. B, though it was not a registered document. The learned Munsif held that it was an agreement to grant a lease and that the selami agreed on was not payable because the lease had not been executed and that the rent due had been paid. So he dismissed the suit. The plaintiff appealed and contended that by the doctrine of part-performance the defendant was liable to pay the selami agreed on since he was enjoying the land. But the learned Subordinate Judge held that the agreement, being unregistered was not admissible in evidence, that oral evidence of the agreement was inadmissible because the contract had been reduced to writing, and that there was, therefore, no evidence on which to found the doctrine of part-performance. He therefore dismissed the appeal.

In second appeal to this Court plaintiff cites a number of rulings: *Harinath v. Promotho Nath* (1); *Satyendra Nath v. Anil Chandra* (2); *Upendra v. Umes* (3); *Sarat Charan v. Shyam Chand* (4);

(1) A.I.R. 1921 Cal. 127.

(2) [1908] 14 C.W.N. 65=5 I.C. 38.

(3) [1910] 12 C.L.J. 25=6 I.C. 346=15 C.W.N. 375.

(4) [1912] 39 Cal. 663=14 I.C. 701=16 C.L.J. 71.



*Ardesir Bejonji v. Sirdar Ali* (5) to show that an agreement which, for want of registration is inadmissible to prove a lease may be admissible to prove an agreement which does not affect the land, for example, an agreement to execute a lease on the fulfilment of certain conditions. Respondents on the other hand cite *Sanjib Chandra v. Santosh* (6), *Hemanta Kumari v. Midnapur Zamindari Co.* (7); *Elahi Baksh v. Hukum Baksh* (8); *Champaklatika v. Nafar Chandra* (9) to show that an agreement coupled with delivery of present possession is in fact a lease and cannot be proved unless it is registered. The question we have to decide is therefore whether the document marked Ex. B, ought under S. 17, Registration Act, to have been registered, and if so, whether it could be admitted under S. 49 (c), Registration Act, as evidence of a transaction not affecting the land.

The recitals of Ex. B are briefly these :

"We agree to settle mallik garden with you for nine years at a selami of Rs. 100 per bigha and a rent of Rs. 15 per bigha for the making of bricks, and we have received 201 in advance. You will now clear the jungle and erect huts and then the land will be measured and the amount of rent and selami will be fixed and all the cosharers will execute a registered lease within two months and you will give us a kabulyat."

The defendant entered on the land in pursuance of this agreement, and not only cleared the jungle, but also made bricks for over a year without any other lease. The document was therefore acted upon as if it were a lease, except that the land was not measured and the rent and selami were not calculated. A Commissioner appointed by the lower Court found that the area of the land was 8 bighas 2 cottas, and not  $4\frac{1}{2}$  bighas as stated by the defendant, nor 8 bighas 18 cottas as stated by the plaintiffs. It is clear that the document was an agreement to grant a lease within two months, after calculation of the area of the land. And it gave the lessee permission to take possession, not for the immediate purpose of making bricks, but for clearing the jungle in order that the land might be measured. We are therefore of opinion that

the document was not a present demise of the land and did not require to be registered, and was rightly admitted in evidence by the Court of first instance. And when the first Court had used it as a defence exhibit and had dismissed the suit because of the terms of the document, it was inequitable to refuse to allow the plaintiff to refer to it in the Court of appeal.

The next question is whether the defendant, having made use of the land by virtue of the agreement, is bound by the doctrine of part-performance to pay the selami and rent agreed on. He pleads that the plaintiffs have not performed their part of the agreement since they have not executed a registered patta. Though the plaintiffs have not fully performed their part of the contract, yet the defendant for 15 months enjoyed the full use of the land and made bricks from it. It was not the plaintiffs who stopped his work. It was the superior landlord who obtained the temporary injunction. And as the superior landlord has since acknowledged that he had no right to interfere with the use of the land, the defendants' remedy for the interruption is against him. We understand that since the withdrawal of the injunction the defendant has been using the land as before. The defendant is therefore enjoying to the full the profits of the land without paying any rent or selami except Rs. 200 or so paid at the beginning of the lease. There has certainly been part-performance of this contract, and it is a contract fit to be specifically enforced. A suit for specific performance was not time barred at the time when this suit was instituted. We have not been given any reason why the land was not measured, by the parties and why a registered lease was not executed. We take it that both parties were equally to blame for these omissions.

The lower appellate Court has found that the area leased to the defendant is 8 bighas 2 cottas, and that the amount paid to the plaintiffs by the defendant was 231 in all. We allow the appeal and grant the plaintiffs a decree for rent at 15/a bigha and selami at 100/ a Bigha for 8 bighas 2 cottas of land minus 231/ all ready paid. But the decretal amount will not be payable until the plaintiffs have tendered to the defendant a duly registered lease in terms of the agreement Ex. B. The plaintiffs-appellants will get

(5) [1908] 33 Cal. 610=10 Bom. L.R. 1146.

(6) A.I.R. 1922 Cal. 436=49 Cal. 507.

(7) A.I.R. 1919 P.C. 79=47 Cal. 485=46 I.A. 240 (P.C.).

(8) [1913] 19 C.L.J. 464=20 I.C. 907=18 C. W.N. 38.

(9) [1910] 15 C.W.N. 536=8 I.C. 44=13 C.L. J. 300.



half costs in all Courts because they wrongly claimed rent at Rs. 20/ a bigha and compensation for cutting down trees.

**Mallik, J.**—I agree.

M.N./R.K.

*Appeal allowed.*

**\* A. I. R. 1929 Calcutta 188**

CUMING AND MALLIK, JJ.

*Hason Ali and others*—Defendants—Appellants.

v.

*Gurudas Kapali and others*—Plaintiffs—Respondents.

Appeal No. 1266 of 1926, Decided on 29th November 1928, from appellate decree of Sub-Judge, 2nd Court Tipperah, D/- 25th January 1926.

**(a) Evidence Act, Ss. 68 and 71**—One of three attesting witnesses called but resiling—Document can be proved by other evidence.

• Out of the three attesting witnesses alive the plaintiff called one witness and when he resiled the plaintiff proceeded to prove the document by other evidence:

*Held*: there was a full compliance with the provisions of Ss. 68 and 71. [P 188 C 2]

**\* (b) Limitation Act, S. 22—S. 22 applies even when party is proper but not necessary—Such a party cannot be added after limitation.**

Section 22 does apply to a case even where a person is not a necessary party but only a proper party to a suit and such a person cannot be added as a party after the expiry of the period of limitation provided for by that section: 36 Cal. 675, *Foll.*; 12 C. W. N. 84; 32 All. 241 and 33 Cal. 425, *Expl. and Dist.*

[P 189 C 1]

**(c) Limitation Act, S. 18—Proof of fraud is essential.**

Before a plaintiff can avail himself of the provisions of S. 18 it is incumbent upon him to show that he was kept out of the knowledge of his right to institute the suit by means of fraud. [P 189 C 1]

*Nasim Ali*—for Appellants.

*Ramgati Sarkar*—for Respondents.

**Mallik, J.**—This appeal arises out of a suit for recovery of money on a mortgage bond. Both the Courts below decreed the suit in full. Defendants 2, 4 ka, 4 kha, 4 gha, 4 uma have appealed to this Court.

There were two points taken before us on behalf of the appellants. First of all it was said that the decree was not sustainable inasmuch as the mortgage bond had not been proved in accordance with law. It appears that at the time of the trial of the suit three of the attesting

witnesses were alive and it appears also that the plaintiff called one of these three witnesses and when this witness resiled the plaintiff proceeded to prove the document by other evidence. It was contended before us that as there were other attesting witnesses alive at the time it was incumbent on the plaintiff to try them before he was allowed to prove execution of the document by other evidence. I do not think there is much substance in the contention. As observed before the plaintiff did actually call one of the attesting witnesses then alive and it was only when that attesting witness resiled the plaintiff proceeded to prove the document by other evidence. This in my opinion was a full compliance with the provisions of Ss. 68 and 71, Evidence Act. The first contention raised before us must, therefore, fail.

The second point that was taken on behalf of the appellants has more substance in it. It was said that the suit ought to have been dismissed as against defendants 4 ka, 4 kha, 4 gha and 4 uma (who were subsequent transferees) inasmuch as they were brought on the record after the period of limitation of 12 years was over. This contention seems to me to be sound and must prevail; under S. 22, Lim. Act, when a party is added after the institution of a suit the suit shall, as regards him, be deemed to have been instituted when he was so made a party. It appears that defendants 4 ka, 4 kha, 4 gha and 4 uma were brought on the record and made defendants in the case after defendant 2 had filed his written statement and this was admittedly more than 12 years after the money had become due and after the statutory period of limitation of 12 years. A considerable amount of argument was advanced on behalf of the respondent to show that S. 22, Lim. Act, could not apply to a case like the present one and a number of cases among which I may mention the cases of *Mahamed Ishaq v. Akramul Huq* (1); *Jaggewar Dutt v. Bhuban Mohan Mitra* (2) and *Imdad Ahmad v. Pateshri Partap Narain Singh* (3) were cited before us. But the point that has been decided in all those cases is that when a person who is a

(1) [1907] 12 C. W. N. 84=6 C. L. J. 553.

(2) [1906] 33 Cal. 425=3 C. L. J. 205.

(3) [1903] 32 All. 241=6 I. C. 931=37 I. A. 60 (P.C.).



necessary party to a suit is brought on the record after the period of limitation the whole suit must fail. These cases, however, are no authority for the proposition that when a party who is not a necessary party brought on the record after the period of limitation no part of the suit not even the part as regards the party who is brought on record after the period of limitation can fail. On the other hand the case of *Mathewson v. Ram Kanai Singh Deb* (4) is a clear authority against the point contended for on behalf of the respondent. In this case it has been laid down that S. 22, Lim. Act, does apply to a case even where a person is not a necessary party, but only a proper party to a suit and such a person cannot be added as a party after the expiry of the period of limitation as provided for by that section. On the authority of this *I. L. R.* 36 *Cal.* case I am of opinion that S. 22, Lim. Act, must be held to apply to the present case and if S. 22, Lim. Act, does apply to the present case there can be no getting over the difficulty about limitation so far as defendants 4 ka, 4 kha, 4 gha, 4 uma are concerned without invoking the aid of some of the saving sections of the Indian Limitation Act.

An attempt has been made by the respondent to show that the limitation in the present case as against these defendants was saved by the provisions of S. 18, Lim. Act. It was urged that the plaintiff came to know of the existence of the subsequent transfers in favour of these defendants only after the written statements of defendant 2 had been filed and these defendants were brought on the record within a short time after the plaintiff came to know of those transferees. It may be that the plaintiff had come to know of these transferees only a short time before these defendants were made parties to the suit. But that alone will not do for bringing in the aid of the provisions of S. 18 of the Act. Before the plaintiff could avail himself of the provisions of that section it was incumbent upon him to show that he had been kept out of that knowledge by means of fraud. But in the present case there was no allegation of any fraud of any kind much less any evidence to substantiate such fraud. S. 18, Lim. Act, could not,

therefore, in my judgment, be of any help to the plaintiff and holding as I do that S. 22 applies to the case the suit as against defendants 4 ka, 4 kha, 4 gha, and 4 uma must be held to have been barred by limitation.

The result, therefore, is that the appeal is allowed in part. The decree of the lower Court as against defendants 4 ka, 4 kha, 4 gha and 4 uma are set aside and the suit as against them will stand dismissed. The rest of the decree of the lower Court will remain intact. Defendants 4 ka, 4 kha, 4 gha, and 4 uma will get their costs from the plaintiff throughout. The plaintiff-respondent will get from defendant 2 his costs of this appeal.

**Cuming, J.**—I agree.

M.N./R.K. *Appeal allowed in part.*

### A. I. R. 1929 Calcutta 189

MUKERJI AND GRAHAM, JJ.

*Suku Ram Koch and others*—Accused—Petitioners.

v.

*Krishna Deb Sarma*—Complainant—Opposite Party.

Criminal Revn. No. 957 of 1928, Decided on 19th December 1928.

**Criminal P. C., S. 403. (1)**—"Tried" does not necessarily import decision on merits—Acquittal under S. 247 bars further trial.

The meaning of the word "tried" in S. 403 (1) does not necessarily import a decision of a case on merits, but only refers to the nature of the proceedings that were had; or in other words, means that the proceedings in which the acquittal was passed were in the nature of a trial. Therefore an acquittal under S. 247 would bar a further trial under S. 403 (1): 34 *Mad.* 253, *Appr.*; 40 *Mad.* 976; 7 *C.W.N.* 492 and 7 *C.W.N.* 711, *Ref.* [P 189 C 2, P 190 C 1]

*Probodh Ch. Chatterjee*—for Petitioners.

*Manmatha Nath Roy (Jr.)*—for Opposite Party.

**Mukerji, J.**—The whole question in this Rule is whether an acquittal under S. 247, Criminal P. C. is an acquittal which would bar a further trial under S. 403, sub-S. (1), Criminal P. C. The decision of this question turns upon the meaning of the word 'tried' as used in that sub-section. I am clearly of opinion that the word 'tried' there used does not necessarily import a decision of the case on the merits, but only refers to the

(4) [1909] 36 *Cal.* 675=1 *I. C.* 626=9 *C. L. J.* 528.



nature of the proceedings that were had ; or in other words, means that the proceedings in which the acquittal was passed were in the nature of a trial. I entirely agree with the view taken by the Madras High Court in the case of *In re : Guggilapu Paddaya* (1), in which it has been pointed out that the non-mention of S. 247 in the explanation to S. 403 is suggestive of this interpretation and that a contrary view would make S. 247 illusory. The authorities bearing on the question have been fully considered in the case of *In re : Dudekula Lal Sahib* (2). I am also of opinion that the cases of this Court, namely *Bishun Das Ghosh v. King-Emperor* (3), and *Kedar Nath Biswas v. Adhin Majhi* (4) though they do not directly touch this question, lend ample support to this view. I would accordingly make the rule absolute and quash the proceedings pending against the petitioners.

**Graham. J.**—I think the case is clearly covered by the rule of *autrefois acquit*. It is plain from the complainant's statement that he was merely presenting before the Court the same complaint that he had formerly made and upon the same facts. The previous case having ended in acquittal the accused could not, so long as that order remained in force, be prosecuted again on the same set of facts.

Whether the acquittal was under S. 247 or under S. 253, Criminal P. C. is immaterial because the accused had been "tried" within the meaning of the word in S. 403 (1), Criminal P. C. and the effect of the acquittal under S. 247 is to bar trial on the same facts. For these reasons I agree that the rule should be made absolute, and the proceedings quashed.

M.N./R.K.                      Rule made absolute.

- (1) [1911] 34 Mad. 253=9 I.C. 253=12 Cr. L.J. 41.
- (2) [1917] 40 Mad. 976=33 M.L.J. 121=45 I.O. 261=6 M.L.W. 175.
- (3) [1903] 7 C.W.N. 493.
- (4) [1903] 7 C.W.N. 711.

### A. I. R. 1929 Calcutta 190

PAGE AND MALLIK, JJ.

*Ram Chandra Kapali and others*—  
Plaintiffs—Appellants.

v.

*Saday Chandra Raha and others*—De-  
fendants—Respondents.

Appeal No. 1826 of 1926, Decided on  
13th August 1928.

(a) Bengal Village Self-Government Act (5 of 1919), S. 64—S. 64 does not apply to all suits but only to those where compensation is claimed for some wrongful act of Union Board done in exercise or honestly supposed exercise of statutory powers.

Section 64 is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Union Board or its members in the exercise or the honestly supposed exercise of their statutory powers and the notice in the section is meant to give the defendant the opportunity of making some pecuniary amends for the wrong without incurring the cost of litigation. [P 191 O 1]

A Union Board in a village decided to repair certain road and carried out the work of repair. Plaintiffs sued for declaration that land on which the road was, belonged to them but no notice under S. 64 was given.

*Held*: that the suit was not barred for want of notice: 6 Cal. 8 (F.B.) and A. I. R. 1921 Cal 91, Foll. [P 191 C 2]

(b) Bengal Village Self-Government Act (5 of 1919), Ss. 63 and 64—Where S. 64 applies, plaintiff has also to show that his case does not fall within ambit of S. 63.

In cases to which S. 64 applies, even if the plaintiffs have complied with the provisions of S. 64, it is incumbent upon them to satisfy the Court that their cause of action is not within the ambit of S. 63, and if they fail to do so the suit or legal proceeding would fail. [P191 C 2]

*Ramgati Sircar*—for Appellants.

*Benoyendra Nath Palit*—for Respondents.

**Page, J.**—The decision of this appeal involves the construction of Ss. 63 and 64, Bengal Village Self-Government Act (Act 5 of 1919) which are in the following terms :

"Section 63. No suit or other legal proceeding shall lie against a Union Board, or any member or officer thereof acting under the direction of such board, in respect of anything done lawfully and in good faith and with due care and attention under this Act or any rule made hereunder."

"Section 64 (1). No suit or other legal proceeding shall be brought against any Union Board or any of its members or officers, or any person acting under its direction, for anything done under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of such Board, and also if the suit is intended to be brought against any member or officer of the said Board, or any person acting under its direction) at the place of abode of the person against whom such suit is intended to be brought, stating the cause of action and the name and place of abode of the person who intends to bring the suit; and unless such notice be proved, the Court shall find for the defendant."

"(2) Every such action shall be commenced within three months after the accrual of the cause of action, and not afterwards."



" (3) If any Union Board or person to whom a notice under Sub-S. (1) is given shall, before a suit is brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover. "

It appears that the Union Board in the Village Kunda within the Brahmanbaria sub-division decided to repair a certain road which runs from Kunda to Maslandpur, and pursuant to the resolution of the Board in that behalf the work of repair was undertaken and was carried out as far as the land in dispute in the present suit. The plaintiffs protested that the land in suit on which the Union Board proposed to execute repairs was not a public road but their private property, and the present suit was brought against the President and members of the Union Board for a declaration of the plaintiffs' title to that land, and for confirmation of their possession of the same. The defence was that the property in suit was part of the public road, and did not belong to the plaintiffs, and further that, inasmuch as the plaintiffs had not served a notice as required by S. 64, Sub-S. (1) of Act 5 of 1919, the suit was barred. It was contended on behalf of the respondents, and found by both the lower Courts that S. 64 of the Act applied to suits and legal proceedings of every description brought against the Union Board or its members or officers, and the suit was dismissed. In my opinion, the decree of the lower appellate Court cannot stand, and the ratio decidendi of the Full Bench in the case of *Chunder Sikhur Bandopadhyaya v. Obhoy Churan Bagchi* (1) is applicable to the present suit, and concludes the matter against the respondents. In that case, a suit for possession of certain land taken by the Santipur Municipality was filed more than three months after the accrual of the cause of action, and it was contended that the suit was barred under S. 87, Bengal Act 3 of 1864, which is substantially in the same terms as S. 64 of Act 5 of 1919. Garth, C. J. in delivering the judgment of the Full Bench observed :

" That section, as it seems to us, is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the commissioners or their officers, in the exercise, or the honestly supposed exercise, of their statutory powers. "

" The notice in the earlier part of the section is meant to give the defendant the opportunity of making some pecuniary amends for the wrong, without incurring the cost of litigation. "

(1) [1881] 6 Cal. 8 (F.B.).

" We think that it could hardly have been the intention of the legislature to allow the commissioners (even by mistake) to appropriate the lands of private persons without paying for them, and to hold those lands forever as against the true owners, unless the latter should happen to be sufficiently watchful to discover the aggression in time to take steps to protect their property within so short a period as two months. "

See also the case of *Sasanka Sekhar Banerjee v. Sudhangsu Mohan Ganguly* (2). I am of opinion that S. 64 has no application to a suit of the nature of that under appeal. In our opinion, however, in cases to which S. 64 applies, even if the plaintiffs have complied with the provisions of S. 64, it is still incumbent upon them to satisfy the Court that their cause of action is not within the ambit of S. 63, and if they fail to do so the suit or legal proceeding will fail.

The result is that the decree of the lower appellate Court is set aside, and the suit will be sent back to the trial Court to be heard on the merits in accordance with law. The plaintiffs will have their costs of and incidental to the present appeal and in the lower appellate Court in any event. The costs in the trial Court will abide the event.

**Mallik, J.**—I agree.

S.N./R.K.

*Retrial ordered.*

(2) A. I. R. 1921 Cal. 91=48 Cal. 45.

### A. I. R. 1929 Calcutta 191

CHOTZNER AND GREGORY, JJ.

*Mahim Chandra Roy*—Petitioner.

v.

*A. H. Watson*—Opposite Party.

Criminal Revn. No. 1225 of 1927, Decided on 10th February 1928, from an order of Sess. Judge, 24-Pargannas, D/- 28th October 1927.

**Criminal P. C., S. 203—Dismissal of complaint without giving opportunity to substantiate charge is illegal.**

A complaint was filed under S. 500, Penal Code. The Magistrate suo motu dismissed the complaint.

*Held*: that the Magistrate was wrong in law in dismissing the petition of complaint without giving an opportunity to the complainant to substantiate the charge by adducing evidence. [P 192 C 1]

*Tarakeswar Pal Chowdhury, Rainendra Nath Ghose and Bireswar Chatterjee*—for Petitioner.

**Facts.**—Certain imputations against the Indian widows appeared in an Eng-



lish daily the "Statesman" on 12th August 1927. A petition of complaint was filed against the editor and printer A. H. Watson alleging that the imputations were false, malicious, and grossly defamatory and had lowered the complainant's reputation as he had several relations who were widows. The Magistrate *sue motu* dismissed the complaint giving reasons therefor. A petition for further enquiry into the complaint was dismissed by the Sessions Judge.

The complainant thereupon moved the High Court and obtained the present rule the sixth ground of which was :

"that the learned Magistrate was wrong in law in dismissing the petition of complaint without giving an opportunity to the petitioner to substantiate the charge by adducing evidence."

**Chotzner, J.**—We are of opinion after hearing the learned vakil for the petitioner that this rule should be made absolute on the sixth ground specified in the petition. We, therefore, remit the case to the learned Magistrate so that the petitioner may be given an opportunity of proving his case.

**Gregory, J.**—I agree.

M.N./R.K. *Rule made absolute.*

### A. I. R. 1929 Calcutta 192

CHOTZNER AND GREGORY, JJ.

*Hemendra Nath Sen*—for Petitioner.  
v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1095 of 1927, Decided on 9th February 1928, from order of Dy. Mag., Dinajpore, D/- 22nd August 1927.

**Criminal P. C., S. 192**—A Magistrate to whom case is transferred can deal as if he had taken cognizance of it.

A Magistrate to whom a case is transferred by the District Magistrate under the provisions of S. 192 stands in the shoes of the original Magistrate and he has full authority to deal with the case as if he himself had taken cognizance of it. [P 192 C 1]

*Mritunjoy Chattopadhyaya and Manindra Nath Bannerjee* No. 2—for Petitioner.

*Khundkar*—for the Crown.

**Judgment.**—This rule was granted on the ground that the learned Magistrate, Mr. S. N. Dutt, not having any jurisdiction to take cognizance of the offence under S. 190 (c), Criminal P. C., the proceedings instituted against the

petitioner are bad in law and should be quashed.

There is no dispute about the facts, which are that one Jaduram was summoned by Mr. Bhowmic, Deputy Magistrate of Dinajur, under S. 420, I. P. C., on the ground that he induced the complainant Kali Charan Deshi, to pay him Rs. 550 on the false representation that money was to be paid to the present petitioner, Hemendra Nath Sen, a Sub-Inspector of Police, in order to secure the release of one Bindha, who had been arrested in connexion with an investigation in a case of murder. The case was subsequently transferred under the orders of this Court by the District Magistrate from the file of Mr. Bhowmic to the file of Mr. S. N. Dutt, another Deputy Magistrate, for trial. The Magistrate after recording the evidence found that the case against Jaduram had not been substantiated, but that there was a strong case against the present petitioner and he, therefore, directed summons to issue against him under S. 161 read with S. 511, Ss. 347 and 323, I. P. C. Mr. Chatterji, who has appeared on behalf of the petitioner, contends that Mr. Dutt had no authority to issue processes and that the only person, who was competent to take such action, was Mr. Bhowmic before whom the original petition of complaint was filed. He further points out that the petitioner was examined as a witness in the case and he says, on the authority of the case of *Khudiram Mookerjee v. Empress* (1), that the action of the Magistrate was illegal. It is contended by Mr. Khundkar on behalf of the Crown that the original petition of complaint filed by Kali Charan Deshi was in itself sufficient to justify the issue of processes against the petitioner and that Mr. Dutt, to whom the trial had been transferred, stood 'exactly in the same position as Mr. Bhowmic, who had taken cognizance on the original complaint.

In our opinion, this rule should be discharged. The petition of Kali Charan Deshi makes it perfectly clear that the present petitioner was *prima facie* instrumental for the demand of the bribe. If Mr. Bhowmic, who took cognizance of the offence, as he did, under S. 190 (a), Criminal P. C., had chosen to issue process against the petitioner, no possible

(1) [1896] 1 C. W. N. 105.



objection could have been taken. Mr. Dutt to whom the case was transferred by the District Magistrate under the provision of S. 192, Criminal P. C., stood in the shoes of Mr. Bhowmic and he had full authority to deal with the case as if he himself had taken cognizance of it. The facts cited in *Khudiram's* case to which we have referred do not seem to us to have any bearing on the present case.

For these reasons this rule must be discharged.

M.N./R.K.

*Rule discharged.*

### \* A. I. R. 1929 Calcutta 193

COSTELLO, J.

*Atarmoni Dasi*—Applicant.

v.

*Bepin Behari Dhur and others*—Opposite Parties.

Appln. in execution from the decree, D/- 8th May 1916, in Original Suit No. 875 of 1904.

**\* (a) Limitation Act, Art. 183—Filing tabular statement under O. 21, R. 11, is making application—Court's order on application is not necessary.**

The filing of a tabular statement in accordance with O. 21, R. 11, is an application to the Court within the meaning of Art. 183 in conjunction with S. 3. The making of an application does not imply an application on which an order has been made: 30 Cal. 979 and A. I. R. 1925 Cal. 668, *Expl.* [P 195 C 1]

**(b) Limitation Act, S. 3—Filing notice of motion is making application (*Obiter*).**

Where an "application" is to be made to the Court within the period of limitation prescribed by any Act, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court: *In re Gallop and Central Queensland Co., Ltd.*, (1890) 25 Q. B. D. 230; A. I. R. 1924 Bom. 36; 17 M. L. J. 215, *Foll.*; 20 Cal. 899, *not Foll.* [P 194 C 1]

S. C. Mitter for *Kali Charan Dhur*—for Applicant.

P. N. Chatterjee for *Nobin Chandra Dhur*—for Opposite Parties.

**Judgment.**—This is an application made by *Kali Charan Dhur*, one of the defendants in this administration suit. The decree directed the plaintiffs and the defendants *Nobin Chandra Dhur* and *Susila Sundari Dasi* to pay to the applicant Rs. 2,590-5-3 with interest thereon from the date of the decree until realization. The application is for the execution of that decree under the provisions of O. 21, R. 11, Civil P. C. and is in the

tabular form required by that rule. In Col. 10 the applicant states:

"I, the applicant pray that the said sum of Rs. 2,590-5-3 with interest thereon at 6 per cent. per annum from the date of the decree till realization and the costs of taking out this execution be realized by attachment and sale of the right, title and interest of the judgment-debtors to and in the immovable properties specified at the date of the application and paid to him."

The tabular statement was duly filed before the Master under Ch. 6, R. 12, of the Rules of the Court and as the decree was more than a year old the matter fell to be dealt with under the provisions of O. 21, R. 22 and the Master endorsed the tabular statement in this way:

"Let usual notice issue under O. 21, R. 22 (a), Civil P. C."

The notice was duly issued and was dated 8th May 1928. It is to be observed that the decree was made on 8th May 1916 and the notice was dated 8th May 1928, that is to say, exactly twelve years after the date of the decree. Under S. 12 (1), Limitation Act, in computing the period of Limitation, the day from which such period is to be reckoned is excluded. If therefore it can be said that the filing of the tabular statement was itself "an application" then the application was made just within the period of limitation prescribed by Art. 183, Sch. 1, Limitation Act.

Section 3, Limitation Act, is first section in "Part 2" of the Act which "Part" bears the heading "Limitation of Suits, Appeals and Applications," so that there are three species of matters which are dealt with in the Limitation Act and the schedule to that Act. S. 3 reads as follows:

"Subject to the provisions contained in Ss. 4 to 25 every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the Sch. 1 shall be dismissed."

Upon looking at Art. 183 we find that that is one of the articles in the division of the schedule which deals with "Applications" and the heading of the Col. 1 is "Description of application," that of Col. 2 "Period of Limitation", and that of Col. 3 "Time from which the period begins to run." Reading Art. 183 in conjunction with S. 3 the provisions of the Statute relating to limitation of the kind applicable to the present instance may be stated to be as follows:



Subject to the provisions contained in Ss. 4 to 25 every application to enforce a judgment, decree or order of any Court established by Royal Charter made after the period of 12 years shall be dismissed.

Therefore it is quite obvious that what has to be considered is whether or not the "application" in the present matter was or was not made after the period of 12 years from the date of the decree.

It was argued by Mr. Chatterjee on the authority of the cases of *Monohar Das v. Futteh Chand* (1) and *Amulya Ratan v. Banku Behari* (2) that it is not sufficient merely that an application should be made but that some order should be made by the Court. In my view these decisions do not go so far as to lay down the proposition that the article requires the making of an order in execution in order that the rights of the decree-holder should be preserved, except no doubt in cases where a question arises as to whether or not there has been a revivor within the meaning of Cl. 3, Art. 183. To my mind in order to preserve the rights of the decree-holder it is only necessary that he should make an "application" within the prescribed period of 12 years. On any other view of the matter the result would be to cut down the period of limitation actually prescribed by the Statute, e g., if the making of an application means the actual hearing of a motion by the Court, it follows that the actual period of limitation has been cut down by the length of time required for notice of that motion. There is a decision of the Bombay High Court *Venkapaiya v. Nazerally Tyabally* (3) that where an "application" is to be made to the Court within the period of limitation prescribed by any Act, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court. In my opinion that is the right view of the matter, although I am aware that there are other decisions of this Court which suggest the contrary. There is also a decision of the Madras High Court which goes even further in that it is to the effect that an application to the Registrar of the Court is an application within Art. 183 even though the affidavits supporting the application are

filed subsequently. The Bombay decision was in the main based upon the well-known decision of Denman, J., *In re Gallop and Central Queensland Co., Ltd.* (4). The effect of Denman J's., judgment in that case reported in *In re Gallop and Central Queensland Co., Ltd.* (4) is that if a notice of motion is given before the last day of any limited time then the application is within the time prescribed. That means that wherever there is a limitation of time prescribed within which one party has to move the Court in any matter in order to preserve his rights, he has safeguarded his position if in fact he gives notice of his motion within the time prescribed, and it is not necessary that such motion should actually be heard by the Court or even have appeared on the list of matters to be heard by the Court within the prescribed period. I respectfully agree entirely with the decision of Denman, J., and with the decisions reported in *Venkapaiya v. Nazerally Tyabally* (3) and *Kuttayan Chetty v. Elappa Chetty* (5) to which I have already referred.

Nevertheless having regard to the decisions of the Calcutta High Court and in particular to the decision of a Bench of this Court consisting of Sir Comer Petheram, C. J., and Norris and Piggot, JJ., in the case of *Khetter Mohan Sing v. Kassy Nath Sett* (6) were I called upon to do so I should feel myself bound to hold that the mere giving of a notice of motion is not of itself sufficient to preserve the rights of the person giving such notice unless at any rate the notice nominated a return day which fell within the period of limitation. I do venture, however, with all due deference to express the opinion that that decision may not be quite in accordance with the law in England on analogous points. But in any event that decision has I think no real bearing on the facts of the present case, and none of the decisions to which I have been referred actually cover the point which I have here to decide and for this reason in my view all that I have now to decide is whether or not Kali Charan Dhur made an application to enforce his decree within 12 years from the date of the decree.

(1) [1903] 30 Cal. 979=7 C. W. N. 793.

(2) A. I. R. 1925 Cal. 668.

(3) A. I. R. 1924 Bom. 36=47 Bom. 764.

(4) [1890] 25 Q. B. D. 230=59 L. J. Q. B. 460=38 W. R. 621=621=62 L. T. 834.

(5) [1907] 17 M. L. J. 215.

(6) [1893] 20 Cal. 899.



I have no doubt that the lodging or filing of the tabular statement was in itself the making of an application to this Court in the person of the Master who is the officer of this Court designated to deal with matters of this character. In Col. 10 of the tabular statement the decree-holder in terms says: "I the applicant pray" and so on. To my mind it is scarcely arguable otherwise than that the tabular statement is in fact a petition to this Court for the setting in motion of the necessary machinery for the execution of the decree. That tabular statement on the face of it being within time, the Master gave directions for notice to be given to the other side to show cause why the decree should not be executed. Therefore without attempting to come to any definite decision as to whether, for example, the giving of a notice of motion would be sufficient irrespective of the hearing of the motion to safeguard the rights of the person giving such notice of motion, I decide that the filing of a tabular statement in accordance with O. 21, R. 11, is an application to the Court within the meaning of Art. 183, Lim. Act, read in conjunction with S. 3 of that Act. That being so, I hold that this application is made within time and must accordingly be dealt with on its merits.

I am supported in the view that I take in this matter by two unreported decisions of Pearson, J., one in suit No. 610 of 1915 *Sashi Moni Daseei v. Dhira Moni Dasee* and the other is an insolvency case *In re Chaitan Das Sarana*.

M.N./R.N. *Objection disallowed.*

### \* A. I. R. 1929 Calcutta 195

CHOTZNER AND GREGORY, JJ.

*Manir Ahamed Chowdhury* — Petitioner.

v.

*Jogesh Chandra Roy*—Opposite Party.

Civil Revn. No. 13 of 1927, Decided on 9th February 1928, against order of Dist. Judge, Chittagong, D/- 9th September 1927.

\* Criminal P. C., S. 476-B—Appellate Court must file complaint when appeal is allowed and not the lower Court.

In an appeal under S. 476-B the District Judge found that there was sufficient justifi-

fication for placing a party on trial for forgery and directed the lower Court to file a complaint :

*Held* : that the only person who was competent to make the complaint was the District Judge himself and the order directing the lower Court to file the complaint was without jurisdiction and must be set aside. [P 195 C 2]

*J. Camell and Satindra Nath Mukherjee*—for Petitioners.

*Monnier and Probodh Chandra Chatterjee and Nripendra Chandra Das*—for Opposite Party.

**Judgment.**—This rule was granted on the first ground stated in the petition, namely, that the order of the learned Judge directing the Subordinate Judge to file a complaint against the petitioner is illegal and without jurisdiction. The proceeding under S. 476, Criminal P. C., was begun at the instance of the opposite party before the Subordinate Judge of Chittagong, and the learned Judge was invited to formulate a complaint against the petitioner under that section. This the learned Judge for reasons recorded in his judgment refused to do. An appeal was taken from that decision to the Court of the District Judge of Chittagong and the learned District Judge after stating the facts said as follows :

"In the circumstances, I am of opinion that there is sufficient justification for placing the opposite party (that is the present petitioner) on trial for forgery under S. 471, I. P. C. The Magistrate after hearing the whole evidence will be in a position to decide whether a charge should be framed or not. Hence ordered that appeal be allowed. The record is returned to the Subordinate Judge and he is directed to file a complaint under S. 471, I. P. C., or such other sections as he thinks fit."

Now the appeal being under S. 476-B, Criminal P. C., the only person who was competent to make the complaint was the District Judge himself. The order, therefore, directing the Subordinate Judge to file the complaint was without jurisdiction and must, accordingly, be set aside.

The rule is, therefore, made absolute and the case remanded to the learned District Judge to proceed according to law.

M.N./R.K.

*Case remanded.*



## \* A. I. R. 1929 Calcutta 196

SUHRAWARDY AND JACK, JJ.

*Harendra Narayan Chaki* — Defendant 1—Petitioner.

v.

*Secretary, Bar Association, Jamalpur* — Plaintiff—Opposite Party.

Civil Rule No. 959 of 1928, Decided on 27th November 1928, from order of Dist. Judge, Mymensingh, D- 26th May 1928, in Misc. Case No. 167 of 1927.

\* (a) Legal Practitioners Act (amended 1927), S. 36—Meeting for considering if a person is tout—All members need not be present—Resolution by majority of present members is sufficient.

The law does not require that all the members should be present at the meeting but requires that a meeting of the association should be convened for the purpose of considering whether a certain person is a tout; and if by a majority of the members present at such a meeting a resolution is passed, it is sufficient : *A. I. R. 1927 Pat. 282, Dist.* [P 196 C 2]

\* (b) Legal Practitioners Act, S. 3—Business of canvassing and introducing clients to lawyer—Consideration can be presumed.

It is a reasonable and legitimate inference of fact that if a man attends Court everyday, works after the cases of clients, even pays to pleaders and realizes costs and engages pleaders and also realizes their fees, he is not rendering gratuitous service such as a casual friend or acquaintance may do. 40 *All. 153, Rel. on.* [P 197 C 2]*Suresh Chandra Talukdar*—for Petitioner.*Surendra Chandra Guha and Nasim Ali*—for Opposite Party.**Suhrawardy, J.**—This rule is directed against an order of the District Judge of Mymensingh declaring the petitioner Harendra Narayan Chaki, a tout under S. 3, Legal Practitioners Act. The point taken on his behalf and seriously pressed by Mr. Talukdar is that there is no evidence and that according to the definition of "tout" as given in S. 3, the petitioner procures, in consideration of any remuneration, moving from any legal practitioner, the employment of the legal practitioner in any legal business; or who proposes to any legal practitioner or to any person interested in any legal business to procure, in consideration of any remuneration moving from either of them, the employment of the legal practitioner in such business.

The matter has come before us in revision and we have to see if the order of the Court below is unsupportable there

being such absence of evidence as to induce us to hold that the order was passed without jurisdiction or with material irregularity.

We have in this case a resolution of the Jamalpore Bar Association declaring the petitioner a tout. Such resolution has now been made evidence of general repute by the amendment in 1927 of S. 36, Legal Practitioners Act. If this resolution is good and in conformity with the requirements of the law, there is evidence in support of the Judge's order that the petitioner is a tout; but it is argued by Mr. Talukdar that the resolution passed was not duly passed and cannot be validly treated as evidence in the case. The findings of the Munsiff who originally dealt with the matter and of the learned District Judge are that a special meeting was convened for the purpose of considering the matter of the petitioner and out of 43 members of the association 29 members were present and they passed a resolution declaring the petitioner a tout. There does not seem to be any irregularity in the proceeding by the Bar Association; but Mr. Talukdar says that the meeting at which such a resolution was passed was not one of the entire body of the members of the association inasmuch as only 29 out of 43 members were present at the meeting. The law does not require that all the members should be present at the meeting but requires that a meeting of the association should be convened for the purpose of considering whether a certain person is a tout: and if by a majority of the members present at such a meeting a resolution is passed it is to be considered as a resolution of an association of persons entitled to practice as legal practitioners in Court. The Courts below have also proceeded upon certain facts in order to hold that the petitioner is a tout within the meaning of the law. Undoubtedly there is no direct evidence to show that the petitioner received remuneration from any legal practitioner. But certain facts were placed before the learned District Judge from which the learned District Judge has observed that the irresistible inference to be drawn from his admitted conduct is that he is a tout and received remuneration from legal practitioners. In this connexion the learned advocate for the petitioner has drawn our attention to the case of *Ugan Prasad Pandey v.*



*Emperor* (1). In that case the resolution of the Bar Committee was held not to have been legally passed. In that case the Bar Association appointed a small committee of seven persons to enquire into the matter of the petitioner in that case and this small sub-committee held that the petitioner was a tout. The learned Judges remarked that such a resolution was not a resolution within the meaning of the law. I am not called upon to consider whether in that case the view expressed there is correct but I am not prepared to say in this case that the view taken by the Judge is wrong. The next point upon which the judgment in that case proceeded was that there was no direct evidence that the petitioner received any remuneration from a legal practitioner. The learned Judge who delivered the judgment had accepted the arguments of the counsel for the petitioner in that case that the mere fact that a person makes it his business to act as general agent and to find legal practitioners for those who want legal aid without being bound as clerk or otherwise to any one legal practitioner does not constitute such person a tout. As a bare proposition of law the argument looks unassailable. But there may be circumstances from which the Court is entitled to draw a legal inference. The Legal Practitioners Act, as it originally stood before its amendment in 1927 made it obligatory upon the prosecution to prove that the person accused receives remuneration from legal practitioners. Even at that time it was held in some cases that this proof may be supported by circumstances leading to the inference that the person accused was in the habit of receiving remuneration from legal practitioners.

It was held by Walsh, J., in the case of *Kalka Prasad v. Emperor* (2) that it is a reasonable and legitimate inference of fact that if a man is shown to spend the greater portion of his working hours in canvassing and introducing clients to members of the profession, he is not rendering gratuitous service such as a casual friend or acquaintance may do. The learned Judges in *Ugan Prasad Pandey v. Emperor's* case (1) also did not lose sight of this principle and ob-

served . . . . . while remanding the case . . . . . to the Court below that there might be evidence on the record showing that remuneration moved from legal practitioners, or giving rise to a reasonable inference that it so moved. It is ordinarily difficult for the prosecution by evidence of the legal practitioners to prove moving of remuneration from them and in order to facilitate the proof of such conduct on the part of the person accused the legislature thought it fit to amend S. 36 by making evidence of a general repute admissible against the person accused. There can be no doubt that the Courts below were within their rights to draw legitimate inference from the facts before them as to the probability of the petitioner receiving remuneration from legal practitioners and this is in accordance with the definition of 'proved' in the Evidence Act.

In the present case the facts, as succinctly stated by the Munsiff in his judgment are that it has been admitted and proved by the evidence on both sides that Harendra Narain Chaki attends Courts regularly every day from 11 a. m. to 6 p. m., looks after cases of clients, even pays to pleaders and realizes costs and engages pleaders and realizes also fees for pleaders. From these facts we cannot say that the inference drawn by the Courts below was unjustifiable. The result is that this rule fails and must be discharged.

**Jack, J.**—I agree.

M.N./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 197

B. B. GHOSE AND CAMMIADE, JJ.

*Secy. of State*—Defendant—Appellant.

v.

*Sati Prasad Garga and others*—Plaintiffs—Respondents.

Appeal No. 1471 of 1925, Decided on 2nd March 1928, from appellate decree of Addl. Dist. Judge, Midnapore, D/- 3rd April 1925.

(a) Bengal Cess Act (9 of 1880), S. 4—“Annual value” includes damages for use and occupation—Payment under *kabuliyat* for use and occupation is “annual value.”

The expression “annual value” is so wide as even to include damages which the Court would allow to the owner of the land against third persons for actual use and occupation of the land. Therefore, the payment of *jama* on

(1) A. I. R. 1927 Pat. 282=6 Pat. 567.

(2) [1918] 40 All. 153=44 I. C. 125=16 A. L. J. 76.



the basis of a kabuliyat by a farmer of a hat on account of his occupation of the land on which the hats were to be held, and from which he was entitled to exclude other persons, is the "annual value" which is payable for use and occupation of the land. [P 201 C 1]

(b) **Bengal Cess Act (9 of 1880), S. 6—Rule of ejusdem generis is not applicable to words "other immovable property" in S. 6.**

*Per Cammiade, J.*—The rule of ejusdem generis cannot apply to the words "and other immovable property" in S. 6, because the classes of business previously enumerated are exhaustive and there is no room for the application of the rule. [P 201 C 1]

*Surendra Nath Guha and Nassim Ali*—for Appellant.

*B. C. Mitter and Probodh Chunder Chatterjee*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the Secretary of State who was the defendant in the suit out of which this appeal arises against the judgment and decree of the Additional District Judge of Midnapore affirming the decision of the Subordinate Judge. The suit was for a declaration that the assessment of cesses under the Bengal Cess Act on the property of the plaintiffs on the basis of realizations on account of hats within the estates of the plaintiffs was ultra vires and for refund of the amount of cesses paid under protest. The learned Judge below held that on the authority of certain cases decided by this Court the assessment of cesses on the income derived from the hats was ultra vires and made a decree in favour of the plaintiffs for refund of the money paid by the plaintiffs.

The learned Government Pleader contends that the decision of the Courts below is erroneous having regard to the terms of the agreement in the kabuliyats accepted by the plaintiffs with regard to the hats read with the provisions of the Cess Act. The relevant portions of the Cess Act should be stated in order to appreciate the contentions of both parties. The imposition of cesses is made under the provisions of Ss. 5 and 6 of the Act which run thus:

"5. From and after the commencement of this Act in any District or part of a District all immovable property situated therein . . . shall be liable to the payment of a Road Cess and a Public Work Cess.

6. The Road Cess and the Public Work Cess shall be assessed on the annual value of the lands and on the annual net profits from mines, quarries, tramways, railways and other immovable property ascertained respectively as in this Act prescribed."

Immovable property is defined in S. 4 of the Act, but it is not necessary to state the definition for the present purpose. "Land" means land which is cultivated, uncultivated or covered with water and does not include houses or buildings. "Tenure" includes every interest in land whether rent paying or not, save and except an estate as defined in the Act. The definition of "annual value of land" runs thus:

"Annual value of any land, estate or tenure means the total revenue or rent which is payable, or if no revenue or rent is actually payable would on a reasonable assessment be payable during the year by all the cultivating raiyats of such land, estate or tenure, or by other persons in the actual use and occupation thereof."

These are all the relevant provisions of the Cess Act which we have to consider in the present proceeding.

The contention of the Government Pleader is that the property with regard to which the assessment is made is "land" within the meaning of the Act. It is not disputed that if any interest in "land" was conferred by the agreement cesses may be assessed on the income. The controversy is with regard to the definition of "annual value of land" whether the income derived from the hats in this case falls within it or not. Before I proceed to discuss the several contentions of the parties, it is necessary to refer to the cases on which the learned Judge below purported to base his conclusion.

These cases are *Umed Rasul v. Anath Bandhu* (1), the Full Bench case of *Secy. of State v. Karuna Kanta* (2), and a case reported in 5 *Indian Cases* 254. It is not necessary to deal with the case of *Umed Rasul v. Anath Bandhu* (1) in detail as it was a case the sequel of which gave rise to the Full Bench case of *Secy. of State v. Karuna Kanta* (2). The facts of that case were these: There was a certain piece of land in the possession of occupancy raiyats within an estate. On that land a mela used to be held for a certain number of days in the year when there were no crops standing. The owner of the estate granted an ijara to some persons called Fakirs permitting them to hold the mela, and an income was derived from the mela. The land was assessed with cesses on the basis of the income derived from the mela. The owner of

(1) [1901] 28 Cal. 687=6 C. W. N. 128.

(2) [1907] 35 Cal. 82=6 C. L. J. 342=11 C. W. N. 1053 (F.B.).



the estate had to pay the amount. He then brought a suit to recover a share of the cesses under S. 41, Cess Act, from the Fakirs. That suit gave rise to the case of *Umed Rasul v. Anath Bandhu* (1). It was held there that the owner of the estate was not entitled to recover cesses because the income of the mela was not liable to be assessed with cesses. Subsequently, the owner of the estate sued the Secretary of State for a declaration that cesses were illegally levied and for recovery of the amount paid. That gave rise to the Full Bench case reported in *I. L. R. 35 Cal. 82*. It was held by the majority of the Judges composing the Bench that the Fakirs, the ijaradars, were mere licensees and had no interest in the land, and therefore cesses could not be levied on the income derived from the mela. It was pointed out that the ijaradars were not given and could not be given any right to the land on which the mela was held. The land was in the occupation of occupancy raiyats and the mela could only be held on it with the leave and license of the occupancy raiyats and if they objected the landlords had no right to put the ijaradar Fakirs into possession of the land in question. It was therefore held that the ijaradars were mere licensees and the money that was realized by the zamindars from them could not by any means be called rent for the use and occupation of the land. That is what was decided in that case.

The case of *Suraj Deo Narain v. M.H. Mackenzie* (3) on which the learned Judge lays special stress is also similar as regards the facts as there the landlord created a mokrari in favour of a defendant and also granted the right to the wife of that defendant to collect dues for hats within the mokrari. That case simply followed the case in *28 Calcutta 637*.

In the Full Bench case observations were made by some of the Judges as to whether the mela or hat is immovable property or not. I do not, however, think that it would serve any useful purpose to discuss that question in the present case having regard to the arguments addressed to us. The learned Government Pleader did not argue that the assessment in question could be made on the amount realized on account of the hats under the last portion of S. 6, Cess

Act, that is to say, as falling within "other immovable property." Sir Binode on behalf of the respondents argued that the expression "other immovable property" must be construed according to the rule of ejusdem generis, that is, coming after the words mines, quarries, tramways and railways it must have a similar meaning as those words, and he supports his argument by an observation of one of the learned Judges, Mookerjee, J. composing the Full Bench at p. 97, *Report in Indian Law Reports 35 Calcutta*. I have considerable doubts whether the expression "other immovable property" should be construed with reference to the rule of ejusdem generis, because in my judgment there is no connexion between mines, tramways and railways, and you cannot find any other immovable property similar to mines, quarries, tramways and railways. To my mind, it seems that this expression 'other immovable property' was used for the purpose of bringing into the net anything that might have been left out by the previous portion of the section, that is to say, by the words lands, mines, quarries, tramway and railways. It is not, however, necessary for me to express a definite opinion on the question whether a hat is immovable property or not under this Act, as I have already said that the learned Government Pleader, Mr. Guha, did not base his argument upon this part of S. 6, Cess Act.

The real question in this case is, as stated by both Mr. Guha and Sir Binode, whether the grant in this case is mere license or a lease of property. It is not disputed that if any right to the land was granted assessment on the income of the hats could be made, but if it is a mere license the assessment is illegal. I have to refer to two cases cited on behalf of the respondents on the strength of which it was contended by Sir Binode that we should hold that the transaction evidenced by the kabuliati which I am presently going to mention constituted a mere license. The first case that was cited was that of *Smith v. St. Michael Overseers* (4). There the owner of a house allowed a person to occupy a number of rooms in the house on condition of receiving a certain amount of money and for which he undertook to keep the premises clean, light fires and attend to the same by

(3) [1910] 5 I. C. 254.

(4) [1860] 3 C. & E. 383.



providing a trustworthy person to reside on the premises to do all these acts. The question was whether the owner was liable to be rated on the value of the premises. It was held that he was, as notwithstanding the right given to a third person to live in a portion of the house he was to be considered as the occupier of the whole of the house. That case to my mind is of no assistance to us in deciding whether the transaction in this case should be considered as a license or a lease. The same thing may be said about the case of *Rochdale Canal Co. v. Brewster* (5). Lord Justice Lindley in his judgment stated that the transaction pointed to a lease, and Lord Justice Lopes thought that it was a license, but all the Lord Justices were of opinion that the grantor of the right to the third person was liable to be rated as the occupier of the whole of the premises. These cases only illustrate the difficulty under the English Law in determining whether a particular transaction amounts to a mere demise of property or to a license. There are cases in the books where it has been held that the grant of a right to occupy a piece of land for a certain number of days in the year for some purposes may amount to a lease, and on the other hand there are cases where it has been held that the right to erect stalls and do certain other things upon a piece of land is a mere license. I think therefore that instead of trying to find what this transaction amounts to by reference to English cases we should look into the document itself in order to determine what sort of right was conveyed to the grantee.

This brings me to the kabuliats which were accepted by the plaintiffs with reference to the hats. One of them has been placed before us and we are informed that the other kabuliats are in the same terms. The relevant portions of the kabuliat run thus:—Kabuliat for a term of one year commencing from the month of Bhadra . . . in respect of hatkars of two hats . . . The total area of the site lands of the said two hats being 4 bighas, 5 bis, 1 cottah, bearing a jama of Rs. 252 . . . I . . . do execute this miadi kabuliat for a term of one year in respect of jamas for realization of hatkar to the effect following :

"Having taken settlement . . . of two hatkars in respect of all sales of paddy, rice and various other articles that will be effected on each hat day at any place comprised within the boundaries given below and appertaining to the two hats . . . appertaining to your touzi . . . the total area of the site land of the said two hats being 4 bighas, 1 cottah, 5 bis (the site lands of such permanent shops as there are in respect of which you are realizing rents and that of your kutcheri bari, etc., that now exists and that may be constructed in future which has become your khas are excluded therefrom) and remaining in possession thereof by realizing the hatkar at the rate previously approved by you from the vendors of all sorts of articles at the said two hats from the commencement of the current amli year in 1318, I execute this kabuliat for a term of one year in respect of the hatkar jama. . . . The said two hats shall pass into your khas possession from the commencement of the year 1319 and you shall grant fresh settlements thereof. I have and shall have no objection thereto. If any police case takes place in the two hats abovementioned taken settlement of by me during the term of my settlement I shall forthwith lodge information thereof with the local police and at your office and shall have the investigation made and shall render proper assistance."

Then in the schedule are given the boundaries of the site land of the two hats, and there is another schedule of instalments for payment of rent.

The question then arises whether the jama payable would be the "annual value" of any land, estate or tenure. It is not necessary, as I have said, in the view I take to decide whether a hat is immovable property within the meaning of that expression under the Cess Act. The question here is, was the amount to be paid by the person executing the kabuliat for the "actual use and occupation of any land." It was contended on behalf of the respondents that if no interest in the land was created, although the expression jama, which means rent, is used the money payable would not be rent. That may be so, but what is the meaning of "annual value" of land according to the definition in the Cess Act? From the words of the definition it seems to me that the expression means not only the rent payable but if no rent is actually payable then what would on reasonable assessment be payable by other persons, (i. e., other than cultivating raiyats) in the actual use and occupation thereof. The expression is so wide as even to include damages which the Court would allow to the owner of the land against third persons for actual use and occupation of the land. If I am right in that

(5) [1894] 2 Q. B. 852 = 64 L. J. Q. B. 37 = 59 J. P. 132 = 71 L. T. 243 = 9 R. 680.



view then we have to see next whether the person executing the kabuliat was entitled to the use and occupation of the land mentioned in the kabuliat. It seems to me that excluding certain site lands of permanent shops and the site land of the kutcheri bari in existence or which might be constructed in future on land which has already become khas of the landlord, the rest of the land was given possession of to the person executing the kabuliat. It may be that this possession would be exercised only on the day on which the hat was to be held. But still there would be use and occupation of the land. Even if I were to accept the contention of the respondents that the grantee could not exclude the grantor from the land on other days or even on the days when the hat was to be held from going upon the land for realizing his rents from the permanent shops or going to his kutcheri bari, still the payment of the jama was on account of his occupation of the land on which the hats were to be held, and with regard to the portion of the land on which the hats were to be held the grantee was entitled to exclude other persons. That being so, the money that was realizable on the basis of the kabuliat is in my view the annual value which is payable for use and occupation of the land. In my view the assessment was not ultra vires.

The judgment and decree of the lower appellate Court cannot, therefore, be supported. The plaintiffs' suit must be dismissed with costs in all Courts.

**Cammiade, J.**—I agree with my learned brother that the preferable view is that hats are covered by the second portion of S. 6, Cess Act. The rule of ejusdem generis cannot apply to the words "and other immovable property" in that section, because the classes of business previously enumerated are exhaustive and there is no room for the application of the rule of ejusdem generis. In spite of that I also agree with my learned brother that hats may be assessed also under the first part of the section. The assessee here is the landlord and the assessment is in respect of the land used for the hat and land is immovable property. The only difficulty that then arises is about the way in which the assessment is to be made. In respect of properties which are to be assessed on the basis of annual value the criterion

for assessment is under the definition of annual value the amount of rent paid for the land or which might be paid for the land where rent is not actually assessed. Then arises the difficulty whether rent is actually paid or not in respect of this land. My personal opinion is that the term rent has been used inartistically in the definition of annual value. But even if that were not so, I agree with my learned brother that the farmer of the hat has sufficient control over the land to be said to have an interest in the land for which he would pay rent. Under these circumstances I hold that the assessment has been rightly made and that the suit should be dismissed as ordered by my learned brother.

M.N./R.K.

*Appeal allowed.*

### \* \* A. I. R. 1929 Calcutta 201

MITTER, J.

*Bir Bikram Kishore*—Plaintiff—Appellant.

v.

*Rajjah and others*—Defendants—Respondents.

Appeal No. 127 of 1928, Decided on 14th December 1928, from decree of 1st Sub-Judge, Zillah Tipperah, D/- 30th June 1927.

(a) **Bengal Tenancy Act, S. 3 (9)**—Parcel of land including undivided share is not "holding."

Where a portion of a tenancy includes an undivided fractional share in a parcel of land, it cannot be regarded as a holding. [P 202 C 1]

\* \* (b) **Civil P. C., S. 11**—Applicability—Subject-matter not same—Constructive res judicata does not apply.

By a decision under S. 104, Ben. Ten. Act, enhancement of rent was made on the ground of rise in the value of crops before 1898. In the suit under S. 30-B of the Act, enhancement was sought on the ground of rise in value of crops after 1898. The defence opposed enhancement on the ground that their jama was not a holding. This plea was not heard and finally decided in the previous suit.

**Held**: that even if the question might and ought to have been made a defence in the former proceeding, the matter is not res judicata as the subject-matter of the S. 104 proceeding is not the same as that of the present suit, and the defendants are not barred from raising their defence to the claim for enhancement on the ground of constructive res judicata: 24 Cal. 711, *Appr. A. I. R. 1925 P. C. 55*; 29 Cal. 252 (P.C.), *Ref.* [P 202 C 2]

*Jogesh Chandra Ray, Ramesh Chandra Sen, Birendra Chandra Das and Santimoy Mazumdar*—for Appellant.



**Judgment**—The Maharajah of Tipperah brought the suit in which this appeal arises for recovery of arrears of rent from the defendants for the years 1332—35 T. E. claiming rents at the rate of Rs. 8 9. He also prayed for enhancement of rent on the ground of the rise in the price of staple food crops under the provision of S. 30 (b), Bengal Tenancy Act.

One of the defences to the claim for enhancement was that as the lands of the tenancy consisted of undivided share the defendants could not be regarded as tenants of a holding within the meaning of S. 30-B, Bengal Tenancy Act and as such the rent could not be enhanced under the provisions thereof.

The Munsif decreed the claim for arrears of rent but dismissed the claim for enhancement on the ground that one of the lands comprising the jama is held in undivided share by defendants and their cosharers. The plaintiff contended that it was not open to the defendants to raise the contention that the jama was not a holding by reason of a previous decision in a proceeding under S. 104, Ben. Ten. Act, as it stood before its amendment in the year 1898. This contention of the plaintiff was negatived by the Munsiff.

On appeal the Subordinate Judge has affirmed the decision of the Munsif and has dismissed the claim for enhancement.

In this second appeal by the Maharaja it is argued that as the arable lands of the tenancy were not held in undivided shares the tenancy must be regarded as a holding and it is quite immaterial if the homestead land of the tenancy is held in undivided shares. I do not think that it is possible to disregard the fact that a portion of the tenancy includes an undivided fractional share in a parcel of land and, therefore, it could not be regarded as a holding, within the meaning of S. 3, Cl. 9, Ben. Ten. Act. S. 30-B authorizes the landlord of a holding to enhance rent.

The present case is governed by the decision in the case of *Binayak Das v. Sominuddi* (1) where it was said that where the land was held by a raiyat consisting of entire parcels of agricultural land and an undivided share of a parcel of homestead land it was not a holding and a suit for enhancement of rent under S. 30 of the Act, did not lie in respect of such undivided share. It was next argued that the Courts below have clearly erred in

law in not holding that the previous decision under S. 104, Ben. Ten. Act, operated as *res judicata* and barred the contention of the defendants that their jama was not a holding. By the previous decision it is true, enhancement under S. 30 (b) was allowed and fair and equitable rent was assessed after keeping in view the principles laid down in S. 30 (b) of the Act. S. 104 of the old Chap. 10, ran as follows :

"In any case under S. 104, sub-S. 2, Cl. (d), (1) the officer shall settle a fair and equitable rent in respect of the land held by the tenant. In settling rents under this section the officer shall presume until the contrary is proved that the existing rent is fair and equitable and shall have regard to the rules laid down in this Act for guidance of the civil Court in increasing or reducing rents as the case may be."

The effect of the provisions of S. 104 and S. 107 of the Act, is to give the decision of the Settlement Officer the force of a decree and the matters determined by that decision could only be reopened on an appeal to the Special Judge. When that decision becomes final, question decided in that suit could not be reopened: see *Durga Churn Law v. Hateen Mandal* (2). The question as to whether rent could be enhanced under S. 30-B because the jama is not holding was not heard and finally decided in that suit, and even if the question might and ought to have been made a defence in the former proceeding the matter is not *res judicata* as the subject-matter of the 104 proceeding is not the same as that of the present suit. The present suit is for enhancement of rent on the ground of rise of staple food crops long after the institution of the 104 proceeding and the ground on which the present suit is based is different from the ground of the proceeding under S. 104 as the 104 proceeding was based on the rise of price of the staple food crops for a period prior to 1898. In this connexion the following observations of Banerjee, J. in the case of *Kailash v. Barada* (3), are instructive :

"It is only where the subject-matter of the two suits is the same that the matter can be said to have been heard and finally decided within the meaning of S. 13 of the Code even though the matter was never raised in issue; but it is very difficult to hold that a matter which was never raised in issue, actually in the former suit and which is raised in defence in a subsequent suit in which the subject-matter is different from that of the former suit

(1) [1920] 24 C. W. N. 1022=59 I. C. 209.

(2) [1902] 29 Cal. 252=6 C. W. N. 238.

(3) [1897] 24 Cal. 711=1 C. W. N. 565.



shall nevertheless by virtue of Expl. 2, S. 13; be deemed to have been not only matter directly and substantially in issue but matter which has been heard and finally decided."

Although these observations of Mr. Justice Banerji have been commented on by their Lordships of the Judicial Committee of the Privy Council in the case of *Fateh Singh v. Jagannath* (3), their Lordships point out that in the actual decision there is no conflict with established authorities.

For the reasons given above I think the lower Courts have held rightly that the defendants are not barred from raising their defence to the claim for enhancement on the ground of constructive res judicata. The appeal fails and must be dismissed but without costs as the respondents have not appeared.

M.N /R.K. *Appeal dismissed.*

(3) A. I. R. 1925 P.C. 55=47 All. 158=27  
O. C. 334=52 I. A. 100 (P.C.).

### \* A. I. R. 1929 Calcutta 203

RANKIN, C. J. AND BUCKLAND, J.

*Jabbar Ali and another* — Accused—  
Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 669 of 1928, Decided on 19th December 1928.

\* (a) Criminal P. C., S. 476—Order of complaint under S. 476 not appealed against—Legality of complaint cannot be questioned before Magistrate.

A person who has not appealed against an order resulting in a complaint under S. 476, cannot argue before the Magistrate whether the complaint is a good complaint or made by a proper officer or so forth. [P 204 C 1]

\* (b) Penal Code, S. 471—Witness filing document to assist defence uses document within S. 471.

Where the accused, who was a witness in the suit, from some interest in, or desire to assist, the defence, filed certain document for the purposes of the suit in advance of a trial.

*Held*: that he "used" the document within the meaning of S. 471. The wider the definition of the word "use" in S. 471 the better, as the use has to be fraudulent: 35 Cal. 820, *Ref.*; A. I. R. 1924 Cal. 718, *Rel. on.* [P 204 C 1]

\* (c) Criminal P. C., S. 476 — Forged document filed in Court — Court having power only to return plaint to be filed in another Court — Document is still filed in judicial proceeding.

A forged document was filed in support of defence. But the Court in which the suit was filed had only the power to return the plaint to be presented in another Court.

*Held*: that the document was filed in a judicial proceeding so as to attract provisions of S. 476. [P 204 C 1]

(d) Penal Code, S. 471—S Convicted for having used forged document and P for having abetted it—Four years rigorous imprisonment for S and 2½ years for P was not severe.

S was convicted under S. 471 for having used a forged document and P for having abetted the same; S was sentenced to 4 years and P to 2½ years rigorous imprisonment.

*Held*: that the sentence was not severe.

[P 204 C 1, 2]

*Jahnabi Ch. Das Gupta* and *Jogesh Chandr Saha*—for Appellants.

*D. N. Bhattacharjee*—for the Crown.

**Rankin, C. J.**—In this case the two appellants have been convicted unanimously by a jury, appellant 1 having been convicted under S. 471, I. P. C., that is, of an offence of dishonestly and fraudulently using a document which he knows to be a forged document. Appellant 2 has been convicted of abetment of that offence. The first has been sentenced to four years' rigorous imprisonment and the second to 2½ years. It appears that there was a third accused who had been acquitted and that a rent suit had been brought against accused 2 and this accused 3 in the Court of the Second Munsif at Comilla. Accused 1 by some procedure which I am not familiar with, was a witness in that case and in advance of that trial he filed a kabuliati which has been found to be a forged document. It is a document which purports to show that the defendant did not hold under the plaintiff but under somebody else. The plaint was returned for presentation before another Munsif as it was a Small Cause Court case and, therefore, it was sent to the 7th Munsif who tried the suit and dismissed it. At the trial the kabuliati was not used in evidence. Some time later on the application of the unsuccessful plaintiff the Second Munsif before whom the document had been filed made a complaint under S. 476 against these two appellants and the third accused who has been acquitted.

In this appeal various points have been taken by way of objection to the conviction. First of all, it is said that although there is an appeal against every order made under S. 476 which results in a complaint it is open to the person complained against not to exercise his right of appeal at all and to argue before a Magistrate or a Sessions Judge whether



the complaint is a good complaint or made by a proper officer or so forth. In my opinion this contention cannot be too formally rejected. What the Criminal Procedure Code requires is that certain proceedings shall not be instituted unless there is a complaint. Whether there is a complaint or there is no complaint in my judgment is a question which can only be agitated in the manner provided.

The second question is whether this document as it was not given in evidence can be said to have been used by appellant 1 at all. It is said that it was filed as a document in the list of documents filed by this accused. Reliance has been placed on the case of *Ambica Prosad Singh v. Emperor* (1). We find, however, another case in *Emperor v. Bansi Sheikh* (2) in which that case has been disapproved of as regards certain particulars. It is pointed out there that if a person puts forward a document as supporting his claim in any matter, whether that document is acted upon by the Court or used in evidence is immaterial for the purpose of constituting use of the document by the party within the meaning of S. 471, I. P. C. In this case the matter rests wholly on this that from some interest in or desire to assist the defence the accused filed a document for the purposes of the suit in advance of a trial. That in my judgment is using a document. The wider the definition of the word "use" the better as the use has to be fraudulent.

The next question is whether it was open to the appellant to contend that as the Second Munsif had only the power of returning the plaint to the plaintiff for its presentation before the 7th Munsif, the proceeding before him was not a judicial proceeding. There are two answers: one is that it was a judicial proceeding, and the second is that it does not matter whether this was a judicial proceeding or not at the present stage of the case.

On the question of sentence no doubt it is true that people are very free in executing or putting forward forged kabuliats and it may be that appellant 1 was somewhat astounded when he discovered that he was sentenced to 4 years' rigorous imprisonment. In my judgment 4 years' rigorous imprisonment imposed

on this appellant is not at all heavy considering the nature of his offence.

So too appellant 2 may have been astonished to find a sentence of 2½ years' rigorous imprisonment imposed upon him because he told somebody to file the document. However, these cases should be severely dealt with so that it may be a lesson to other persons who try to file documents of that character and in my judgment the sentence imposed on this appellant is not at all severe. This appeal is dismissed. The appellants who are on bail must surrender to their bail and serve the remaining portions of their sentences.

**Buckland, J.**—I agree.

R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 204

MUKERJI AND JACK, JJ.

*Kasim Ali (Molla)* — Complainant—Petitioner.

v.

*Mahammad Tafazzal Hossain and others*—Accused—Opposite Party.

Criminal Revn. No. 904 of 1928, Decided on 13th December 1928, against order of Addl. Dist. Magistrate, Dacca, D/-23rd June 1928.

(a) Criminal P. C., Ss. 182 and 438—District Magistrate moved against — Order under S. 182 on the ground that Court outside district had jurisdiction is deemed to act under S. 438.

Where the District Magistrate is moved against any order of a Magistrate under S. 182 and the contention is that a Court altogether outside the district has jurisdiction to try the case, the District Magistrate deals with the matter only in his revisional powers.

[P 205 C 2]

(b) Criminal P. C., S. 438—District Magistrate sitting in revision—Defence case made out—He cannot quash proceeding but ought to make reference to High Court.

Where the District Magistrate deals with a matter in the exercise of his revisional powers he cannot, under the law, quash the proceedings, but if he thinks the contention of the defence to be made out, the only course open to him is to make a reference to the High Court for final order.

[P 205 C 2]

(c) Criminal P. C., S. 438—District Magistrate sitting in revision must give notice to opposite side.

Where the contention on behalf of the defence is that a Court altogether outside the district had jurisdiction to try the case, the district Magistrate sitting in revision, must give notice to the complainant and bring on record all the materials which both the parties may desire to adduce, before he arrives at a proper conclusion.

[P 205 C 2]

(1) [1908] 35 Cal. 820.

(2) A. I. R. 1924 Cal. 718=51 Cal. 469.



*Mrityunjay Chattopadhyaya and Sachindranath Banerji*—for Petitioner.

*Asitaranjan Ghosh* — for Opposite Party.

**Judgment.**—This rule relates to a case which arose out of an occurrence which, according to the police report and the case for the prosecution, took place in a certain Char called Char Gobindopur in the Sub-Division of Manickgunge in the District of Dacca. According to the defence the place of the alleged occurrence lies in Agsimulia which, the defence alleged, is within the District of Pabna. On the case being started in the Court of the Sub-Divisional Officer of Manickgunge an objection was taken on behalf of the defence to the jurisdiction of that Court. The learned Sub-Divisional Magistrate being of opinion that there was considerable uncertainty as to the local area where the alleged offence was committed made an order under S. 182 (1), Criminal P. C., that the trial of the case be held at Manickgunge. The accused thereupon moved the Additional District Magistrate of Dacca who asked for a report from the Sub-Divisional Officer of Serajgunge within the District of Pabna as to whether the place of occurrence, of which a description was supplied to him, lay within the District of Pabna or within the District of Dacca. The Sub-Divisional Officer of Serajgunge thereupon sent a report to the Additional District Magistrate of Dacca in which he stated that his Khas Mahal Officer knew the place of occurrence well and that Agsimulia Gap Part 3 was within the Mirkutia group of khas mahal and also within the Serajgunge sub-division. Reading that report the learned Additional District Magistrate of Dacca passed the following order in this case:

"I think in the circumstances that I have no option but to act on this report and find that both the Sub-Divisional Officer of Manickgunge and the District Magistrate of Dacca are without jurisdiction. I, therefore, quash this proceeding being without jurisdiction and direct the opposite party to complain to, or move the Sub-Divisional Magistrate of Serajgunge in the matter."

It is against this order that the present rule is directed.

Having heard the parties and perused the relevant papers on the record we are of opinion that the order complained of is open at least to three objections. In the first place it is apparent that the

learned Additional District Magistrate was acting under his revisional powers. No application for transfer of the case could possibly have been entertainable by him by reason of the fact that what was urged on behalf of the defence was that a Court altogether outside the district had jurisdiction to deal with it. If the learned Additional District Magistrate was dealing with the matter in the exercise of his revisional powers he could not have under the law quashed the proceedings but if he agreed with the contention urged on behalf of the defence the only course open to him was to make a reference to this Court so that this Court might pass final orders in the matter. Nextly it appears that in dealing with this matter the learned Additional District Magistrate did not give any notice to the complainant and in point of fact the complainant was not heard against the contention that was urged on behalf of the defence. Lastly the learned Additional District Magistrate did not come to any proper finding of his own on the question of the local jurisdiction of the Court at Manickgunge but acted upon the report made by the Sub-Divisional Magistrate of Serajgunge whose report again was based upon some information supplied to that officer by some Khas Mahal Officer under him. We are of opinion that in order to arrive at a proper conclusion on the question of jurisdiction it would be necessary for the learned Additional District Magistrate to give notice to the complainant and to bring on the record such materials as both the parties may desire to adduce in connexion with this question, and then if he comes to the conclusion that contention urged on behalf of the defence has been made out, to make a reference to this Court for passing such orders.

In dealing with this matter the learned Additional District Magistrate will have to consider also the provisions of S. 182, Criminal P. C., under which the learned trial Court appears to have acted. The rule is made absolute in the terms indicated above. The order of the learned Additional District Magistrate complained of in the rule is set aside and the case sent back to him to be dealt with in accordance with the observations made above.

S.N./R.K.

*Rule made absolute.*



## A. I. R. 1929 Calcutta 206

MITTER, J.

*Nafar Chandra Pal Chowdhury* —  
Plaintiff—Appellant.

v.

*Jatindra Nath Das and others* —  
Defendants—Respondents.

Appeal No. 190 of 1928, Decided on 29th November 1928, from appellate decree of Sub-Judge, Nadia, D/- 15th June 1927.

**(a) Bengal Tenancy Act, S. 153—Utbandi tenancy — Court deciding rate of rent or whether rent is payable—Appeal lies.**

Even if a tenancy is an utbandi tenancy, still if the Court has decided what is the rate of rent which is payable, or whether the rent is payable in respect of certain lands, appeal can lie against the decision. [ P 206 C 2 ]

**(b) Bengal Tenancy Act, S. 80 (a) and (b) —Utbandi character of tenures continues until order under S. 80 (a) is passed, notwithstanding acquisition of occupancy right before such order.**

Irrespective of the question whether occupancy rights have or have not been acquired, the utbandi character of tenures continues until order under S. 180 (a) determining the annual rental with respect to those tenures, has been passed. [ P 206 C 2 ]

**(c) Bengal Tenancy Act (as amended in 1923), S. 180 (a) and (b)—Addition of S. 180 (a) and (b) under Amendment Act does not interfere with arrangement or custom previously existing.**

Addition of S. 180 (a) and (b) under the Amendment Act (10 of 1923) does not interfere with any previous arrangement or custom that might have regulated the rights as between the landlords and tenants. [ P 207 C 1 ]

*Radhikaranjan Guha*—for Appellants.

*Bireswar Bagchi, Panchanan Ghose and Sitangshu Bhusan Bose*—for Respondents.

**Judgment.**—This is an appeal by the plaintiffs landlords and arises out of a suit for arrears of rent on utbandi basis. The defence of the tenants in substance was that some of the lands were patit or khicha or asha lands during the period in suit, that no rent was payable for patit lands and that the rate of rent for khicha lands was 8 annas and for asha lands 6 pies per bigha. The Court of first instance held that the plaintiffs had failed to establish that defendants were liable to pay rent for lands kept patit. The lower appellate Court agreed with the Munsiff.

A second appeal has been taken to this Court by the plaintiffs landlords and the main contention before me has been that

even if it were held that some lands remained patit or khicha or asha during the years under claim the plaintiffs are yet entitled to full rate in respect of those lands inasmuch as the tenants have acquired a right of occupancy therein. It is to be noticed that this grounds on which the plaintiffs sought to recover full rates of rent does not find place in the plaint. It is true that the question was raised in the course of argument in the Court of first instance.

A preliminary objection has been taken by the learned advocate for the respondents to the hearing of this appeal and it is contended that as the tenancy is an utbandi tenancy the provisions of S. 153, Ben. Ten. Act did not apply to such a case and that an appeal is not allowed by the proviso to S. 153 as it cannot be said that there is any decision on any question of amount of rent annually payable. It is not disputed that the word "rent" under the Bengal Tenancy Act includes money as well as paddy rent and although the rent may vary still the Court has determined what is the rate of rent which is payable or as to whether the rent is payable in respect of certain classes of land or not. I do not think there is any substance in the preliminary objection.

With regard to the contention of the appellants that the tenants are liable to pay full rent as they have acquired rights of occupancy, in my judgment, S. 180 (a) (b), Ben. Ten. Act, affords a complete answer. It is not disputed that in this case no order has been made yet under S. 180 (a) determining a uniform annual rental for any land of the tenancy and S. 180 (b) provides that it is only when such an order is made that such lands in respect of which an order has been made shall cease to be held as utbandi lands with effect from the date from which new rent takes effect and the tenant shall hold them as occupancy raiyats from the date of the order. It is said on behalf of the respondents that it is open to the landlord to make an application under S. 180 (a), Cl. (2). I think the view taken by the lower appellate Court as to the effect of S. 180 (a) is right and that the utbandi conditions of the tenures still continue irrespective of whether occupancy right has or has not been acquired in this tenancy. It also appears from the deposition of plaintiff's



gomasta, his witness No. 2, that no rent is payable for patit lands in the mouza irrespective of the time such lands are in possession of the tenants. It also appears from the evidence of plaintiff's witness No. 1 that the tenants never paid rent for the patit land before the settlement operation. The learned advocate for the respondents supports the judgment of the Court below also on the ground that there is a custom not to pay rent for patit lands as has been deposed to by the plaintiff's own witnesses and that irrespective of the time of the occupation of the lands by the tenant. S. 108 (a) and (b) have been added to the Bengal Tenancy Act by the Utbandi Amendment Act 10 of 1923. I do not think that the effect of the amendment is to interfere with any previous arrangement or custom that might have regulated the rights as between the landlord and the tenant. It is argued on behalf of the appellants that there would be considerable hardship if the landlord is not to get fair and equitable rent in respect of all lands although the defendants have acquired rights of occupancy in these utbandi lands having regard to the provisions of S. 24, Ben. Ten. Act. It is contended, on the other hand, that ordinarily with regard to these Utbandi tenancies the rates are very high. In this connexion reference is made by the learned advocate for the respondents to a case in 3 *W. R. Act* 10 B. 159 to show that in the district from which this case comes utbandi tenancies are granted at pretty high rates. I am not, however, concerned with the question as to whether the construction that has been put by the Courts below on S. 180 (b) operates harshly on the plaintiffs landlords. The rights of the parties have to be regulated by the law although it may operate harshly on one party or another. I think the Courts below have taken a right view. The appeal accordingly fails and must be dismissed with costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1929 Calcutta 207**

PEARSON, J.

*Mohun Lal Kundu—Plaintiff.*

v.

*Nanibala Dabee and others—Defendants.*Original Civil Suit No. 2596 of 1925,  
Decided on 30 March 1928.

**Calcutta High Court Rules, Chap. 27—Sale held under S. 27 — Attachment subsisting prior to mortgage suit—Purchaser in execution of mortgage decree knowing of such attachment only after purchase—Purchaser can have sale set aside—Civil P. C., O. 21, R. 91.**

Where a sale is held under Ch. 27 and not under Civil P. C., if there is an attachment subsisting from before a mortgage suit the purchaser in execution of decree obtained in such suit is entitled to reject the title, have the sale set aside and have his deposit returned if the fact of attachment is disclosed to him only after purchase: *A. I. R. 1921 Cal. 554* and *14 Cal. 18, Ref.* [P 209 C 1]

*S. M. Bose—for Plaintiff.**P. N. Chatterjee—for Defendants.*

**Judgment.**—The applicant is the purchaser of certain property at a Registrar's sale, and seeks to have the sale set aside and the deposit refunded.

The property in question is No. 48/5, Boloram Dey Street. This was purchased in September 1912 in the name of one Nanibala Dabi, the wife of Mani Haldar. On 22nd May 1922 Mani Haldar and Nanibala borrowed moneys from plaintiff on mortgage of the property. On 10th June 1923 Mani borrowed certain money from one Durlava Sett upon a promissory note. This debt was assigned by Durlava Sett to one Satya Srimani who obtained a decree against Mani Haldar on 28th August 1924 in suit No. 2106 of 1924. On 8th September 1924 Satya Srimani in execution obtained an order for attachment of this property, and on 11th September 1924 the Sheriff attached the property. On 8th Nov. 1924 Nanibala instituted claim proceedings.

On 16th November 1925 the plaintiff filed a suit on the mortgage.

On 12th January 1926 Nanibala's claim was dismissed. The preliminary decree in the mortgage suit was on 22nd March 1926 and the final decree on 27th July 1927. The property was sold to the applicant on 18th February 1928 at the Registrar's sale for Rs. 16,600.

After the purchase an abstract of title was submitted, and requisitions on title were sent to plaintiff's attorney, when the claim proceedings and attachment came to light. It appeared that the attachment was prior to the institution of the mortgage suit but the plaintiff in the mortgage suit had no knowledge of it and the attaching creditor was not made a party, although under S. 91. T. P. Act, he is entitled to redeem, and under O. 34, R. 1 all persons having an interest in the right of redemption must be joined as parties.



Consequently it is said that the title is bad and the purchaser entitled to reject it, because the attaching creditor can at any time come in and redeem. To this it is said that the only reason for setting aside a sale under O. 21, R. 91 of the Code is that the judgment-debtor had no saleable interest in the property, and that O. 34, R. 1 is subject to the other provisions of the Civil Procedure Code including those that a suit is not to be dismissed because of a nonjoinder of parties : see *Har Chandra v. Mahmed* (1). To which is added the argument that he is a bona fide purchaser and cannot be disturbed, so that he has suffered no prejudice: *Rewa Mathon v. Ram Kishen* (2).

The sale, however, was held not under the Civil Procedure Code but under Ch. 27 of the Rules and the conditions of sale framed thereunder. These are the conditions under which the purchase was made and the purchaser is entitled to refuse if he is not given a clear title. If there is an attachment subsisting from before suit giving the creditor a right of redemption, which fact is only disclosed after purchase, I think the purchaser is entitled to reject the title and have the sale set aside and his deposit returned. I make the order in terms of the summons.

S.N./R.K. *Order accordingly.*

(1) A. I. R. 1921 Cal. 554.

(2) [1887] 14 Cal. 18=13 I. A. 106=4 Sar. 746 (P.C.).

### \* A. I. R. 1929 Calcutta 208

LORT-WILLIAMS, J.

*Osman Jamal & Sons Ltd.*—Plaintiff.

v.

*Gopal Purshottam*—Defendant.

Original Civil Suit No. 1310 of 1927,  
Decided on 19th July 1928.

**\* (a) Contract Act, S. 125—Promisee in contract of indemnity becoming bankrupt—Trustee in bankruptcy can recover from promisor—Sum recovered, to be applied to discharge claim agreed to be indemnified—Provincial Insolvency Act (1920) S. 61.**

*B* has a claim upon *A*, but in respect of that claim, *A* has a right to be indemnified by *C*. *A* goes bankrupt. *A*'s trustee in bankruptcy can force *C* to pay the amount of the claim to him but the sum recovered by virtue of the indemnity must be applied exclusively in paying that debt against which the debtor was entitled to be indemnified. (*English Cases discussed.* [P 208 C 2 ; P 209 C 1])

*B. K. Ghos* and *B. N. Ghosh*—for Plaintiff.

*S. N. Banerji (Jr.)* and *J. C. Hazra*—for Defendant.

**Judgment.**—In this case the plaintiff company is in liquidation and is represented by the Official Liquidator. By a contract made in July 1925 it was agreed inter alia that the plaintiff company should act as commission agents for the defendant firm in the purchase and sale of hessian and gunnies and that the defendant firm would indemnify the plaintiff company against all losses in respect of such transactions. Pursuant thereto, on or about the 2nd December 1925, the plaintiff company purchased certain hessian from one Maliram Ramjidas, which the defendant firm failed to pay for or take delivery of, with the result that the goods were resold by the vendor at less than the contract price, and he has claimed the balance from the plaintiff company. Consequently the plaintiffs now seek to recover this sum from the defendants under the aforesaid indemnity, in addition to a further sum for commission which otherwise they would have received. The defendants contend, firstly, that the plaintiffs have never become liable to the vendor, because they acted only as agents for disclosed principals, namely, the defendant firm, and therefore no right to indemnity has arisen. This argument seems to rest upon a misapprehension of fact. The plaintiffs purchased through a broker as principals and not as agents which becomes evident upon perusal of the bought and sold notes. Consequently they are liable to the vendor for breach of the contract of sale.

Secondly, the defendants contend that inasmuch as it is admitted that the plaintiffs have not actually made any payment to the vendor in respect of their liability to him, they are not at present entitled to any sum on account of the aforesaid right of indemnity. In support of this contention their learned counsel has referred to the case of *In re Richardson. In re Richardson, Ex parte the Governors of St. Thomas's Hospital* (1) and especially to the observations therein of Fletcher Moulton, L. J. at p. 712 as follows :

" Suppose *A* has a claim upon *B*, but in respect of that claim, *B* has a right of indemnity from *C*. *B* goes bankrupt. Is *B*'s trustee in bankruptcy in a position in which he can force *C* to pay the amount of the claim to him and then can use the money so obtained

(1) [1911] 2 K. B. 705=80 L. J. K. B. 1232=18 Manson. 327=105 L. T. 226.



for distribution amongst the creditors generally, whereas he only pays a dividend upon the claim which A has against the bankrupt?

"If you seek guidance in the matter from common law, there is no doubt whatever that it went on this principle. It would not help a man to make a profit out of what was merely an indemnity. If, for instance, B was bound to pay a sum to A and C was bound to indemnify B, which is the case before us, then B could not sue C unless he could aver payment to A."

But the learned Lord Justice was there expounding the doctrine of the common law, which he recognized was different to the rule in equity. Moreover in that case the right of indemnity did not arise from contract but from a trust and the learned Judge goes on to say at p. 714:

"It would not be right for a trustee to obtain money from this right to be indemnified against payments made to the head creditor when he not only has not made those payments but comes here to say that he does not intend so to do. Therefore I come to the conclusion that, as a general principle, an indemnity like this can be used by the trustee only for the purpose of bringing about payment to the head creditor of the claim against which he is indemnified."

These distinctions were drawn also by Cozens-Hardy, M. R. at p. 709, where he says:

"In the first place this is not the case of a contractual right of indemnity. It is merely an equitable right which every trustee has to be indemnified by his cestui que trust. It is a right which the common law would not in any way have recognized. Equity has always taken a wider and more liberal view of these rights of indemnity than the old Common Law Courts did. It is settled at common law that, given a contract of indemnity, no action could be maintained until actual loss had been incurred. The common law view was first pay and then come to the Court under your agreement to indemnify. In equity that was not the view taken. Equity has always recognized the existence of a larger and wider right in the person entitled to indemnity. He was entitled, in a Court of Equity, if he was a surety whose liability to pay had become absolute to maintain an action against the principal debtor and to obtain an order that he should pay off the creditor and relieve the surety. Another way in which the indemnity was often worked out in the Court of Chancery was by ordering a fund to be set a part to meet the liability as and when it arose. So that in the view of the Court of Equity it was not necessary for the person entitled to the indemnity to be ruined by having to pay the full amount in the first instance. He had full power to take proceedings under which that fate might be averted, and he might substantially protect himself and secure his position by coming to the Court."

Further, Buckley, L. J. says at p. 715:

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"Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay . . . ."

In *Richardsons* case (1) it was held that the sum recovered by virtue of the indemnity must be applied exclusively in paying that debt against which the debtor was entitled to be indemnified. The reason given for this by Buckley, L. J. was that if such sum were distributed among the creditors generally, the creditor whose claim the debtor was indemnified against would only get a dividend and would have the right to a further dividend if further assets came in; against this claim, the debtor would have no right of indemnity left, and, therefore, his indemnity against such creditor would not be complete, as it had been intended to be. And the Master of the Rolls at p. 711 says as follows:

"The respondent says: 'This right to an indemnity which the bankrupt as trustee had against his cestui que trust is property which vests in me as his trustee in bankruptcy, and I am bound to apply that like all other assets of the bankrupt for the benefit of all the creditors.' But is that quite so? I cannot think it is. If and when he pays the amount of the debt he will have a right to treat the money, which he can then sue for from the person who is bound to indemnify, as part of the estate, but unless and until he pays I fail to see how it can be in accordance with justice and common fairness that he should be allowed to augment the estate of the bankrupt in a way which results in this, that the greater the liability the greater will be the advantage to the estate."

In my opinion, however, a sounder reason appears in the next paragraph, viz:

"The trustee cannot be allowed to say: 'I will take the money recovered under my right of indemnity against the claim of St. Thomas's Hospital and will apply it, not towards satisfying the claim of the hospital in the way which the indemnity implies, but as part of the general assets, and I will give no effect whatever to the indemnity except so far as the hospital come in and prove for their claim in the bankruptcy.' To allow that would be to allow a trustee to make a profit out of his position as trustee."

This case of *Richardson* (1) and especially the observations of Fletcher Moulton, L. J. were adversely criticized by Scrutton, J. in the *Liverpool Mortgage Insurance Co's* case (2), which I will deal with hereafter.

In *Lacey v. Hill* (3) Sir George Jessel M. R. said:

(2) [1914] 2 Ch. 617=84 L. J. Ch. 1=30 T. L. R. 616=58 S. J. 704=111 L. T. 817.

(3) [1874] 18 Eq. 182 (191).



"Last of all it is said this is a liability as distinguished from an actual payment, and that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law (as to which I say nothing, because it is not necessary), it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him."

And in *British Union and National Insurance Co. v. Rawson* (4), Pickford, L. J. says :

"It has been stated in several cases that at common law an indemnity is confined to protecting the indemnified against actual loss and not against liability, for example, *In re Perkins* (5) though this was doubted by Scrutton, J. in *In re Law Guarantee Trust and Accident Society* (2) on the authority of *Ashdown v. Ingamells* (6) However this may be, the indemnity is not so confined in equity (see *Lacey v. Hill* (3) and the two cases above mentioned), and in equity the indemnified may call upon the indemnifier to pay the debt either to him or to the principal creditor before having paid himself, and if paid to him the indemnifier has no concern with what he does with the money."

And Warrington, L. J. at p. 486 says :

"Moreover, I think this decision follows logically on the manner in which Courts of Equity had given effect to contracts of indemnity. In many cases they had ordered the indemnifier to pay the debt against which the indemnity had been given though nothing had been paid by the person indemnified. *Cruse v. Paine* (7) is an example. Money has even been ordered to be paid by the indemnifier to the indemnified himself in respect of moneys for which he was liable but which he had not paid. *Evans v. Wood* (8) is an example and shows that Sir George Jessel, M. R. was not mistaken in saying, as he did in *Lacey v. Hill* (3) that if the creditor is not a party, 'I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him.' The more recent cases of *In re Richardson* (1) and *In re, Law Guarantee Trust and Accident Society* (2) are in accordance with this view."

In *In re Law Guarantee Trust and Accident Society, Ltd. Liverpool Mortgage Insurance Co's. case* (2), Buckley, L. J. says :

"The equitable doctrine is that the party to be indemnified can call upon the party bound

to indemnify him specifically to perform his obligation, and to pay him the full amount which the creditor is entitled to receive, and that whether having received it he applies it in payment of that creditor or not is a matter with which the party giving the indemnity is not concerned. In such a case the party indemnified is entitled to receive 20s. in the pound, and, having got it, to deal with it as he thinks proper. The case is otherwise where the party giving the indemnity is concerned with the application of the money which he pays. This was the case in *In re, Richardson* (1). The wife who was bound to indemnify was there concerned in seeing that the money which she paid went to the lessor so as to relieve the property of which she was beneficial owner from the consequences of non-payment of rent and damages for breach of covenant. In *Cruse v. Paine* (7) the stock jobbers were interested in seeing that the amount which they provided was applied in discharging the calls upon the shares. In *In re Perkins* (5) the executors of assignee No. 2 were interested in the application of that which they had to pay in discharging the obligations under the lease. But here the company are not interested in the question whether the amount which they pay does or does not go to the debenture-holders. The case is that which is put in *Carr v. Roberts* (9) where both Littledale, J. and Patteson, J., at the conclusion of their judgments point out that it is the duty of the defendant to pay the whole amount, and it makes no difference whether it is applied in discharge of the debt, or whether the plaintiff, having recovered it, does not make a proper use of it."

And Kennedy, L. J., says at p. 638 :

"There appears to me to be authority for holding that, in the view of a Court of Equity to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given. See Wright, J., in *Wolmershausen v. Gullick* (10), citing Lord Lindley's work on Partnership, 5th Edition, pp. 374, 375. As Neville, J., points out in the course of his judgment in this case *Liverpool Mortgage Insurance Co's. case* (11), if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance."

And again, at p. 639 :

"This being that which may be called the normal position, is it altered by the fact of the insolvency and liquidation of the society? It is contended on behalf of the company that it is ; that, inasmuch as the debenture-holders will not be able to enforce against the society payment in full of the amount due to them from the society, but only payment of a dividend upon their proof in the liquidation for that amount, the company, so far as the indebtedness to the debenture-holders as distinct from costs and expenses is concerned, will

(9) [1833] 5 B & Ad. 78.

(10) [1893] 2 Ch. 514, 527, 528=68 L. T. 753 =3 R. 610.

(11) [1913] 2 Ch. 612.

(4) [1916] 2 Ch. 476 (481)=85 L. J. Ch. 769=32 T. L. R. 665=60 S. J. 679=115 L. T. 331.

(5) [1898] 2 Ch. 182.

(6) [1880] 5 Ex. D. 280=43 L. T. 424.

(7) [1869] 4 Ch. 441=38 L. J. Ch. 225.

(8) [1868] 5 Eq. 9=37 L. J. Ch. 159=16 W. R. 67=17 L. T. 190.



satisfy its contractual obligation to the society if it pays only the amount of that dividend. This question might have arisen on the facts stated in the report of that case in *In re, Eddystone Marine Insurance Co.* (12), but it does not appear to have been argued by counsel or dealt with by the learned Judge. I do not think that the contention of the respondents is sound. How the person who receives payment of a sum of money under a contract of insurance or re-insurance, or, I will add, of indemnity, deals with that sum is, in general and apart from special considerations, no concern of the party who, in fulfilment of his contract, has made the payment to him."

Again at p. 640 :

"I desire only, in conclusion, to refer to the case *In re Richardson* (1), which my brother Neville seems to treat as an authority for the view which he has taken of the present case. It appears to me that we can decide the present question in favour of the society without differing from the decision of the Court of appeal, in that case. The circumstances were peculiar. The husband's right of indemnity, upon which the wife was sued in an action in which the trustee in bankruptcy of her husband's estate and the husband's landlord were joint plaintiffs was not a contractual right, but an equitable obligation arising from the relation of cestui que trust and trustee which existed between wife and husband ; and it was held by the Court of appeal that the husband's trustee in bankruptcy could avail himself of the husband's right of indemnity only for the purpose of passing on the money, which his wife paid by way of compromise in the action, to the landlord, his co-plaintiff, who was the principal (or ultimate) creditor. To hold otherwise, said the Master of the Rolls, would be to allow a trustee to make a profit out of his position as trustee. In the present case the right to payment upon which the society is insisting depends upon an express contract, whether of insurance or re-insurance, for the payment in a certain event of a sum of money. The debenture-holders are not parties to these proceedings. There is no bond of connexion between the company and the debenture-holders. The company has no sort of interest in seeing how the money due from the company to the society is applied by the society."

And Lord Justice Scrutton at p. 650 says :

Neville, J., thought himself bound by the decision in *In re Richardson* (1), to hold that the society could not recover from the insurance company more than they had actually paid, but could call upon the insurance company to pay off the debenture-holders. The latter point, however, he said was not before him; and it was not in the original summons. The facts in *In re Richardson* (1), were remarkable and peculiar. Richardson, the husband, was twice bankrupt. He was also lessee of some properties from St. Thomas's Hospital and held them as trustee for his wife under circumstances explained in *Governors of St. Thomas's Hospital v. Richardson* (1).

(12) [1892] 2 Ch. 423=61 L. J. Ch. 362=7 Asp. M. C. 167=40 W. R. 441=66 L. T. 370.

Between his first and second bankruptcy the landlords got judgment against him for arrears of rent, damages for non-repair, and costs, and he then went into bankruptcy. The Court of bankruptcy gave leave to the landlords to join with the trustee in an action against the wife as cestui que trust. I understand how the husband and his trustee could ask to be indemnified by the wife. I do not understand and how the landlords had any direct claim against the wife to the sum claimed. However, the action never came to trial, for the wife paid £ 520 to the two plaintiffs in compromise of a claim for £ 711. Then the question arose who was to have the £ 520, the trustee for the general body of creditors, or the landlords, against whose claim the husband was to be indemnified, and the Court of appeal gave the money to the landlords. But the Master of the Rolls stated that it was not the case of a contractual right of indemnity" but of the "equitable right which every trustee has to be indemnified by his cestui que trust." The case did not decide that the trustee could not recover till he paid, and only what he paid. He had in fact paid nothing and got £ 520 by consent. The authorities on insurance were not cited to the Court, which was not dealing with any questions of re-insurance, and while Fletcher Moulton, L. J., made some very general statements as to the common law right of indemnity, they were not, as I read the decision, necessary for it' and if I understand the decision of the Court of appeal in *Ashdown v. Ingamells* (6), were contrary to the common law rules therein laid down. In *Ashdown v. Ingamells* (6) A agreed for valuable consideration to pay the trade debts of B ; he did not do so, and B was forced into liquidation by his trade creditors, whose proof for £ 1750 was admitted. The trustee of B sued A for damages, and it was replied that as B's estate would only have to pay a nominal dividend there were no damages. Huddleston B agreed with this contention, but the Court of appeal reversed him. They held that the insolvent if solvent, would have recovered the full amount, whether it was a contract to indemnify or pay was immaterial, and that the trustee could recover what the bankrupt could, if solvent, have recovered, without regard to whether the estate had paid or not. I do not understand how this supports the view of Neville J., or justifies the general observations of Fletcher Moulton, L. J."

Now the present case seems to me to fall in the category of those in which the party giving the indemnity is concerned with the application of the money which he pays. The defendants may be liable as undisclosed principals, and it would be a most unjust result if after paying the full amount claimed in this case, of which sum the vendor would receive only a dividend, they were called upon to pay a further sum to the vendor, to make up the balance due on the contract made by their agent on their behalf.

Therefore there will be a decree in favour of the plaintiff company for two



sums of Rs. 7,175-8-6 and Rs. 224-4-0 and costs with a direction that the sum of Rs. 7,175-8-6 be paid by the Official Liquidator to Maliram Ramjidas in settlement of his claim.

R.K.

*Suit decreed.*

## **\* \* A. I. R. 1929 Calcutta 212**

### **Full Bench**

RANKIN, C. J., BUCKLAND AND  
MUKERJI, JJ.

In the matter of—*Turner Morrison & Co. Ltd.*

Reference under Income-tax Act, Decided on 16th May 1928.

**\* \* Income-tax Act, S. 4 (3) (7)—Compensation for abrupt loss of office as managing agents is "receipt arising from business" and liable to levy of income-tax.**

The assessee company were the managing agents of another company, which, by reason of the resolution to wind up, paid money to the assessee company as compensation for their loss of office as managing agents of the company.

*Held:* that the compensation, thus given, was "receipt arising from business" and was not exempted from income-tax. [P 213 C 2]

**Rankin, C. J.**—In this case, the Commissioner of Income-tax, Bengal, has stated to this Court for its opinion the question whether a certain sum, Rs. 2½ lakhs, received by the assessee is exempt from taxation under S. 4, sub-S. 3, Cl. 7, Income-tax Act, 1922. The sum in question is a sum which was voted to the assessee by the shareholders of a company called the Cossipur Sugar works Ltd. It appears that that company was passing a resolution for voluntary winding up. A firm which had previously carried on the business now carried on by the assessee had been nominated by the Articles of Association of this company as their Managing Agents. No time was fixed throughout which they were to be the Managing Agents and no remuneration was settled for the office; but in point of fact, the firm and afterwards the company, namely, the present assessee acted as the Managing Agents and during certain years which are mentioned in the letter of Reference, received about half a lakh of rupees annually for their trouble. Now the business was coming to an end. The Cossipur Sugar works Ltd. was being wound up and the Resolution passed by the share holders was that an amount of

2½ lakhs of rupees was to be paid to Messrs. Turner Morrison and Co. Ltd. as compensation for their loss of office as Managing Agents of the company.

The question which we have to decide is whether or not that sum which was paid to the assessee is a receipt not being a receipt arising from business of the exercise of a profession, vocation or occupation, which is of a casual and non-recurring nature and is not by way of addition to the remuneration of an employee. The Commissioner of Income-tax is of opinion that it cannot be predicated that it was not a receipt arising from business. I am of the same opinion.

We are dealing here with two companies. It is quite true that the assessee company was a shareholder of the Cossipur Sugar Works Ltd. One company was not only making a large payment to the other company but stated that the reason of it was "as compensation for their loss of office as Managing Agents." We are not, therefore, considering a personal gift to a friend, and cases of that class may be put on one side.

It has been contended before us that, in view of the fact that the Managing Agency of the Cossipur Sugar Works Ltd. came to an end by reason of the resolution to wind up, the payment of compensation for the loss of office cannot be a payment or receipt arising from business. Now, that contention has been urged upon us mainly on the basis of certain English cases which are addressed to a very different state of the law. The problem before the English Courts in the cases which have been cited before us was whether or not the payment in question was a perquisite of an office or employment. The scheme of the Indian Act is different. S. 4 sets out, in the first place, certain forms of income which are not to be exposed to income-tax at all; and it is in that connexion that Cl. (7), sub-S. (3), is enacted. When we come to the subsequent section, we find that these sections beginning with S. 6 deal with incomes under certain heads specified by the statute. S. 6 lays down these heads and the following sections deal with each of those six heads. When we come to S. 10 we find that tax is payable under the head of "business" in respect of the profits or gains of any business carried on by the assessee; and S. 12 which deals with the



residuary heading "other sources" is expressed in this way: the tax shall be payable in respect of

"income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads)."

If, therefore, a payment comes under Cl. (7), Sub-S. (3), S. 4, it is not covered by S. 12 at all. In my judgment we have to take the words of Cl. (7) by themselves. We are not concerned for this purpose with the wording of S. 10. We are vitally concerned with the wording of Cl. (7) of the third subsection of S. 4. Whether or not an amount is profit or gain of any business is one question; whether it is "a receipt arising from business" is another question. We are concerned with the latter.

Now the English cases go not upon any similar test. They go upon the question whether a certain receipt is a perquisite of an office. If it is not a perquisite of an office or a profit of business or trade, then it is not taxable. Consequently, the class of cases, known as 'Easter offering' cases, e. g., *Herbert v. Mequade* (1) and *Turner v. Cuxson* (2), are not, in the least, in point. In one case, it was held that the person got the money because he was the parson, therefore, it was a perquisite of the office. In the other case, it was held that, although the curate would not have got the money unless he had been the curate of the parish, still he got it as a testimonial for his work and not because he was curate. In the same way, in the case of *Cowan v. Seymour* (3) the question was whether or not the voluntary payment accrued to the person by reason of his office. That was the case of a person who had acted as the secretary of a company. He was given what was called a testimonial. In view of the fact that it was a testimonial, it was held that it was not a perquisite of the office which had come to an end. Similar considerations were canvassed in the 'Cricketer's case' [*Seymour v. Reed* (4)]

and in the Jockey's case [*Wing v. O'Connell* (5)].

Now, in the case before us, we are not considering whether Messrs. Turner Morrison and Co. Ltd. received this sum of money as a perquisite of an office. We are enquiring whether they received this sum of money as a receipt arising from business. They are a company that have several—it may be many—managing agencies. This is found as a fact by the Commissioner of Income-tax. They were given this sum of money because, without notice to them, in the middle of the year, one of their managing agencies was being brought to a close. In these circumstances, it was thought right to give them this moment by way of compensation for their sudden dismissal. In my judgment, it is impossible to say that the receipt is not a receipt arising from business and that is the statutory test which in this country has to be applied. It was not contended before the Commissioner that this case, if it did not come under S. 10, would not apart from this exemption clause, be hit by S. 12. We are not concerned, therefore, to find yea or nay whether Rowlatt, J.'s view is right or not in the case of *Seymour v. Reed* i. e., whether the payment for the loss of the managing agency would be a profit of the business. If it does not come under S. 10, then it comes under S. 12. And the observation in the Cricketer's case that such windfall as was there before the house was not income does not avail in this case. There is no doubt upon the Indian Act that the payment in the present case is income within the meaning of S. 12 unless it is saved by S. 4 (3) (7).

In these circumstances, it seems to me that the Commissioner of Income-tax was right in deciding that the exemption relied on was of no use for the assessee and that income-tax was rightly assessed.

Costs must be paid by the assessee.

**Buckland, J.**—I agree.

**Mukerji, J.**—I agree.

S.L./R.K.

*Reference answered  
against assessee.*

(1) [1902] 2 K. B. 631=71 L. J. K. B. 884=18 T. L. R. 728=4 Tax. Cas. 489=66 J. P. 692=87 L. T. 349.

(2) [1888] 22 Q. B. D. 150=58 L. J. Q. B. 131=53 J. P. 148=37 W. R. 254=60 L. T. 332.

(3) [1920] 1 K. B. 500=89 L. J. K. B. 459=36 T. L. R. 155=64 S. J. 259=122 L. T. 465.

(4) [1927] A. C. 554.

(5) [1927] Irish Rep. 34.



\* **A. I. R. 1929 Calcutta 214****Full Bench**RANKIN, C. J., SUHRAWARDY AND  
GRAHAM, JJ.*Brojo Gopal Roy Burman*—Defendant  
—Appellant.

v.

*Amar Chandra Bhattacharya and  
others*—Plaintiffs—Respondents.Letters Patent Appeal No. 1 of 1928,  
and Civil Rule No. 994-(S) of 1927, De-  
cided on 18th April 1928, from order of  
C. C. Ghose, J., D/- 2nd December 1927.\* (a) **Limitation Act, S. 3—Appellant pro-  
ceeding with diligence—Statutory period  
lapsing—No right accrues in favour of res-  
pondent.**It appears to be the intention of the Limi-  
tation Act that where an appellant has pro-  
ceeded with due diligence, no right shall  
accrue to the respondent by reason merely of  
the lapse of the statutory period. [P 216 C 1]\* (b) **Letters Patent (Calcutta), Cl. 15—  
Order admitting appeal under S. 5, Limita-  
tion Act, after lapse of statutory period is  
not judgment within meaning of Cl. (15).**The mere circumstance that an order puts in  
peril the finality of a decision given in a per-  
son's favour, does not of itself make that order  
a judgment within the meaning of Cl. 15, Let-  
ters Patent. A decision under S. 5, Limitation  
Act admitting an appeal after the period of  
limitation prescribed merely declares that an  
appeal is entertainable. It is not a "judg-  
ment" and no appeal lies against it under  
Cl. 15 : 33 Cal. 1323 ; 43 Cal. 857 ; A.I.R. 1924  
Bom. 399 ; A.I.R. 1922 Cal. 407 ; 9 Cal. 482  
(P.C.) and A.I.R. 1917 P.C. 179, Ref. [P 216 C 2]*Upendra Kumar Roy*—for Appellant.*Satindra Nath Ray Chowdhry*—for  
Respondents.**Rankin, C. J.**—In this case a second  
appeal was presented out of time and the  
appellants (respondents before us) ob-  
tained a rule calling upon their opponents  
to show cause why the appeal should not  
be registered though filed out of time.  
The case made was that there had been a  
miscalculation of the time by the vakil  
acting in the matter of the presentation  
of the second appeal and that, in the cir-  
cumstances, this amounted to a sufficient  
cause within the meaning of S. 5, Limi-  
tation Act. The rule came on for hearing  
before C. C. Ghose, J., and Buckland, J.,  
who differed in opinion. Buckland, J.,  
would have discharged the rule but C. C.  
Ghose, J., being the senior Judge, made  
the rule absolute and permitted the  
appeal to be filed and registered. From  
this order an appeal has been taken under  
Cl. 15, Letters Patent, and at the hearingbefore us the competence of this appeal  
has been objected to on the ground that  
the decision of C. C. Ghose, J., was not a  
judgment within the meaning of that  
clause.An opinion has been judicially expres-  
sed to the effect that the term "judg-  
ment" includes any decision or deter-  
mination affecting the rights or interests  
of any suitor or applicant and that it is  
impossible to prescribe any limits to the  
right of appeal founded upon the nature  
of the order or decree appealed from: per  
Bittleston, J., in *De Souza v. Coles* (1).  
In this Court, however, the contrary  
view has been well-settled. The well-  
known definition of Couch, C. J., defines  
judgment as a decision which affects the  
merits of the question between the par-  
ties by determining some right or liabi-  
lity: *The Justices of the Peace for Calcutta  
v. Oriental Gas Co.* (2); but in more than  
one recent case it has been stated that  
this definition is not exhaustive.The correct technical use of the word  
'judgment' as distinct from 'order' was  
considered in England in the case of  
*Ex parte Chinery* (3), and *Onslow v. Com-  
missioners of Inland Revenue* (4). Ac-  
cording to these decisions a judgment is a  
decision obtained in an action and every  
other decision is an order. These cases  
were referred to with approval by the  
Judicial Committee and applied to the  
construction of the Letters Patent of the  
Bombay High Court in *Tata Iron and  
Steel Co. v. Chief Revenue Authority* (5).  
In view of the use of the word 'order'  
in Cl. 15, of our Letters Patent as they  
now stand, it may be doubted whether  
for the present purpose the correct techni-  
cal use of the word 'judgment' in Eng-  
land is a safe guide to the meaning of the  
clause. It was apparently upon some  
such principle, however, that the case of  
*Gobinda Lal Das v. Shiba Das Chat-  
terjee* (6), was decided. In that case the  
senior Judge of a Division Bench had re-  
fused to extend the time for presenting  
an appeal under S. 5, Limitation Act, and  
it was held upon Letters Patent Appeal

(1) [1868] 3 M.H.C. 384.

(2) [1872] 8 B.L.R. 433=17 W.R. 364.

(3) [1884] 12 Q.B.D. 342=53 L.J.Ch. 662=1  
Morrell. 31=32 W.R. 469=50 L.T. 342.(4) [1890] 25 Q.B.D. 465=59 L.J.Q.B. 556=38  
W.R. 728=63 L.T. 513.(5) A.I.R. 1923 P.C. 148=47 Bom. 724=50  
I.A. 212 (P.C.).(6) [1906] 33 Cal. 1323=3 C.L.J. 545=10 C.  
W.N. 986.



that no appeal lay from this refusal. The reasoning was :

" It may no doubt be said that an order which terminates a proceeding is a judgment within the meaning of Cl. 15, but it must be a proceeding, as we understand it, in the course of a suit or in relation thereto and in which some question or other as to the right or liability of any party is raised, and not a proceeding in respect of a matter which has already come to a termination by the operation of law or otherwise."

This view was objected to by Mookerjee, J., in *Mathura Sundari Dasi v. Haran Chandra Saha* (7), as going beyond the definition of the term 'judgment' given by Couch, C. J., in *Nagindas Motilal v. Nilaji Moroba Naik* (8), the High Court of Bombay dissented from the reasoning in *Gobinda's* case, holding that an appeal lay under the Letters Patent from a refusal to extend time under Cl. 5, Limitation Act. There is much force in the objections which have been taken to the decision in *Gobinda's* case and were the order appealed against before us an order refusing to extend time, and thereby putting an end to the litigation between these parties, we might well have thought it necessary to refer the question of the correctness of that decision to a Full Bench.

The cases which bear upon the competence of an appeal under Cl. 15, Letters Patent, from a decision under S. 5, Limitation Act, admitting an appeal after the period of limitation prescribed require, in my opinion, to be separated from cases which proceed upon the footing that the decision appealed from has put an end to the litigation. Even within this limited range, however, it cannot be said with confidence that the decided cases are uniform or consistent. While it has been held in *Mathura Sundari Dasi v. Haran Chandra Saha* (7), that an order made under O. 9, R. 9, Civil P. C. refusing to restore a suit after it had been dismissed for default under R. 8 of the same order is a judgment within the meaning of Cl. 15, Letters Patent, it has also been held in *Maharaj Kishore Khanna v. Kiran Shashi Dasi* (9) that no appeal lies from an order made under R. 9 setting aside a dismissal and restoring a suit. Again, while under O. 43, R. 1 (k), Civil P. C. an appeal is expressly given from an order

under R. 9, O. 22 refusing to set aside the abatement of a suit, it has been held (*Sarat Chandra Sarkar v. Maihar Stone and Lime Co., Ltd.*) (10), that an order setting aside the abatement of a suit is a judgment under Cl. 15, Letters Patent. This decision followed an unreported case *Padmabati v. Tulsi* (11), where Woodroffe, J., laid stress upon the circumstance that under R. 9 of O. 22,

" where a suit abates . . . no fresh suit shall be brought on the same cause of action " and said

" the appellant has acquired thereby a right which the order made by Chaudhury, J., has interfered with. There is therefore in my opinion an appeal. "

Of cases decided by the Judicial Committee there appear to be two. The first is *Hurrish Chunder Choudhry v. Kali Sundari Debi* (12). Pontifex, J., had refused to transmit a certain order in Council to the appropriate Court for execution, holding that the applicants must be left to a regular suit to enforce their claim thereunder. Their Lordships agreed that the learned Judge had in fact exercised a judicial discretion and had come to a decision of great importance which, if it remained, would entirely conclude any rights of Kali Sunderi to an execution in the suit. They held therefore that it was a judgment within the meaning of Cl. 15. In *Krishnasami Panikondar v. Ramasami Chettiar* (13), an appeal had been admitted out of time by the ex-parte order of a single Judge. When the appeal came on for hearing before a Division Bench in the presence of the respondent it was held that the delay should not have been excused and the appeal was dismissed upon that ground. On appeal to the Privy Council it was contended that the Division Bench had no jurisdiction to override the order made extending the time under S. 5, Limitation Act. Sir Lawrence Jenkins delivering the judgment of the Board said in *Krishnasami Panikondar v. Ramasami Chettiar* (13) at p. 416 [of 41 *Mad.*]:

" But this order of admission was made not only in the absence of Ramasami Chettiar, the contending respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the

(10) A.I.R. 1922 Cal. 335=49 Cal. 62.

(11) Appeal No. 16 of 1918, decided on 18th June 1918.

(12) [1882] 9 Cal. 482=10 I.A. 4=12 C.L.R. 511=4 Sar. 407 (P.C.).

(13) A. I. R. 1917 P. C. 179=41 Mad. 412 = 45 I. A. 25 (P.C.).

(7) [1915] 43 Cal. 857=23 C.L.J. 443=34 I.C. 634=20 C.W.N. 594.

(8) A.I.R. 1924 Bom. 399=48 Bom. 442.

(9) A.I.R. 1922 Cal. 407=49 Cal. 616.



finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected."

It will be seen therefore that of the cases before the Privy Council one was a case in which execution had been entirely refused. In the other the observations made were directed to the question whether the order was of a kind which should finally be pronounced *ex parte*. In both, however, the importance of the decision to the party complaining thereof was referred to.

An examination of the language of Ss. 3 and 5, Limitation Act of 1908, leads me to think that for the present purpose there is a certain fallacy in the language commonly employed to the effect that an order admitting an appeal under S. 5 deprives the respondent of a vested right granted to him by S. 3. The opening words of S. 3 are "subject to the provisions contained in Ss. 4 to 25 inclusive." S. 5 applies broadly speaking, to cases in which the limitation period is short. It does not apply so as to give a power of extending the period of limitation prescribed for suits. It appears to me to be the intention of the Limitation Act, that where an appellant has proceeded with due diligence, no right shall accrue to the respondent by reason merely of the lapse of the statutory period. On the whole, and not without some doubt, I think that the mere circumstance that an order puts in peril the finality of a decision given in the respondent's favour, does not of itself make that order a judgment within the meaning of Cl. 15 of the Letters Patent. The same might be said of an order restoring a suit under O. 9, R. 9, and with much greater reason. The same might be said of any order giving leave to appeal or granting a certificate that a case was a fit one to be taken on appeal. Whether any distinction can logically or practically be maintained between an order setting aside an abatement and an order restoring a suit after dismissal for default may well be doubted. But in the case now before us the order complained of does not set anything aside. It operates merely to declare that the appeal may be entertained. For the purpose of the present objection to the competence

of this Letters Patent Appeal it is a stronger case in favour of the present respondent than the case of *Maharaj Kishore Kahunna v. Kiren Shashi Dasi* (9).

In my judgment we should uphold the preliminary objection and dismiss this Letters Patent Appeal with costs 4 gold mohurs.

**Suhrawardy, J.**—I agree.

**Graham, J.**—I also agree.

S.N./R.K.

*Appeal dismissed.*

### \* A. I. R. 1929 Calcutta 216

RANKIN, C. J., AND B. B. GHOSE, J.

*J. C. Galstaun*

v.

*Sahebzadi Mamoodi Begum*

Small Cause Court Ref. No. 2 of 1928,  
Decided on 19th July 1928.

\* Limitation Act, Art. 97—Contract for sale—Vendor to satisfy certain conditions before completion — Time not specified—Property subsequently mortgaged and sold in satisfaction thereof — Original purchaser suing for deposit money—Limitation begins from sale in satisfaction of mortgage—Purchaser need not sue within reasonable time—Suit is governed by Art. 97 and not Lim. Act Arts. 60 and 115.

In a certain contract for the sale of property the vendor was to satisfy certain conditions before completion of the contract, but no time was specified for it. The vendor mortgaged the property to another and afterwards it was sold in satisfaction of that mortgage. The purchaser then sued for recovery of deposit money.

*Held*: that the purchaser need not have sued within a reasonable time. It was Art. 97 and not 60 nor 115, that governed such a case, and time was to be counted since when the property was sold in satisfaction of the mortgage, because it was then that the contract, having become impossible of performance, ended. [P 217, C 1 & 2]

**Rankin, C. J.**—This is a reference from the Small Cause Court. The question arises upon a contract for the sale of a certain house in Chowringhee No. 34 Chowringhee Road, which was entered into between Saheb Zadi Mamoodi Begam as vendor on the one part and John Caropiat Galstaun as purchaser on the other part on 9th September 1919. It appears that the premises in question were subject to a certain wakf and they were also subject to a renewal clause in a certain indenture of lease. No period for completion was fixed by the contract and it was a term of the contract that



the vendor should use due diligence to apply to the proper Court in the matter of the wakf for an order for sale thereof and that she should take advice of counsel with a view to nullify, if possible, the clause in the lease to which I have referred. The contract provided that within one week from the date on which the purchaser should be satisfied in respect of the above two clauses being fully complied with by the vendor, the vendor would send all the title deeds. There were further provisions as regards what would happen thereafter in the matter of the completion of the contract. It appears that, in 1921, the vendor mortgaged this property to another and, in 1927, the property was sold in satisfaction of that mortgage.

The present suit was brought for the return of the deposit money, namely, Rs. 501 with reference to which there was a clause in the contract that, if for any laches of the vendor or failure on the part of the vendor to comply with the conditions of these presents and on her part to be observed and performed the said purchase cannot be completed, then and in such event the vendor should forthwith return on demand to the purchaser the said sum of Rs. 501.

Now, the question which arose and upon which the two Judges of the Small Cause Court composing the Full Bench disagreed has been stated as follows :

(1) Whether Art. 60 or Art. 115 applies to the claim in suit ?

(2) Whether the claim is barred ?

The view taken by the trial Judge is that the question for decision is whether the plaintiff, that is, the purchaser can be allowed to keep the agreement in force for an indefinite period. He thinks that, when the defendant mortgaged the property, it became impossible for her to convey it to the plaintiff and that the plaintiff immediately on becoming aware of this should have called upon her either to convey or to put an end to the contract. He is of opinion that the case comes under Art. 115, Sch. 1, Lim. Act. The Chief Judge is of opinion that the case comes under Art. 60 Lim. Act, as money deposited under an agreement that it shall be payable on demand.

In my opinion, Art. 60 is not applicable to this case at all. This money at the time it was deposited was not de-

posited on the term that it should be repayable on demand but it was deposited as part of the purchase money of the property and also as a deposit in the sense that it was capable of being forfeited if the purchaser did not fulfil his part of the contract. I have no doubt that the view taken of Art. 60 being applicable is incorrect. I am very doubtful whether, in any view, Art. 115 can be said to be the article applicable. Art. 115 is for compensation for the breach of any contract express or implied and the period of limitation is three years from the time when the contract is broken.

It appears to me that the Article applicable is Art. 97 for money paid upon an existing consideration which afterwards fails, the period of limitation being three years from the date of the failure. It is quite clear that in a case of this sort, the purchaser has three years from the time at which the contract comes to an end either by reason of impossibility of performance or by reason of refusal to perform or because the contract is abandoned or because the contract is rescinded by one party for the default of the other. In this case, the position is that notice was fixed for completion. The vendor had two things to do which might take a very substantial time. The purchaser never made time of the essence of the contract by giving notice that he should require performance within a definite time. It is erroneous to say that such a contract as this became impossible of performance, because the vendor mortgaged the subject-matter. This is a mere matter of conveyance. It is for the vendor to pay off the mortgagee at or before the time of completion. This contract certainly came to an end at the latest for impossibility of performance in 1927 when the mortgaged property was sold. After that the vendor was unable to perform the contract. The question is whether the contract came to an end earlier. It is erroneous to say that it was the duty of the purchaser to sue the vendor at the expiry of a reasonable time. It might have been within his rights so to do, but there is no law which prevents a purchaser from extending the time for his vendor. The object of the limitation Act is to make people bring their suit promptly when their cause of action has



arisen. It is not to make people bring their cause of action into existence before they want to do so. In the present case, it appears, so far as one can gather from the judgment, that there are very few facts indeed which can be relied upon on one side or the other. It does not appear that the time was extended by express arrangement. It does not appear that either party purported to rescind the contract. It is a question on which there seem to be very few materials whether there is any proof that the parties had abandoned the contract before 1927. It does not appear that until 1927 the vendor became unable to perform the contract. This contract remained in existence for the present purpose until either by arrangement or rescission or impossibility of performance or refusal, the plaintiff's right to sue for the return of the money arose. It will be for the Small Cause Court to apply these principles to the facts of this case. Let the case be returned to the Small Cause Court with this expression of opinion.

**B. B. Ghose, J.**—I agree.

S.N./R.K.

Case returned.

### \* A. I. R. 1929 Calcutta 218

SUHRAWARDY AND JACK, JJ.

*Durganath Bhattacharjya and others*—  
Defendants 1 to 5—Appellants.

v.

*Harkishore Chakrabarty and others*—  
Plaintiffs—Respondents.

Appeal No. 1470 of 1925, Decided on  
28th May 1928.

(a) **Adverse possession**—Two estates previously owned by two persons jointly subsequently transferred to two persons—Possession of each transferee is adverse to other.

Where two estates previously owned by two persons jointly, afterwards become vested in two different transferees between whom there is no privity of estates, possession of each transferee becomes adverse to the other although there was no question of adverse possession when the two estates were jointly held by the same persons. [P 220 C 1]

\* (b) **Adverse possession**—Nature.

Possession is adverse even if it is not of trespassers. Possession, if not permissive, is adverse. 4 Bom. 89, Rel. on. [P 220 C 1]

\* (c) **Civil P. C., O. 21, R. 91**—Execution purchaser can assert his vendor's title although he can also set aside sale.

Although a purchaser at an execution sale may have the remedy of setting aside the sale, he cannot get possession, it does not prevent him from asserting the title of his vendor which he has acquired by the purchase. [P 220 C 2]

(d) **Bengal Tenancy Act, S. 167**—Scope.

Under the rules framed by the Government of Bengal which have the force of law, the service of notices under S. 167 must be as provided in the Civil P. C. [P 221 C 1]

(e) **Bengal Tenancy Act, S. 167**—Notices must be separately served.

A joint notice under S. 167 to all defendants is not enough as there must be separate service on each of them. 5 C. W. N. 272, not Foll. [P 221 C 2]

(f) **Bengal Tenancy Act, S. 167**—Plaintiff knowing encumbrance failing to have proper service—Decree subject to annulment of encumbrance cannot be granted by applying for fresh notice.

A decree subject to an annulment of encumbrance by applying to the Collector for a fresh and proper service of notice under S. 167 cannot be granted to the plaintiff when he knew the existence of the encumbrance and when knowing that the service of notice was not proper, he took no steps to have the proper service made. 24 C. W. N. 657 and 24 C. W. N. 659, Ref. [P 222 C 1]

*Braja Lal Chakravarti and Upendra Kumar Roy*—for Appellants.

*Dwarka Nath Chakravarty, Birendra Kumar De, Sasadhar Roy (Sr.) and Romes Chandra Sen*—for Respondents.

**Suhrawardy, J.**—This appeal by defendants 1 to 5 arises out of a suit for recovery of possession of some lands which the plaintiffs claim as appertaining to Taluk No. 164 purchased by them at a rent sale in 1906. The facts of this complicated litigation may shortly be given. Under the Maharaja of Tipperah there was a taluk No. 164 standing in the name of one Jay Narain Sarma and called after his name taluk Jay Narain Sarma. This Jay Narain had also a niskar called niskar Jay Narain Sarma. Jay Narain Sarma left two sons Sib Prosad and Ram Gobinda. Sib Prosad had also acquired an agat taluk called agat Sib Prosad Taluk Ram Keshab. Agat taluk has been explained by the learned Judge in his judgment as meaning :

"A specific block of land carved out of a taluk. The owner of an agat need not enter into direct relations with its superior landlords, but he pays the proportion of the rent due from him in respect of agat to the owner of the taluk. On failure to pay this due proportion the owner of the taluk has to pay it himself to preserve his taluk from sale, but he can recover the proportion from the agatdar in a contribution suit."

The taluk No. 164 was sold for arrears of rent and purchased by the Choudhuries of Markuta in 1863. About 12 years after they had purchased, one Ananda-moyee, widow of one of the three sons of Sib Prosad, brought a suit for recovery of



some lands on the allegation that they were niskar lands of Jay Narain Sarma and the agat lands of agat Sib Prosad. The suit was decreed or compromised by a compromise decree Ex. F. By that decree Anandamoyee got one-third of the lands which she claimed as belonging to niskar Jay Narain. The other lands claimed in the suit went to the Choudhuries. Thereafter one Gurudas Muhari purchased Anandamoyee's interest in the decree and one Gurudas Barman purchased one-third share, in the niskar belonging to some other members of Jay Narain's family. Subsequently the three parties Gurudas Muhari, Gurudas Barman and the Choudhuries came to an arrangement under which Gurudas Muhari obtained 16 annas interest by transfer from the other parties in 12 specific plots of niskar Jay Narain Sarma. Then Gurudas Barman and Gurudas Muhari respectively conveyed to the Choudhuries their one-third share in the rest of the lands described as niskar in Ex. F, and the Choudhuries thereby obtained an interest in the Niskar land also. Between 1888 and 1894 the defendants purchased in execution of decrees the interest of the Choudhuries which was described in the sale certificates as niskar and agat Sib Prosad. Between 1890 and 1895 Ram Charan and Bhairab Shaha whom we will call the Shahas hereafter purchased in execution of decrees and by private conveyances the interest of the Choudhuries in taluk Jay Narain Sarma. In 1900 the Shahas brought a suit against the defendants' father to recover some lands as taluk Jay Narain. That suit was withdrawn. Then in 1906, Taluk Jay Narain Sarma (taluk No. 164) was sold for arrears of rent by the Maharaja of Tipperah and purchased by the plaintiffs. This suit was instituted in October 1918 for recovery of some lands which the plaintiffs claim to appertain to the taluk purchased by them. The defence was that the land in suit belonged to the niskar Jay Narain and agat Sib Prosad and did not form part of the plaintiff taluk. It was also maintained that if they did, the defendants had acquired good title to them by adverse possession for more than 12 years.

On these facts the learned Subordinate Judge without going minutely into the question of title held that the defendants were in adverse possession of the land for

more than 12 years ; and in this view dismissed the plaintiffs' suit. On appeal the learned Additional District Judge of Tipperah modified the decree of the trial Court and gave the plaintiff a decree in respect of some plots and remanded the case to the trial Court for enquiring into the title in respect of some other plots. Defendants 1 to 5 have appealed and it is contended on their behalf that the view taken by the trial Court is correct and ought to be maintained.

On the facts above stated the learned Judge has come to the following findings: (a) that it is not possible to find out definitely the extent either of the taluk or of the niskar ; (b) that the agat somehow or other had passed to the Choudhuries or they had acquired title to it by adverse possession it having become a part of their taluk ; (c) that Ex. F, the compromise decree in Anandamoyee's suit, is to be preferred to other evidence in finding as to what lands belong to the niskar at such distant date ; (d) that the settlement record so far as it is inconsistent with Ex. F, must be considered to be incorrect though it mentions some plots in suit land as appertaining to the agat ; but it must now be held that they have become part of the taluk and have ceased to have a separate entity ; (e) as to possession, in the circumstances of the present case there can be no question of adverse possession. In this view the learned Judge passed a decree in favour of the plaintiffs as above stated. It is admitted that some plots in suit belong to the defendant's niskar and have been excluded from the decree.

This appeal may be disposed of on the short ground of possession. The argument which the learned District Judge employed to support his finding that there could be no question of adverse possession in the present suit is, that at one time the Choudhuries held the niskar and the taluk both together. At that time there could be no question of adverse possession between the two estates. They elected to treat some lands as appertaining to the taluk and some as niskar. These lands were sold at different times to different parties the defendants and the Shahas. There cannot, therefore, be any question of adverse possession between these two parties. It is difficult to understand the process of reasoning adopted by the learned Judge in holding that the de-



defendants are not entitled to claim adverse possession in the present suit. It is intelligible that so long as the taluk and the niskar were held by the same person the Choudhuries no question of adverse possession could arise nor could it be claimed by one against the other. But the same reasoning cannot be applied when the niskar and the taluk become vested in different parties. There was no privity of estate between the Shahas and the defendants nor was there any such jointness of possession as to stop the running of time against each party. The learned Judge holds that the land belonging to the niskar or to the agat taluk became part of the taluk No. 164 by adverse possession by the Choudhuries and passed along with the taluk to the plaintiffs. If that was so, there does not seem to be any reason for not holding that the lands which were thus acquired by adverse possession and formed part of the taluk being adversely possessed by other parties became permanently severed from the taluk. In one part of his judgment the learned Judge observes that since the possession of the defendants was never that of trespassers there could be no adverse possession in their favour. This is not a correct statement of the law. Possession if not permissive, is adverse. It may be adverse even to the vendor in a case between the vendor and the vendee. *Sambhu Bhai Karsandas v. Shib Lal Das Sadashivdas* (1). But it is not necessary to go so far in the present case. The possession of the defendants as against the Shahas was clearly adverse whether they possessed it as adverse to the taluk or as part of their niskar.

The learned Judge again becomes unintelligible when he says that the possession of the defendants could not be treated as adverse as neither set of transferrers could sue the other for recovery of possession. He further goes to elucidate this point and observes that if a private purchaser does not obtain possession of a part of the land purchased, his remedy is to sue his vendor for compensation or to avoid the contract altogether. Similarly a purchaser in an execution sale has remedy given to him under the Civil Procedure Code of having the sale set aside and claiming a refund of the purchase money. This view also cannot be supported. The remedy suggested by

the learned Judge may be open to the purchaser but it does not take away his right of asserting the title of his vendor which he has obtained by his purchase. There is no question that the defendants were in possession of the lands for a much longer period than 12 years. Whether they were possessing this land as appertaining to the niskar or to the agat taluk or as against the owner of the taluk No. 164 they have acquired a good title to those lands by adverse possession. I take this view on the facts of this case relating to possession without considering the question of title as to which of the lands in suit appertain to the taluk.

It is a moot question whether a purchaser at a rent sale or a revenue sale obtains along with the estate the accretion to the estate caused by encroachment by the late holder of the estate. For it is said that a purchaser at such a sale purchases the estate as it stood at its creation. But this point though suggested in the lower Court was not raised and discussed before us and I do not propose to deal with it any further.

The learned Subordinate Judge in the trial Court held that the defendants acquired a good title to the lands in suit by adverse possession and since such adverse possession was an encumbrance it must be avoided under the law and the attempt to avoid it by the plaintiffs failed. After purchase of the taluk in rent sale the plaintiffs served notices on the defendants under S. 167, Ben Ten. Act. The learned Subordinate Judge found on an examination of the evidence that notices were not properly and legally served. The learned District Judge in the view he took of the facts and of the law governing the case did not consider it necessary to examine in detail whether the notices under S. 167 were properly served on the defendants or not. But he observes that if it were necessary he would agree and for the reason given by the Subordinate Judge in holding that such notices were not properly served on defendants 1 to 5.

Mr. Chakraborty for the respondent, however, wanted to be heard on his cross-objection, namely, on the question of service of notice under S. 167, Ben Tenancy Act. Both the Courts below have found that the service was not legal and

(1) [1879] 4 Bom. 89.



proper. The learned Subordinate Judge thoroughly went into the evidence in this case and found facts on which he based his finding that notices under S. 167 were not properly served. The learned District Judge in his judgment does not refer to the evidence in detail but expresses his concurrence with the findings of the trial Court on the issue relating to the service of notice. The learned Subordinate Judge found first that there was no separate service of notices on the four encumbrancers who are the defendants in the suit: secondly, defendant 4 was a minor, 15 years of age, and notices ought to have been served upon him also whereas notice was served upon his mother as guardian: thirdly, all due and reasonable diligence was not used to serve the defendants with notices: defendant 4 not having been found in the house and there being no one authorized to accept notices on their behalf, the peon ought to have affixed a copy of the notice on some conspicuous part of the house in which the defendants ordinarily resided. Under the rules framed by the Local Government which have the force of law notices under S. 167 are to be served in the manner provided for service of summons in the Civil P. C.

It was found by the learned Subordinate Judge that the peon went to the spot with only one notice in which the names of the defendants were written. He offered the notice to one Mohes who refused to accept it on the ground that he had no authority to do so. On which the copy of the notice was left with Mohes though he refused to take it and the peon returned without any further attempt to effect a proper service. The peon had no spare copy of the notice to affix at the outer door of the defendant's house. The learned Subordinate Judge further found that defendants 1, 2 and 3 one of whom was a well-known pleader of Comilla were not there and they were at Comilla and other places for the purpose of carrying on their profession. The plaintiffs being the residents of the village no doubt knew all about their whereabouts but took no steps to have the notices properly served on them. In fact he found that the circumstances under which the procedure laid down by O. 5, R. 17, Civil P. C. should be followed did not exist. With regard to service on the defendants the learned

Subordinate Judge refers to O. 5, R. 11 which shows that service of summons shall be made on each defendant. As regards defendant 4 who is a minor the learned Subordinate Judge holds that though there is no express provision in the Civil Procedure Code with regard to service upon the minor the authorities are in agreement that the procedure laid down for the service of processes upon adult defendants should be followed also in the case of a minor and this has not been done. With regard to the service of notices separately on each defendant, the learned advocate for the respondent argues that a joint notice under S. 167 is enough to satisfy the requirements of law and has referred us to the case of *Jogabundhu Mujumdar v. Rashamanjan Dassya* (2). In that case there was a joint notice. But it does not appear that there was a separate notice also. Besides, the judgment does not appeal to us as of a weighty character inasmuch as the learned Judges say that no form of notice under S. 167 is laid down. But it would appear of a reference to Mr. Surendra Chandra Sen's book on the Tenancy Act at p. 706 that a form has been prescribed of a notice under S. 167. The learned advocate further argues that a strict observance of the rules of service as given under O. 5, Civil P. C., need not be followed in the case of service of notice under S. 167; and he has referred us to some cases which have no bearing on the point. We are not satisfied that the view urged is correct.

Lastly, Mr. Chakravarti for the respondent has argued on the authority of *Gopinath Biswas v. Kadha Shyam* (3) and *Easin v. Inti Jennessa Bibi* (4) that he should be allowed a decree in this case with liberty to apply to the Collector for a fresh and proper service of notice under S. 167, Ben. Ten. Act. It is no doubt true that if a notice is not properly served the plaintiffs are entitled to have a fresh service through the Collector; and it has also been held in those cases that where the plaintiff did not know of the encumbrance and brought a suit to eject the encumbrancer as a trespasser and subsequently it transpired that there was an encumbrance, he could be given

(2) [1901] 5 C. W. N. 272.

(3) [1920] 24 C. W. N. 657=58 I. C. 671.

(4) [1920] 24 C. W. N. 659=58 I. C. 745.



a decree subject to the annulment of the encumbrance. We are not prepared to apply that principle to this case as it is not a case where the plaintiff did not know the existence of the encumbrance; and when he came to know that the service of notice was not proper he should have taken necessary steps to have the proper service made. We think that the view taken by the Courts below on the question of service of notice is correct.

The result of all the above considerations is that the cross-objection is dismissed and the appeal is allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs in all Courts.

The Maharaja of Tipperah (respondent 4 defendant 11 in the suit) has been made a party but no relief seems to have been claimed against him. The appellants before us agree to leave all the questions in controversy in this suit open so far as the Maharaja is concerned. We think that in the circumstances of this case the interest of the Maharaja who is not entitled to immediate possession of the lands in suit should not be affected by any decision arrived at in this case.

**Jack, J.**—This appeal has arisen out of a suit by the purchasers of a tenure Joy Narain Sarma Taluk No. 164. The taluk was sold in execution of a decree for rent and purchased by the Choudhuries of Merkutia in 1269. In 1300 and 1301 Ram Charan and Bharat Shaha purchased the taluk from the Choudhuries and auction-purchasers from them in execution of mortgage decrees: c.f. Exs. 30, 31 and 79. The taluk was sold for arrears of rent on 22nd October 1906, and was purchased by the plaintiff-appellants who got delivery of possession in 1908 but did not actually get possession of the suit land and, therefore, this suit has been brought for recovery of possession of the suit land as belonging to the taluk.

The respondents maintain that the land in suit does not belong to the taluk. That part of it belongs to nishkar Joy Narain Sarma, and part of it to agat Shib Prosad of taluk Rai Keshab being lands of which the Chaudhuries were also in possession, and which were subsequently purchased by the respondents'

predecessors at sales in execution of mortgage and money decrees between the years 1295 and 1301: c.f. Exs. M, O. Q. S. D and E.

The questions which arise therefore are :

(1) Whether the lands in suit are part of the taluk No. 164 ?

(2) If so, whether the holdings of the respondents are incumbrances ?

(3) If they are incumbrances whether notices under S. 167, Ben. Ten. Act, have been properly served on them ?

If the suit lands form part of the taluk then certainly the appellants are entitled to possession of them by virtue of their purchase in auction sale if not barred by limitation and provided the holdings of the respondents are not encumbrances, or, if those holdings are encumbrances, provided notices under S. 167, Ben. Ten. Act. have been duly served upon them.

It appears that beyond the settlement Record-of-Rights, there is no evidence as to what lands exactly formed the taluk. The superior zemindar has been made a party (defendant 11) and on his behalf it is claimed that the taluk lands are as shown in the settlement records. Neither of the Courts below are, however, prepared to rely entirely on these records. The learned Subordinate Judge relies on the Record-of-Rights except where it is in conflict with a compromise decree obtained by Anandamoyi (Ex. F) showing that certain of the lands in suit belong to the nishkar Joy Narain Sarma, but he also holds that the lands of Shib Prosad agat referred to in that decree should be considered to be lands of taluk 164 or lands which have accrued to the taluk by adverse possession. The appellate Court came to the same conclusion as regards the lands referred to in Ex. F.

In the compromise Ex. F the Choudhuris practically admitted that certain of the plots in suit belonged to the nishkar Joy Narain Sarma, and relinquished them as such to the predecessor of the defendants. If these lands really belong to the taluk as found by the settlement authorities, then, in parting with them as nishkar lands, the Choudhuris in reality created interests adverse to the taluk which have become by lapse of time encumbrances of the taluk, and before the appellants can get possession of these



lands they must show that notices under S. 167, Bengal Tenancy Act, were properly served. The same reasoning would apply to the agat lands. The defendants' father purchased them in an auction sale in execution of a decree against the Choudhuris in 1891. In the sale certificate Ex. D the lands are described as belonging to the agat Shib Prosad. In the compromise decree too the lands were retained by the Choudhuris as belonging to the agat. In these circumstances I see no reason for not accepting the settlement record that they did in fact belong to the agat especially as the superior zemindar does not claim that they belong to the taluk 164 since he claims according to the settlement Record-of-Rights. The onus is obviously on the appellants if they wish to dispossess the respondents to show that the lands belong to the taluk 164, if they fail to do so they are not entitled to get possession and, as regards these Shib Prosad agat lands, I certainly think they have failed to show that they belonged to the taluk. Their claim in respect of these lands must therefore fail.

As regards the nishkar lands both the lower Courts have given reasons for relying on the compromise decree (Ex. F) rather than on the Record-of-Rights. There is evidence showing that in a number of transactions these lands were claimed, and bought and sold as nishkar lands since 1282 B. S. Here again the onus was on the plaintiffs to show that these lands belonged to the taluk and the Courts below have held that the presumption arising from the Record-of-Rights was rebutted as regards the lands relinquished as nishkar by the compromise decree Ex. F. But even if originally belonging to the taluk, these lands and the remaining lands in suit which the defendants have been holding as nishkar since 1300 B. S., would certainly be encumbrances on the taluk by virtue of adverse possession. I cannot accept the learned Judge's reasoning in this connexion. He holds that in this case there was no adverse possession because there was no one who could claim any title to these lands as against the defendants. But this is not so. When the Sahas purchased the taluk, they became entitled to any lands of the taluk which the Choudhuris had trans-

ferred to the defendants as nishkar. The Sahas purchased the taluk in 1300 and 1301 B. S. (1894) and these holdings of the defendants had become encumbrances on the taluk by adverse possession at the date of the plaintiffs' purchase of the taluk in October 1906. That the defendants were holding these lands adversely to the Sahas is obvious from the fact that the Sahas brought a suit to recover them as taluk lands from the defendants in 1900. The appellate Court allowed the withdrawal of that suit. The learned Judge has referred to the case reported in *Gocool Bagdi v. Debendra Nath Sen* (5) and says :

"that case and the line of cases following it have restricted adverse possession (forming an encumbrance) to the possession of a trespasser in parts of the land of the defaulting tenancy."

He therefore holds that since the defendants in this case were not trespassers there could be no question of adverse possession. The cases he refers to, do not appear to be an authority for any such restriction and in the present case it was immaterial to the Sahas whether the defendants obtained the taluk lands as trespassers or by purchase from the Choudhuris as nishkar lands. If the lands in fact belonged to the taluk, as against the purchasers of the taluk the defendants' possession was equally adverse in either case. I hold therefore that the defendants acquired a title by adverse possession to these lands if, as shown by the settlement records, they belonged originally to the taluk.

In this view it becomes necessary to ascertain whether, in respect of these lands, notices under S. 167, Bengal Tenancy Act, had been properly served. The learned Subordinate Judge has discussed this question exhaustively, and is I think right in holding that the notices were not served as provided for the service of summons in such cases in the Civil Procedure Code. Under the rules framed by the Government of Bengal which have the force of law the service of notices under S. 167, Bengal Tenancy Act, must be as provided in the Civil Procedure Code. The notices were therefore not legally served. The learned Judge in appeal though he did not discuss the evidence of service agreed with the finding of the trial Court in this respect. It must be taken therefore that



if any of the lands in suit are not included in the nishkar lands of Ex. F or in the agat lands of Ex. D, or if the so-called nishkar lands are really taluk lands, the defendants' holding of them would be encumbrances, and since these encumbrances have not been annulled, proper services of notices under S. 167, Bengal Tenancy Act, not having been made, the appellants claim must fail as regards all the lands in suit. The appeal is therefore allowed with costs, the decree of the first Court being restored.

S.N./R.K.

*Appeal allowed.***A. I. R. 1929 Calcutta 224**

MITTER, J.

*Radhu Hari and another—Appellants.*  
v.

*Narendra Nath Chatterjee and another—Respondents.*

Appeals Nos. 2614 and 2615 of 1927,  
Decided on 14th December 1928.

(a) Bengal Regulation (5 of 1812), S. 3—  
Contract to do gratuitous service in lieu of  
rent is not illegal either under S. 3 of the  
Regulation or under Contract Act, S. 23.

A contract to do gratuitous service for a certain number of days in a year in lieu of rent for the land occupied is not illegal as being against public policy, nor is it illegal for being indefinite and arbitrary under S. 3 of the Regulation. [P 224 C 2]

(b) Bengal Tenancy Act, S. 74—Contracts  
of service in lieu of rent.

Contracts to do gratuitous service in lieu of rent are governed not by Bengal Tenancy Act but by Transfer of Property Act. [P 224 C 2]

*Bankim Chandra Mukherjee and Tara Pada Banerjee—for Appellants.*

*Gopendra Nath Das—for Respondents.*

**Judgment.**—These two appeals are by the defendants and arise out of two rent suits commenced by the plaintiffs respondents. The plaintiffs prayed for recovery of rent at the rate of Rs. 6 and damages at 25 per cent. The case of the plaintiffs is that their predecessor took settlement of the choukidari chakran lands to which the disputed lands appertain and that the defendants are in possession of these lands by doing gratuitous work or begar for 12 days every year in lieu of rent. The defendants contested the suit and amongst other defences they raised the contention that the suit for rent could not be maintained as the stipulation to work for 12 days in the year was arbitrary and indefinite and is opposed to the provisions of S. 3, Regn. 5 of 1812. The trial Court held that the agreement to do begar work for 12 days has been

established in both the cases and decreed the suit at the rate of Rs. 2-4-0 a year in each of these suits. The lower appellate Court has taken the same view.

In second appeal by the defendants it has been contended that such an agreement, namely, to do begar in lieu of rent is contrary to public policy and should not be given effect to. It is said that such a contract contravenes the provisions of S. 23, Contract Act. It is also argued that as the contract to do work for 12 days in the year is indefinite and arbitrary such an imposition cannot be made under S. 3, Regn. 5 of 1812. All that S. 3 lays down is that no arbitrary and indefinite imposition could be made in addition to rent, such impositions being in the nature of abwabs. S. 74, Ben. Ten. Act, says that :

"all impositions upon tenants under the denomination of abwab, mahtut or other like appellations in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void."

There is nothing in Regn. 5 of 1812 to suggest that there cannot be a valid agreement by which in lieu of rent the tenant may agree to perform certain services. There is nothing indefinite in the contract for all that is required of the tenant is work for 12 days in the year. It is not known, it is true, whether 12 days are at the option of the tenant or at the option of the landlord. It has been contended, as I have already said, that S. 3, Regn. 5 of 1812, should be so construed as not to legalise the imposition of the arbitrary rent of this description. It appears, however, that the section of the regulation to which I have referred altered certain of the provisions of Regn. 8 of 1793 which laid down that where abwabs were consolidated with the asil jama into one specific sum, such abwabs could be realised. Besides, there is authority for saying that cases of this description are governed not by the Bengal Tenancy Act but by the Transfer of Property Act. The tenures are really in the nature of service tenures and I am not satisfied that they are contrary to public policy and are in any way illegal. Such contracts are not unknown in this country. In the circumstances, I think, the view taken by the Courts below is right and these appeals must be dismissed with costs.

S.N./R.K.

*Appeals dismissed.*



## A. I. R. 1929 Calcutta 225

RANKIN, C. J.

*Rajkishore Gope and others*—Plaintiffs—Petitioners.

v.

*Bhabatosh Chakravarty and others*—Defendants—Opposite Party.

Civil Revn. Applns. Nos. 568 and 569 of 1928, Decided on 21st August 1928, from decision of Munsif, Naogaon, in Money Suit No. 1536 of 1927.

(a) Civil P. C., O. 21, R. 60—Debtor agreeing that sums due to him be realized direct by creditor—Sums attached by another creditor—Objection by first creditor should be allowed.

A contractor incurred a debt for the security of which he agreed that the creditor would be entitled to receive direct, the sums due to him from the person for whom he was executing the contract till its completion and the final adjustment of the whole amount.

*Held:* that a judgment-creditor of the contractor could not attach the sum which was to be paid not to the contractor but to his creditor, as the judgment-creditor stands in the shoes of his debtor who could not have claimed the amount against his creditor. [P 226 C 1]

(b) Civil P. C., S. 115—Mistake upon fact or law on merits e. g., not properly following provisions of O. 21, R. 60 can be revised.

The High Court can interfere in a case of mistake by the lower Court upon the fact or law on its merits, occasioned by not directing proper attention to O. 21, R. 60, to find out whether the attached property was in the judgment-debtor's possession and whether objector was entitled to resist the claim of the decree-holder: 46 Cal. 962, Dist. [P 226 C 1]

(c) Civil P. C. O. 21, R. 63—Attachment before judgment.

Order 21, R. 63 applies to a case of attachment before judgment: 41 Mad. 849 (F.B.), Rel. on. [P 226 C 1]

*Bireswar Bagchi*—for Petitioners.*Radhabenode Pal*—for Opposite Party.

**Judgment.**—In this case it appears that one Asutosh Chakravarti was a builder and he had a building contract with the Naogaon Ganja Cultivators' Co-operative Society for the construction of a charitable dispensary. He had other works in hand and in order to finance the building work he proposed to take a loan from the Naogaon Loan Office. He submitted a petition to the Naogaon Ganja Cultivators' Co-operative Society saying that he desired to take a loan and asking them to enter into an arrangement that when their bills were certified as due they would pay the money to the Loan Company direct. In that way a certain

amount of security for the loan would be made realizable to the Loan Society. This arrangement has been held by the Munsif to have been an arrangement that the builder would borrow sums up to Rs. 5,000 but it is quite clear from the agreement which was entered into with the building owners the Ganja Cultivators Co-operative Society, that the authority to pay the money to the lenders would not be withdrawn except by the consent of the Loan Society until the completion of the works and the final adjustment of the whole amount.

Now, two creditors of the builder for Rs. 313-8-9 & Rs. 349-14-0 respectively attached money in the hands of the building owners the Co-operative Society for the debt of the builder Asutosh Chakravarti and thereupon the lenders put in a claim. The proceedings were under an attachment before judgment and the effect of the judgment of the Munsif is shortly this. Looking to the original proposal he has come to the conclusion that the original intention was to borrow the sum of Rs. 5,000 and the builder having borrowed the sum of Rs. 5,000 and having paid it back under the arrangement he has held that the contract was exhausted. In my judgment he has taken an entirely erroneous view. When the question is as regards a claim one is to have regard to the directions contained in R. 60, O. 21 of the Code and has to find whether or not the property was in possession of the judgment-debtor or of some persons in trust for him. No doubt when an attachment is of a debt it is difficult to apply the notion of possession but one has in that case also to consider the matter upon the basis that the judgment-creditor the attaching creditor can have no right except his right as one standing in the shoes of his debtor. One has to ask oneself whether between Asutosh on the one hand and the lender on the other hand, Asutosh could possibly maintain that he had a right to take this money direct from the building owners or whether the position was that the lender was entitled to say:

"the building owners are to pay me and I shall have the security for the amount advanced."

It is quite clear on the finding of the learned Judge that this transaction did not stop with one sum of five thousand rupees. The learned Munsif found that the lender had taken from the Ganja



Cultivators' Co-operative Society directly some 16 or 17 thousand rupees. It is quite clear, therefore, that whatever be the construction of the original document whether it be for one sum not exceeding five thousand rupees or whether it be that the loan at any one time would not exceed Rs. 5,000 these parties were acting under the original arrangement which was continuing and it is impossible to say that Asutosh, who had never withdrawn the authority to the lender to take the money direct from the Ganja Cultivators' Co-operative Society and who had promised not to withdraw it until the completion of the work could claim this money as against the Loan Society. In these circumstances I have no doubt whatever that the Munsif was wrong in rejecting this claim.

The question then arises whether this is a case that can be interfered with under S. 115, Civil P. C., I have great difficulty on that point, because it is not a case like the one cited before me: *Hindley v. Joy Narain Marwari* (1), where the error of the Court below consisted in the misconstruction of its own power. This is in some sense a case of mistake upon the fact or law on the merits. At the same time having considered this matter and examined some of the cases in this Court I think it is open to me upon this occasion to hold that the Munsif has not directed his attention properly to the rule in question and that under R. 60, O. 21, Civil P. C., he should not merely have applied his mind to the question whether the original contract existed or not. In my judgment that would not end the matter at all. The Munsif ought to have applied his mind to the question whether this was a property which was in the judgment-debtor's possession so that the creditor of the judgment-debtor would be entitled to resist the claim. On the whole it appears to me that these applications should succeed. I desire to say that there is no doubt or difficulty in applying R. 63, O. 21 to a case of attachment before judgment. The matter is the subject of a Full Bench case of the Madras High Court: *Mallikarjuna Prasad Nayadu v. M. Virayya* (2). So far as I

can see that has been the law of this Court also since Sir Barnes Peacock's time.

In these circumstances the rules should be made absolute, the orders of the Munsif should be set aside and both the claims should be allowed with costs both in the lower Court and in this Court. Hearing fee one gold mohur in each case.

M.N./R.K. Rules made absolute.

### \* A. I. R. 1929 Calcutta 226

SUHRAWARDY AND JACK, JJ.

*Ramgopal Sanyal and another*—Plaintiffs—Petitioners.

v.

*Narendra Nath Ghatak*—Defendant—Opposite Party.

Civil Revn. Appln. No. 541 of 1928, Decided on 1st June 1928, from order of Dist. Judge, Rajshahi, D/- 30th January 1928.

\* Civil P. C., S. 115—Order in appeal that 'no appeal lies from order rejecting plaint—Second appeal and not revision lies—Civil P. C. O. 7, R. 11.

The order rejecting a plaint is a decree. An order passed in appeal from that order that no appeal lies amounts to dismissal of the appeal. Even such order is a decree and is open to a second appeal and not a revision to the High Court: 8 C. W. N. 64, *Rel. on.* [P 227 C 1]

*Nripendra Chandra Das*—for Petitioners.

*Jatindra Mohan Chaudhury*—for Opposite Party.

**Judgment.**—This revision petition is directed against an order of the District Judge of Rajshahi dated 30th January 1928, dismissing the petitioners' appeal on the ground that no appeal lay from the order of the trial Court to him. The plaintiff-petitioners brought a suit in the Court of the Subordinate Judge of Rajshahi for a declaration that the sale held in execution of a decree obtained by the opposite party was null and void. The Subordinate Judge ordered the petitioners to put in Court-fees sufficient to cover the value of the claim. The petitioners instead of doing that applied for amendment of the plaint. The learned Subordinate Judge rejected the petition for amendment and thereafter rejected the plaint under O. 7, R. 11, Civil P. C. That order is according to the definition of 'decree' as given in S. 2, Civil P. C., a decree and was open to appeal. The petitioners appealed to the District Judge

(1) [1919] 46 Cal. 962=54 I. C. 439=24 C. W. N. 288.

(2) [1918] 41 Mad. 849=35 M. L. J. 231=3 M. L. W. 197=47 I. C. 1000=(1918) M. W. N. 693 (F.B.).



who dismissed the appeal on the ground that no appeal lay to him.

This Rule has been obtained against that order and a preliminary objection is taken that S. 115, Civil P. C. does not apply as in the present case the order of the Court below was open to appeal. We think that the preliminary objection should prevail. The order rejecting a plaint is a decree. An order passed in appeal from that order is also a decree and is therefore open to a second appeal to this Court. The learned vakil for the petitioners argues that where the lower appellate Court holds that no appeal lies to him, there is no appeal to this Court and his only remedy is to proceed with the help of S. 115, Civil P. C. This is not a correct view of the law. Whatever the order of the lower appellate Court may be and on whatever ground it may be based, the effect of it is that the plaintiffs' appeal is dismissed, and if from the original order there was an appeal to the District Judge a second appeal to this Court is also available from the order of the District Judge. In support of this view we may refer to the case of *Mathura Mohan Pal v. Amiruddi* (1). In this view we think that this Rule is incompetent. It is therefore discharged with costs—2 gold mohurs.

M.N./R.K. *Rule discharged.*

(1) [1903] 8 C. W. N. 64.

### A. I. R. 1929 Calcutta 227

LORT-WILLIAMS, J.

J. C. Galstaun—Plaintiff.

v.

Diana Sarkies and another — Defendants.

Original Civil Suit No. 1365 of 1926,  
Decided on 21st May 1928.

(a) Letters Patent (Calcutta), Cl. 12—Suit for declaring a person secured creditor—Land outside High Court's Original Jurisdiction—High Court on original side cannot entertain suit (But see A. I. R. 1927 Bom. 278 (F.B.)).

A suit for declaring a person as secured creditor of land is a suit for land and if the land in question is outside the local limits of the ordinary original jurisdiction of the High Court, the High Court in the exercise of its ordinary original jurisdiction cannot try the suit: 19 Cal. 361 Note, *Foll.* [P 227 C 2]

(b) Letters Patent (Calcutta), Cl. 12—Interest in land—Civil P. C. O. 21, R. 54.

Mortgagee's interest is an interest in land. [P 227 C 2]

S. C. Mitter and P. C. Kar—for Plaintiff.

W. W. K. Page—for Defendants.

**Judgment.**—This case started as an originating summons which was originally heard by my learned brother Costello, J., who made an order on 6th July transferring it to the list of suits for hearing, and giving certain orders, with regard to discovery and evidence, and reserving the question of jurisdiction.

The direction asked for under R. 1, Ch. 13, Rules of the High Court, comes under sub-S. (e) of that rule or alternatively under (b), the one directing executors, administrators, etc., to do or abstain from doing a particular act and the other concerning the ascertainment of any class of creditor and the principal direction asked for by the plaintiff in this case is a direction to the defendants the executrix and executor to admit him the plaintiff as a secured creditor of the estate of C. M. Sarkies deceased.

I am of opinion that this procedure if allowed would simply amount to a way of avoiding the limitations imposed by the Letters Patent for the High Court of Calcutta 1865 which under Cl. 12 ordain that the High Court in the exercise of its ordinary original civil jurisdiction shall be empowered to try suits for land if such land shall be situated within the local limits of the ordinary original jurisdiction of the said High Court.

The property in question in this suit is situated outside such local limits. It has been held by the High Court of Calcutta in the case of *Kante Chunder v. Kissory Mohan Roy* (1) that a suit for declaring any interest in land is a suit for land, and with this decision I agree.

Before I could give the direction asked for, I should have to decide that the plaintiff was a mortgagee of the property which would be a decision declaring an interest in land and I am satisfied that such a decision would be beyond the powers conferred by the Letters Patent. Therefore I have no jurisdiction to entertain this suit which is accordingly dismissed with costs on scale No 2.

S.N./R.K.

*Suit dismissed.*



## \* A. I. R. 1929 Calcutta 228

SUHRAWARDY AND GARLICK, JJ.

*Khetra Nath Bakuly and others—*  
Plaintiffs—Appellants.

v.

*Baharali and another—*Defendants—  
Respondents.Appeal No. 1864 of 1926, Decided on  
21st August 1928, from appellate decree  
of 1st Sub-Judge, Howrah, D/- 19th May  
1926.\* (a) Lease—Covenant—Alienee from per-  
manent lessee recognized by lessor agreeing  
not to alienate—Alienee is not bound by  
covenant against alienation.A purchaser, from a permanent lessee who  
had covenanted not to alienate, if recognized  
by the lessor is not bound by the covenant  
against alienation. [P 228 C 2](b) Transfer of Property Act, S. 111 (g)—  
Breach of covenant against alienation—  
Right of re-entry not reserved—Lessor can-  
not sue for possession.Where a lessor does not reserve to himself  
the right of re-entry on breach of a covenant  
against alienation, the lessor cannot sue the  
holder of the leasehold for recovery of posses-  
sion on the breach of the condition : A. I. R.  
1924 Cal. 1012, *Expl. (Case law Referred.)*

[P 229 C 1]

*Satindra Nath Mukerjee—*for Appel-  
lants.*Apurba Charan Mukerjee—*for Respon-  
dents.

**Judgment.**—This is an appeal by the plaintiffs in a suit for recovery of possession of land in the following circumstances : In 1876 the plaintiffs' predecessors granted a permanent heritable lease to one Beni Madhab in respect of land purported to be used for habitation. After Beni Madhab's death the land was enjoyed by his widow, Matangini. In 1913 Matangini transferred the leasehold right in the land to one Ambika. In 1918 Ambika's son Dharendra transferred it to the present defendant. In the lease granted to Beni Madhab there was a condition or a covenant that the lessee should not be entitled to transfer the lease. The plaintiffs have accordingly brought the suit on the allegation that the covenant in the lease was broken and that the defendant was a trespasser on the land. The trial Court gave a decree to the plaintiffs but the lower appellate Court has dismissed the plaintiffs' suit mainly on the ground of estoppel and waiver. The learned Subordinate Judge finds that Ambika, the transferee from Matangini was recognized by the landlord who received rent from

him. He accordingly thinks that as the plaintiffs waived the right under the lease of objecting to the transfer by the lessee, subsequent transferees of the interest were led to believe that the plaintiffs did not intend to enforce the covenant or that the lease was transferable by custom. The plaintiffs appeal ; and it is argued on their behalf that the lease granted in favour of Beni Madhab continued operative in the hands of his widow and of Ambika whom they recognized as their tenant till Dharendra committed breach of covenant by selling the land to the defendant. The defendant accordingly is liable to be ejected. The case in the plaint, however, is differently made. There it was said that the holding was abandoned on the death of Beni Madhab's widow Matangini and that Dharendra son of Ambika not having been an heir of Beni Madhab had no interest in the land to pass to the defendant and the cause of action was based upon these allegations. These allegations have not been accepted by the Courts below since they concurred in finding that the landlord accepted Matangini's transferee, Ambika as his tenant. The plaintiffs' suit was accordingly misconceived and he cannot get the relief in the suit as it was brought.

Nextly, the plaintiff's contention that the lease in favour of Beni Madhab continued operative with all its conditions and the right to recover possession accrued on Dharendra's transferring it to the defendant, cannot also be supported. According to the facts mentioned by the plaintiffs in their plaint and accepted by the Courts below the lease came to an end as soon as Matangini committed the breach of the covenant against alienation. All the subsequent holders of the land were either plaintiffs' tenants being recognized by them or trespassers. Ambika was recognized by the plaintiffs. He purchased nothing according to the plaintiffs' case from Matangini because she had no right to sell. Whatever status he had in respect to the land was derived from the recognition by the plaintiffs. The plaintiffs, therefore, cannot sue the defendants for ejectment on the ground of violation of the covenant against alienation.

Then again in the lease in favour of Beni Madhab the lessor did not reserve the right of re-entry on breach of a covenant. It has been held in a number of



cases that where the lessor does not reserve to himself the right of re-entry the covenant against alienation is not enforceable and the lessor cannot sue the holder of the leasehold for recovery of possession on the breach of the condition: *Jogesh Chandra Roy v. Mokbul Ali Chowdhury* (1), *Mohammad Reajuddin Ahmad v. Basuda Sundari Dasi* (2), *Mahananda Roy v. Saratmani Debi* (3) and *Nil Madhab Sikdar v. Narattam Sikdar* (4). The plaintiffs cannot in this case rely for their right to re-entry on the lease in favour of Beni Madhab. In my opinion the Subordinate Judge is right in holding that the plaintiffs by their conduct created an impression on the mind of the defendant that they would not enforce the condition against alienation by accepting Ambika the transferee from Matangini as tenant: *Doe v. Rowe* (5); *Doe v. Sutton* (6).

I should like to say a word with regard to the decision in *Safar Ali Mia v. Abdul Rashid Khan* (7). The Munsif was obliged to rely upon this case in holding in favour of the plaintiffs. The learned Subordinate Judge finds it difficult to distinguish this case on the ground that there was no reservation of the right of re-entry by the lessor. It does not, however, appear from the report that no right of re-entry was reserved and the point does not seem to have been argued at all. It may be said as has been held in *Nil Madhab Sikdar v. Narattam Sikdar* (4) that the condition restraining a permanent lessee from alienating his interest is void in law as enacted by S. 10, T. P. Act. When a lessor grants a permanent lease he carves out a major portion of his interest and bestows it upon the lessee. He has no possessory interest left in the property unless he reserves to himself a right of re-entry. For these reasons, in my judgment the decree of the lower appellate Court should be confirmed and this appeal dismissed with costs.

M.N./R.K.

*Appeal dismissed.*

## \* A. I. R. 1929 Calcutta 229

MUKERJI AND GRAHAM, JJ.

*Santiram Mandal* — Accused — Petitioner.

v.

*Emperor* — Opposite Party.

Criminal Revn. No. 972 of 1928, Decided on 7th January 1929.

\* Criminal P. C., S. 208 (1) — Complainant is to be heard and need not necessarily be examined.

Section 208 (1) enjoins that the complainant (if any) shall be heard. It is not the examination of the complainant that is necessary but only that he shall be heard. [P 230 C 2]

*B. C. Chatterjee, Mrityunjoy Chattopadhyaya and Bholanath Roy* — for Petitioner.*N. K. Basu, Ambikapada Chaudhury and C. C. Sinha* — for the Crown.

**Mukerji, J.**—This Rule has been issued to show cause why a commitment to the Court of Sessions should not be quashed on two of the grounds set forth in the petitioner's petition of motion. The commitment has been made for the trial of the petitioner on a charge under Ss. 211, 193 and 194, I. P. C. The two grounds on which the Rule has been issued are :

"First for that in view of the fact that the judicial enquiry in respect of which the petitioner is alleged to have committed the offence with which he has been charged was in regard to a prosecution which was not legally instituted, no judicial notice could be taken of the complaint made or of the evidence given by the petitioner both of which are *non est* in the eye of law, and the commitment made on the basis thereof is not sustainable in law."

Second : For that the order of commitment is vitiated by the fact that the complainant was not examined at the enquiry before the Magistrate.

Now the relevant facts are these : The petitioner lodged a complaint in the Court of the Magistrate at Howrah against five persons including one Mr. Mould. It was stated in the complaint that on 7th March 1928 a lock out was declared by the authorities of the East Indian Railway against 14,000 men, working in their Lillooh Workshop who had gone on strike, that on 28th March 1928, when some of the strikers were proceeding homewards they were held up by some Police Officers, some Goorkha guards of the Watch and Ward Department of the Railway and some men of the Railway Volunteer Rifles. It was stated that

(1) A. I. R. 1921 Cal. 474.

(2) [1916] 28 C. L. J. 278=48 I. C. 330.

(3) [1911] 14 C. L. J. 585=10 I. C. 374.

(4) [1890] 17 Cal. 826.

(5) [1826] 2 C. &amp; P. 246=R. &amp; M. 343.

(6) [1841] 9 C. &amp; P. 706.

(7) A. I. R. 1924 Cal. 1012.



offences punishable under various sections of the Penal Code were committed by the accused persons. The specific allegation made against Mr. Mould was in these words :

"While all this was going on Mr. Mould came running from the direction of the Loco quarters and snatching off a gun from a Goorkha guard, fired it without any previous warning on the strikers. One man was hit and fell down by the side of the road."

On being examined on oath on the said complaint the petitioner said :

"Then Mr. Mould came running from the Loco quarters, snatched up a gun from a Goorkha and shot a man who was standing under a banian tree on the side of the road and the man dropped down and did not move again."

On this complaint a judicial enquiry was held by Mr. G. S. Dutt, the District Magistrate, in which a number of witnesses were examined, and the complaint was dismissed under S. 203, Criminal P.C. Mr. Mould then moved the District Magistrate for proceeding against the petitioner under S. 476, Criminal P. C. The petitioner showed cause but eventually the District Magistrate preferred a complaint against the petitioner for having committed offences under Ss. 193 and 211, I. P. C. On the basis of this complaint an enquiry preliminary to commitment was held by Mr. H. C. Bose, Deputy Magistrate, who eventually made the order of commitment against which this Rule is directed.

The second of the two grounds set forth above may be disposed of quite soon. It rests upon the words of S. 208, sub-S. (1) which says :

"The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any) and take . . . evidence etc."

It is said that the subsection means that if there is a complainant his evidence must be taken, and that in this respect the provision contained in this subsection is very different from the provisions contained in S. 200 Proviso (aa) which dispenses with the examination of the complainant in any case in which the complaint has been made by a Court or a public servant acting or purporting to act in the discharge of his official duties, and in S. 244 (1), proviso and S. 252 (1), proviso which say that in the case of a complaint by a Court the Magistrate shall not be bound to hear any person as complainant. It is said that the omission in S. 208 of a proviso of this character to be found in Ss. 244 and 252 and on the other

hand the deliberate use of the words referred to above in S. 208 is significant, and that this difference has been made in view of the importance and seriousness of the offences to which the procedure in Chap. 17 is applicable. I am of opinion that the argument though specious is not sound. In the first place there is a palpable difference between hearing the complainant and examining him, so that what S. 200, Proviso (aa), means is that the complainant need not be examined on the complaint while S. 244 (1), proviso and S. 252 (1), proviso mean that he need not be heard, but on the other hand S. 208 (1), enjoins that the complainant (if any) shall be heard. It is not the examination of the complainant that is necessary under S. 208 (1), but only that he shall be heard. In this case it is not suggested that the complainant was not heard. What reason there is for making this distinction in this respect between the procedure in trials before Magistrate on the one hand and enquiries by them preliminary to commitment on the other need not be speculated upon ; probably it was a case of pure oversight so far as the enactment of S. 208 is concerned, or it may be, though it is hardly likely that the distinction was deliberate. Be that as it may, it is clear beyond doubt that the examination of the complainant was not obligatory.

The first of the grounds is based upon the view that the complaint was not sustainable because of the bar imposed by S. 132 of the Code. It is said that if the Court could not entertain the complaint by reason of the bar, no offence was committed by the petitioner under S. 211 or S. 193 or S. 194, I. P. C. In the present case I do not desire to express any opinion on the question whether the offences could be held to have been committed by the petitioner if his contention that S. 132 of the Code barred the complaint was well-founded ; because in the view I take of the applicability of S. 132 it is not necessary for me to go into that question. S. 132 is worded very differently from S. 195. The words in S. 132 are :

"No prosecution against any person for any act purporting to be done under this chapter shall be instituted in any criminal Court,"

while the words in S. 195 are :

"No Court shall take cognizance of any offence punishable under section etc."



In connexion with S. 132, therefore, two matters have to be considered : first whether the filing of a complaint against Mr. Mould amounted to an institution of a prosecution against him ; and second whether the complaint was in respect of any act of his purporting to be done under Ch. 9. There is authority for the proposition that the prosecution of a person does not commence till he is summoned to answer a complaint : *Golap Jan v. Bholanath Khettry* (1). Whether the institution of a prosecution as contemplated by S. 132 is synonymous with the commencement of a prosecution for the purpose of a suit for malicious prosecution is a matter on which I have my doubts but it does not call for any decision here. I would rather rest my judgment on the second matter which I have already referred to, namely the question whether the acts alleged against Mr. Mould fall within Ch. 9 of the Code; in other words to quote the words of S. 127 whether a Magistrate or an officer in charge of a Police Station had required the assistance of Mr. Mould, and Mr. Mould had done the acts attributed to him on such requisition. There is a passage in the order of the District Magistrate on which a good deal of reliance has been placed on behalf of the petitioner, so far as this question is concerned. The passage runs thus :

"It appeared from Mr. Sturgis' evidence that he considered the assembly of strikers to be an unlawful one and that he purported to act under the provisions of Ch. 9, Criminal P. C., in dispersing the assembly. He admitted that he had directed the police under him as well as other accused persons named in the complaint to assist him in dispersing the assembly which he considered unlawful and that, in so dispersing the assembly, these persons had, under his order used force."

The passage seems not to be entirely borne out by the evidence of Mr. Sturgis and is evidently loosely worded in so far as it refers to all the other accused persons. It is not the complainant's case anywhere that the assistance of Mr. Mould was requisitioned by Mr. Sturgis and it cannot also be the case of Mr. Mould. I am of opinion, therefore, that the acts attributed to Mr. Mould can by no means be regarded as falling within Ch. 9 and consequently S. 132 has no application to this case. The rule must

therefore, be discharged. Let the record be sent down as early as possible.

**Graham, J.**—In my opinion the rule should be discharged on two grounds : 1. Firstly, because the case instituted by the petitioner Santiram Mandal had not reached the stage at which it became a prosecution, there being merely an inquiry which resulted in the dismissal of the complaint (1) (*I. L. R. 38 Cal. 880*), and 2. Secondly, because, even if S. 132, Criminal P. C., be held to apply, it seems to be clear that it can have no application so far at all events as Mr. Mould is concerned. I agree that the rule should be discharged.

M.N./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 231

MITTER, J.

*Sm. Pakija Bibi and others*—Defendants—Appellants.

v.

*Adhar Chandra Nath and others*—Plaintiffs—Respondents.

Appeal No. 168 of 1927, Decided on 3rd May 1928, from appellate decree of Addl. Dist. Judge, Zillah Tipperah, D/- 10th September 1926.

(a) Registration Act, S. 17, Cl. (6)—Unregistered solenama filed at the mutation proceedings before Collector is not a part of the decree of the Land Registration Collector and is not admissible in evidence—Transfer of Property Act, S. 54.

Where an unregistered solenama was filed before the Collector in proceedings taken under the Land Registration Act for mutation of names and name of a cosharer was registered in respect of certain property and it was stated in the solenama that he was in exclusive possession for over 30 years and the other cosharer gave up all rights to the property on payment of some money :

*Held* : that the solenama did not form a part of the decree of the Land Registration Collector. That there should have been a deed of sale which in order to be effective was necessary to be registered having regard to the provisions of S. 54, T. P. Act, and the solenama was not admissible in evidence.

[P 232 C 2]

(b) Cosharer — Adverse possession—Mere admission of exclusive possession by one cosharer, cannot create adverse possession against him.

Mere admission by one cosharer that another has been in exclusive occupation of a certain property would not alone create adverse possession against him and his title cannot be said to have been extinguished from the date of admission.

[P 232 C 2]

(1) [1911] 38 Cal. 880 = 11 I. C. 311 = 15 C. W. N. 917.



(c) **Transfer of Property Act, S. 44—Constant residence of members is not necessary—It is sufficient if house is an undivided house.**

The requirements of S. 44 are satisfied if it is shown that the house is an undivided house and that occasionally the members of the family reside in the house. It is unnecessary to constitute an undivided family for the purpose of S. 44 that the members of a family should have constantly resided in the dwelling house, nor is it necessary that they should be joint in mess : 30 All. 324 Ref. and 23 Bom. 73, Rel. on. [P 233 C 1].

*Upendra Kumar Roy*—for Appellants  
*Asitaranjan Ghose* for Abinash Chandra Ghose—for Respondents.

**Judgment.**—In this appeal by the defendants several points of law have been raised. The case of the plaintiff-respondent is that they acquired the property in suit including cadastral survey plot 1304 of defendant 7 in January 1922. The property in suit belonged to the father of defendant 7 and to Pakija who is defendant 1 in the suit and it is said that three *keras* and odd land was inherited by the sisters from their parents. Shortly after the death of the father of defendants 1 and 7 a solenama was filed before the Collector in proceedings taken under the Land Registration Act for mutation of names and the name of defendant 1 was registered in respect of the disputed plots and it was stated in that solenama that for over 30 years defendant 1 was in exclusive occupation of the disputed lands. It was also stated that on payment of Rs. 250 defendant 7 gave up whatever right she had in the disputed properties to defendant 1. This solenama was in the year 1914. There were partition proceedings, however, between defendant 1 and defendant 7 in which the disputed lands were included. The contention of the defendants is that whatever rights plaintiffs' vendor defendant 1 had in the disputed properties have been extinguished both by adverse possession and the solenama which was executed in 1914. Both the Courts below have decreed plaintiffs' suit and have held that the solenama was not admissible in evidence for want of registration. Against the decision of the lower appellate Court affirming the decree of the Munsif in favour of the plaintiffs, now respondents, a second appeal has been taken to this Court and it has been contended by the learned vakil for the appellants that the Courts

below have erred in law in rejecting the compromise petition from evidence on the ground that it was not registered. His argument is that as it formed part of the mutation proceedings and the solenama was referred to in the order-sheet of the Collector no registration was necessary having regard to the provisions of S. 17, Registration Act. It is conceded that the solenama did not form a part of the decree of the Land Registration Collector. It was not incorporated in the same and even assuming that the decree of the Land Registration Collector was a decree of a Court within the meaning of S. 17, Cl. (2), sub-Cl. (6) as the solenama was not incorporated in the Land Registration decree or order S. 17, Cl. (2), sub-Cl. (6) did not apply to the present case and as for the extinction of the right of defendant 1 to the disputed properties of defendant 7 it was necessary that there should be a deed of sale which in order to be effective was necessary to be registered having regard to the provisions of S. 54, T. P. Act, the solenama has rightly been held not to be admissible in evidence. It is said next that at any rate there are admissions in the solenama which would go to show that defendant 7's title to this property has been extinguished and the title vested in defendant 1 sometime before the execution of the deed of sale in favour of the plaintiff in 1922. The admissions, however, are to the effect that defendant 1 has been in exclusive occupation of the disputed lands. That alone would not create adverse possession as against the cosharer, namely, the plaintiffs' vendor, that is defendant 7. After the solenama which was executed in 1914 more than 12 years had not elapsed when the deed in favour of the plaintiff was executed. Consequently the title of the plaintiffs or the plaintiffs' vendor cannot be said to have been extinguished by that date.

It has next been argued that no deed was necessary to effect the transfer as defendant 1 was put in possession and reliance has been placed on the class of cases of which the case of *Mahomed Musa v. Aghore Kumar Ganguli* (1), is a type. That case, however, is distinguishable. There, the possession was transferred long before the Transfer of Property Act came into operation. There were actings and

(1) A.I.R. 1914 P.C. 27=42 Cal. 801=42 I.A. 1 (P.C.).



conduct of the parties for over half a century and the Judicial Committee of the Privy Council in those circumstances laid down that although a deed was not executed having regard to the long course of the actings and conduct of the parties the defect of the non-existence of the deed was immaterial. I think, therefore, that the contention raised by the appellants on this part of the case cannot be sustained. A special ground has been taken with regard to the C. S. plot 1304 which is said to be a homestead on which there is a dwelling house. It is said that by reason of S. 44, T. P. Act no decree for joint possession could be given to the plaintiff in respect of this dwelling house. The learned District Judge in appeal has given the following reasons for coming to the conclusion that S. 44 does not apply to the facts of the present case. He says:

"There must be joint management in an undivided family to save the bari and allow the other occupants of that bari the privilege of S. 44, T. P. Act. No one is going to contend with any degree of reason that joint possession is to be denied to a purchaser in a case like this, where the vendor is living away with her husband for many years. Any jointness of management ceased with her severance from home at marriage. Appellant therefore relies in vain on *Pranjivan Dayaram v. Bai Reva* (2), and it is not necessary to refer to *Khirode Chandra v. Saroda Prosad* (3), for definition of family which was only mentioned as showing that the sister living away was a part of the family. This is not denied, but there is no presumption of jointness unless it is shown."

I think the learned District Judge has taken a somewhat narrow view of the scope of S. 44. The dwelling house is the paternal property of two sisters, defendants 1 and 7 are entitled to live in this house as member of the joint undivided family. It is said that defendant 1 is actually living in this house. It is true that defendant 7 is living away. But the requirements of S. 44 is satisfied if it is shown that the house is an undivided house and that occasionally the members of the family, namely, two sisters in this case reside in the house. It is unnecessary to constitute an undivided family for the purpose of S. 44 that the members of the family should have constantly resided in the dwelling house nor it is necessary that they should be joint in mess. Reference may be made to the cases of *Sultan Begam v. Debi Prosad* (4)

(2) [1880] 5 Bom. 482.

(3) [1910] 12 C.L.J. 525=7 I.C. 436.

(4) [1903] 30 All. 321=5 A.L.J. 352=(1908) A.W.N. 126.

and *Vaman Vishnu Gokhale v. Vasudev Morbhat Kale* (5). In the latter case Farran, C. J., pointed out that it is ownership of the dwelling house and not its actual occupation which brings the provisions of S. 44, Partition Act, into play. It will be noticed that the same words "undivided family" which occur in S. 44, T. P. Act also occur in S. 44, Partition Act (Act 4 of 1893). In this view, I think so far as plot 1304 is concerned the decree of the Courts below in favour of the plaintiff for joint possession cannot be sustained. The title of the plaintiff to the half-share in plot 1304 is established but the decree for joint possession given in his favour is set aside. It will be open, however, to the plaintiff to institute a suit for partition in respect of the same.

The result is that the decree of the lower appellate Court is affirmed except with reference to the C. S. plot 1304 in respect of which the decree for joint possession given in favour of the plaintiff is set aside. Subject to this small variation the appeal fails and must be dismissed with costs.

A.L./R.K. *Decree varied.*  
(5) [1890] 23 Bom. 73.

## A. I. R. 1929 Calcutta 233

MUKERJI AND GARLICK, JJ.

*Digambar Suthar and others*—Defendants—Appellants.

v.

*Suajan and others*—Plaintiffs—Respondents.

Appeal No. 148 of 1925, decided on 18th April 1928, from appellate decree of Addl. Sub-Judge, Chittagong, D/- 16th June 1924.

(a) Transfer of Property Act, S. 89—Order of sale of mortgaged property extinguishes mortgagee rights in it—Civil P. C., O. 34, R. 5.

An order under S. 89 for the sale of the mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished: *A. I. R. 1918 P. C. 34* and *A. I. R. 1920 P. C. 79, Rel. on, (Cases discussed)*.

[P 236 C 2]

(b) Civil P. C., O. 34, R. 1—Mortgagee not impleading transferees of equity of redemption in suit for sale—Decree passed in such suit is nullity.

Decree passed in a mortgage suit in which the transferees of the equity of redemption were not impleaded, although they were neces-



sary parties, is a nullity, and the purchaser in execution of such decree acquires nothing.

[P 236 C 2]

*Chandra Sekhar Sen*—for Appellants.

*Narendra Kumar Das*—for Respondents.

*Biraj Mohan Mazumdar*—for Dy. Registrar.

**Mukerji, J.**—This appeal arises out of a suit which was instituted by the plaintiff for recovery of possession after declaration of title to the lands of Sch. 2 of the plaint. These lands form a part of plot 1, Sch. 1, of the plaint. One Balaram Acharjya, the predecessors of defendants 5 to 8 executed a simple mortgage of the lands of Sch. 1 in favour of one Krishna Mangal Sen, the predecessors of defendants 11 to 13, on 10th November 1893. In December 1893 the said Balaram Acharjya executed a usufructuary mortgage of the lands in suit in favour of the predecessors of defendants 1 to 4 and thereafter in June 1894 sold the said lands to them. In 1900 Krishna Mangal Sen sued on his mortgage. In that suit defendants 1 to 4 or their predecessor were not parties. Krishna Mangal obtained a decree on 19th January 1901, which was made absolute on 31st November 1903. At the execution sale that followed the father of defendants 9 and 10 purchased the lands of Sch. 1 on 8th June 1904 and they obtained delivery of possession through Court on 13th October 1904. On 25th June 1908 defendants 9 and 10 sold plot 1, Sch. 1, to the plaintiff and put him in possession thereof. Defendants 1 to 4 then instituted a suit against the plaintiff for recovery of possession of the disputed lands and obtained a decree on 16th August 1918 and succeeded in recovering khas possession by eviction of the plaintiff. In the decree passed as aforesaid a reservation was made in favour of the plaintiff in the following words :

• "This decree will not, however, affect any equitable right of the defendant (i. e., the present plaintiff) to which he may be entitled under his prior mortgage."

The plaintiff then instituted the present suit on 13th August 1921.

The Munsif dismissed the suit. The Subordinate Judge has reversed that decision and has decreed the suit declaring the plaintiff's title to the land and ordering that defendants 1 to 4 will be at liberty to redeem the property on payment of Rs. 229-12-0 within two months and that in default of such pay-

ment within the said period the right of the said defendants to redeem would be barred and the plaintiff would be entitled to obtain khas possession. Defendants 1 to 4 have then preferred this appeal.

The validity of the decree is challenged on various grounds which may be broadly classed under two heads : 1st, as regards the maintainability of the plaintiff's prayer for khas possession ; and 2nd, as regards the basis on which redemption has been allowed.

To deal with the first contention it is necessary to consider the rights of the parties, that is to say, those of the plaintiff as transferee from a purchaser at a sale held in pursuance of a decree for sale under the provisions of the Transfer of Property Act (4 of 1882) and those of the contesting defendants, namely, defendants 1 to 4 who are the owners of the equity of redemption but were not impleaded in the suit. As regards the rights of a purchaser at a mortgage sale where the suit is properly constituted, that is to say, where all persons having interest in the property comprised in the mortgage are parties thereto two views fundamentally different from each other, may be taken : he may be regarded as having acquired the equity of redemption as it stood at the date of the mortgage together with the lien of the mortgagee or he may be looked upon as having acquired the property as it stood at the date of the sale, that is to say, the property discharged of the mortgage lien. If the suit is properly constituted as aforesaid the title of the purchaser will be absolute and relate back to the time of the execution of the mortgage and it will make no difference to the rights of the purchaser whichever of the aforesaid two views be proceeded upon. The difference arises where the constitution of the suit is defective, that is to say, where all persons having interest in the property mortgaged have not been joined as parties in the suit. In such a case different results follow according as one view is taken, or the other, of the rights of the purchaser at the sale, and this has led to a divergence of judicial opinion in this country. This conflict has been summarized in the judgment of Suhrawardy, J., in the case of *Kristopada Roy v. Chaitanya Charan Mondal* (1), and the cases that have been

(1) A. I. R. 1923 Cal. 274 = 49 Cal. 1048.



noticed in that judgment are the more important of those that have been cited on behalf of the parties before us. On behalf of the appellants reliance has been placed on the two Full Bench decisions of the Allahabad High Court, namely, the cases of *Hargu Lal Singh v. Gobind Rai* (2) and *Madan Lal v. Bhagwan Das* (3). In the former of these cases a part of the mortgaged property was sold by the mortgagor, after the execution of the mortgage, to some third parties but the vendees were not made parties to the suit, and it was held that the auction-purchaser at the mortgage sale had no title to possession as against the vendees.

In the latter case the aforesaid decision was re-affirmed and applied to a case in which in a prior mortgagee's suit on his mortgage the puisne mortgagee and the purchaser at the sale on his mortgage decree to which the prior mortgagee was not a party were not made parties. To these may be added the case of *Entholi Kizhakki Kandy Kanaran v. Vallath Koylil Unnoli* (4), in which the Allahabad case first mentioned above was followed and applied to a case where a mortgagor, subsequent to the mortgage, sold the mortgaged properties to another person, who, however, was not impleaded in the mortgagee's suit. The appellants also rely on the case of *Agore Nath Banerjee v. Debnarain Guin* (5), in which the aforesaid Allahabad decisions were applied to a case where a person who had purchased a portion of the mortgaged property from the mortgagor subsequent to the mortgage was not impleaded in the suit. They also rely upon the decision of this Court in the case of *Kristopada Roy v. Chaitanya Charan Mandal* (1), in which Walmsley, J., appears to have expressed himself as approving of the principle of the Allahabad decisions abovementioned. Reference has also been made on behalf of the appellants to such cases as *Habibullah v. Jugdeo Singh* (6), in which it was held that a purchaser in execution of a mortgage-decree has no right to retain possession of the property obtained through civil Court against a purchaser of the equity of redemption, who was not a party in the suit on the mortgage, and

who had obtained and remained in possession till the sale in execution of the decree in the mortgage suit and *Girish Chunder Mandal v. Iswar Chunder Roy* (7), in which also the position was similar-cases which have been disapproved of in the more recent decisions of this Court, e. g., *Kalu v. Abboy Charan* (8), *Bhagaban Chandra Kundu v. Tarak Chandra Basu* (9), and *Bhodai Shaikh v. Barada Kanta* (10). On behalf of the respondent reliance has been placed upon the Bombay decisions of which *Dadoba Arjunji v. Damodar Raghunath* (11), is the type, and which lay down that the auction-purchaser is entitled to a conditional decree which allows the party excluded from the suit an opportunity to redeem. Special reliance is also placed on behalf of the respondent upon two decisions of this Court, namely, the cases of *Jugdeo Singh v. Habibullah Khan* (12), and *Gangadas Bhattar v. Jogendra Nath Mitter* (13), in both of which cases there are observations which are clearly in conflict with the decisions of of this Court upon which the appellants have relied, though the former of these two cases was one in which all the owners of the equity of redemption except one were made parties to the suit, and what was actually held in the latter case was that it was not obligatory on the auction-purchaser to institute a fresh suit for enforcing his security against the party who was left out of the previous suit but that he might sue for possession giving the omitted party an opportunity to redeem.

The respondent further relies upon cases of which *Protab Chandra v. Ishan Chandra* (14), is a specimen in which the auction-purchaser seeks to retain the possession which he has obtained in consequence of his purchase as against the owner of the equity of redemption who was excluded from the suit. To go back to the two views stated above and to consider the aforesaid cases in the light of these views, according to one of them the purchaser acquires the property subject to the rights of the parties omitted from the suit, and according to the other

(7) [1900] 4 C. W. N. 452.

(8) A. I. R. 1921 Cal. 157.

(9) A. I. R. 1927 Cal. 259.

(10) A. I. R. 1928 Cal. 116 = 55 Cal. 602.

(11) [1892] 16 Bom. 485.

(12) [1907] 6 C. L. J. 612 = 12 C. W. N. 107.

(13) [1907] 11 C. W. N. 403 = 3 C. L. J. 315.

(14) [1900] 4 C. W. N. 265.

(2) [1897] 19 All. 541 = (1897) A. W. N. 154 (F.B.).

(3) [1899] 21 All. 235 (F.B.).

(4) [1907] 30 Mad. 500 = 17 M. L. J. 431.

(5) [1907] 11 C. W. N. 314.

(6) [1907] 6 C. L. J. 609.



view he acquires title to it only as against those parties who are parties to the suit. I have referred to the more important of the authorities that have been relied upon on this point and do not see any use referring to others which are either irrelevant or of lesser importance. The appellants have tried to distinguish some of the decisions on which the respondent relies on the ground that the ratio decidendi of those cases was that the mortgagee had no notice of the assignment of the equity of redemption at the time when he instituted the suit on his mortgage whereas in the present case the transfer in favour of the predecessor of defendants 1 to 4 having been by means of a registered instrument the mortgagee must be held to have had notice in view of the decisions of the Judicial Committee in the cases of *Hetram v. Shadiram* (15) and *Tilakdhari Lal v. Khedan Lal* (16). They also seek to distinguish other cases cited on behalf of the respondent on the ground that in those cases the purchaser was within time in enforcing his security while in the present case he has no such remedy available to him. The respondent has on the other hand made an attempt, though somewhat vain, to distinguish the decision of this Court upon which the appellant has relied. I do not propose to go into further details but desire to state that I agree generally with Suhrawardy, J., as he expressed himself in the case of *Kristopada Roy v. Chaitanya Charan Mandal* (1) in so far as he was of opinion that an attempt to reconcile the conflicting decisions of this Court is futile, and if the case had not presented some exceptional features which obviate the necessity of a reference to a Full Bench I should have been prepared to adopt that course in order to remove the conflict that exists.

The exceptional features of the present case are two: they are that in the mortgage suit the equity of redemption was entirely unrepresented and that any remedy which the purchaser or the present plaintiff could have on the basis of the mortgage was barred long ago. The Judicial Committee have authoritatively explained the meaning of S. 89, T. P. Act

(4 of 1882) in the cases of *Hetram v. Shadi Ram* (15) and *Matru Mal v. Durga Kunwar* (17). It is now plain beyond controversy that an order under S. 89 of the Act for the sale of the mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished. I do not feel called upon in the present case to express any opinion on the question whether this proposition applies to a decree obtained in a suit in which the equity of redemption is entirely unrepresented. If it does the purchaser at the sale did not acquire any rights under the mortgage the same having already been extinguished by the order and substituted by the right of sale. On the other hand it is possible to take the view that the decree is to be treated as a nullity, as on general principles it would be, having been passed in respect of property which was entirely unrepresented and so to hold that the purchaser acquired nothing. In Jones on Mortgages the following passage occurs:

"Section 1406. The owner of the equity of redemption by purchase from the mortgagor is of course an essential party to a bill to bar the equity by foreclosure. Such owner is in fact the only necessary party defendant. Equally with the mortgagor he is unaffected by any foreclosure proceeding to which he is not made a party, and moreover the decree is generally regarded as void . . ."

Sir Rashbehari Ghose in his *Law of Mortgage* 4th Edn., Vol. 1, pp. 620-621, observes thus:

"If the owner of the equity of redemption is not a party to the suit the purchaser cannot claim the position of an assignee of the security, as it would still remain in the mortgagee. And this seems to be the law even in America where the general rule that the security is transferred to the purchaser does not hold good if the owner of the equity of redemption, who is said to be the only necessary party, is not made a defendant. In all other cases the security passes to the purchaser; for the sale though it fails to be effectual in every other respect, operates as an assignment of the mortgage to the purchaser who may, if he chooses, proceed *de novo* to foreclose those who were, not represented in the suit."

Whatever difference S. 89, T. P. Act, may make in the latter class of cases there is nothing in the Act which militates against the view expressed in the other part of these observations as regards the rights of a purchaser at a sale in pursuance of a decree in the equity of

(15) A. I. R. 1918 P. C. 34=40 All. 407=45 I. A. 130 (P.C.).

(16) A. I. R. 1921 P. C. 112=48 Cal. 1=47 I. A. 239 (P.C.).

(17) A. I. R. 1920 P. C. 79=42 All. 364=47 I. A. 71 (P.C.).



redemption is entirely unrepresented. Then again, assuming for a moment that the sale had operated as an assignment of the security, the rights of the purchaser at the auction sale, and of the plaintiff as assignee from the said purchaser in the present case is irretrievably barred. The result is that whatever view may be taken of the rights of a purchaser at a sale under circumstances such as are disclosed in the present case, the plaintiff's suit must necessarily fail. It is therefore unnecessary to consider any other matter in connexion with this appeal.

In this view of the matter, this appeal must succeed and the decree of the Subordinate Judge being set aside, that of the trial Court dismissing the suit should be restored with costs in this and the lower appellate Court.

**Garlick, J.**—I agree.

S.N./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 237

MUKERJI AND GARLICK, JJ.

*Upendra Nath Ghose and others—*  
Defendants—Appellants.

v.

*Baikuntha Nath Ghose and others—*  
Plaintiffs—Respondents.

Appeal No. 2665 of 1925. Decided on 1st June 1928, from decree of 2nd Sub-Judge, Sylhet, D/- 15th June 1925.

(a) Civil P. C., O. 1, R. 9—Deity installed in family dwelling house by ancestors of parties—Suit for adjusting rights of worship is maintainable, though deity be unrepresented (Deity's property being not likely to be affected) and female members of family be not joined—Hindu law—Religious endowment.

A deity had been installed by the ancestors of parties. There was no property of the deity likely to be interfered with by the arrangements sought to be made and none outside the family was interested in the deity:

*Held:* that the suit for the adjustment of mutual rights as regards the worship and possession of the deity was maintainable, though the deity be unrepresented and though the female members, interested in the deity, be not joined as parties: A. I. R. 1925 P. C. 139, Dist. [P 238 C 2]

(b) Hindu law—Religious Endowments—Idol—Suit for adjustment of rights of worship—Fractional share in deity should not be declared.

In a suit for the adjustment of rights as to the worship and possession of a family deity, declaration of a fractional share in the deity should not be made; the right to worship the deity only should be declared. [P 233 C 2]

*Hemendra Kumar Das* — for Appellants.

*Sarat Chandra Roy Chowdhuri and Birendra Kumar De* — for Respondents

**Mukerji, J.**—This appeal arises out of a suit which was instituted by the plaintiffs for certain reliefs which are of a somewhat unusual character. The plaintiffs' case shortly stated was that their grandfather, Raj Krishna Ghose and Sri Ballav Ghose, the grand father of the defendants 1 to 8 and Kali Charan Ghose who was the great-grandfather of defendant 10 and grandfather of the husband of defendant 9 were three brothers whose ancestor had installed a deity in their ancestral dwelling house, and the deity according to the plaintiffs went by the name of "Dayal" and according to the defendants "Sridhar," that the deity is a Saligram Bigrha and there is daily worship of the deity at the place where it was installed and that the said three brothers used to worship the deity every day as well as on special occasions, according to their shares which were equal. The plaintiffs alleged that in consequence of certain events that took place it is they and the principal defendants and one Rama Nath Ghose who are now solely interested in the said "Deity" and that they exercised their right of worship of the deity down to 1327 when the principal defendants denied their right and interfered with the exercise thereof.

The prayers that were made in the plaint were very unusual in their character and purported to treat the deity as a moveable chattel, in the nature of property which is capable of being owned and possessed by them and also of being partitioned in accordance with their respective shares. There was a prayer which was of a more reasonable character, namely, for a declaration of the plaintiff's right to worship the deity and for an arrangement being made as regards the turns of worship as between the different co-sharers so that the right of worship might be exercised in accordance with such turns. This prayer, however, appears not to have been pressed eventually and the relief that was claimed by the plaintiffs was confined more or less to the deity being treated as moveable property. Defendant 1 who was the only contesting defendant in the trial Court denied the plaintiffs' right altogether.



The trial Court decreed the suit in the following terms :

" That the suit be decreed with costs and future interest at 6 p. c. p. a. Plaintiffs' title to the disputed deity as stated in the plaint be declared, and they be free to bring the deity to their new bari on the occasions of annual parbas and ceremonies such as Puspa Jatras, Puskarni Pratistas, Sradhs, marriages, Kali Pujas, Mansha Pujas, Radhastamis, Durga Pujas, Tulashi offerings in the month of Kartick, Nabannas in Agrahayan, Uttara-yan Sankrantis, Sri Panchamis, Basanti Pujas, Dhaja Dwadasis, Sasthi Pujas, Annaprasans and Griha Prabeshas without interfering with the worship of the deity by the principal defendants and performance of ceremonies at their (meaning the defendants') bari : that a perpetual injunction be issued on the principal defendants not to interfere with plaintiffs' right to worship the deity as indicated above."

The above is an extract from the ordering portion of the judgment ; but in the decree that was drawn up it was clearly stated that the plaintiffs' title to the disputed deity was one-third. There was an appeal preferred by the defendant 1 from the decree as passed by the trial Court and the plaintiffs also preferred a cross-appeal. The learned Subordinate Judge dismissed the appeal and the cross-appeal and affirmed the decree of the trial Court. Defendants 1, 2 and 3, have thereupon preferred a second appeal to this Court and the plaintiffs have preferred a memorandum of cross-objection.

The appeal of the defendants is pressed upon five distinct grounds. The first of these grounds is to the effect that the decree should be set aside as the suit was not maintainable without the deity being properly represented therein and because the female members of the family who were also interested in the deity were not made parties to the said suit. In support of this ground reliance has been placed upon the decision of the Judicial Committee in the case of *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* (1). Now the facts of the present case are that the deity was, upon the allegations of the parties, installed by some ancestor of the parties themselves but it is not suggested that anybody else than the members of the family to which the parties belonged is interested in the deity or that there is any property of the deity which is likely to be interfered with by the arrangement

which is asked to be made. The suit in its essence appears to be one for adjustment of the rights as between the parties themselves in relation to the deity. In that way the case seems to be entirely distinguishable from the case of *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* (1). In that case there was an installation of the deity with a fixed abode; and for the idol so established as well as for the other idols ancestral, a fund was created by a will for performing their worship. In such a case their Lordships of the Judicial Committee pronounced the opinion that if the idol was not otherwise represented in the proceedings result might ensue which might, conceivably, vitally affect its interests and also that the interest of the female members of the family might need special protection. Upon these considerations their Lordships observed that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the Court and that the female members of the family should also be joined and a scheme should be framed for the regulation of the worship of the idol. The scope of that suit was entirely different from the scope of the present one.

In the present case it is really and substantially a case of dispute between two contesting parties, one claiming to have a right jointly with the other to perform the worship of the deity and to have the possession of the deity for the performance of such worship and the other party claiming an exclusive possession of the deity with a denial of a right of the former to perform any worship at all. I am of opinion that the observations of their Lordships of the Judicial Committee cannot be said to apply to a case of the present nature and they are not to be treated as authority for the purpose of holding that in the absence of the deity or of the female members of the family the present suit is not maintainable. The female members, who may be interested in the deity and are not parties to the suit, will not be bound by the result of the present litigation. That, however, is quite a different matter; but in so far as the parties who are parties to the suit are concerned it cannot be contended that the suit is not maintainable. This ground, therefore, in my opinion, fails. It may

(1) A. I. R. 1925 P. C. 139=52 Cal. 803=52 I. A. 245 (P.C.).



be noted also that this objection does not appear to have been taken on behalf of the defendants in any of the Courts below.

The next ground is to the effect that a suit of this character or rather a prayer of this character is not maintainable. The objection is unquestionably correct and well founded if the wording of the plaint is taken at its face-value. As I have already stated, the plaintiffs appear to have entertained a very curious conception of the deity but the learned Subordinate Judge has pointed out in his judgment that although many of the expressions used in the plaint are extremely unhappy what in substance is asked for on behalf of the plaintiffs is a declaration of their right of worship which is a very valuable right and a permanent injunction restraining the principal defendants from interfering with the exercise of that right by and on the part of the plaintiffs. Ground 2, therefore, must also be overruled.

It is urged in the next place that upon the facts found by the Courts below it should be held that the plaintiffs have got no subsisting right or interest in the deity, in respect of which he can possibly get any declaration or relief from the Court. As regards this matter the findings at which the Courts below have arrived, more or less concurrently, seem to be these: that the deity was installed by the ancestors of the plaintiffs as well as of the contesting defendants, that after certain incidents, into the details of which it is not necessary to enter, the ancestors of the plaintiffs and the principal defendants and Rudranath Ghose became the sole worshippers of the deity quite a long time ago and that they all along exercised the said right, giving rise to the presumption that they had acquired the sole right to worship the deity either on a grant or by mutual arrangement: that in 1305 when the plaintiffs removed to their new house in which there was already installed another deity of the name of Lakshminarayan there was an arrangement between the father of defendant 1 and the plaintiffs in which the females of the family or at any rate some of them also took part, and the arrangement was that the plaintiffs would leave the deity at their ancestral house, namely, the homestead of the defendants, liberty being reserved to them

to bring the deity to their new homestead according to necessity; that the plaintiffs used occasionally to exercise their right of worship of the deity and to bring the deity to their new house on festive and ceremonial occasions and that they continued to do so till Baishak 1327 after which date their right to worship the deity was denied. On these findings it seems somewhat difficult to conceive how it can reasonably be said that the plaintiffs had no longer any subsisting right or interest in the deity. This contention must also be overruled.

The next contention is to the effect that in any event the plaintiffs are not entitled to a decree entitling them to remove the deity from the place where it is to their new house. This contention overlooks the terms of the arrangement which have been found by both the Courts below, the arrangement being that the plaintiffs would be competent to remove the deity on occasions on which such removal would be necessary.

The last ground urged on behalf of the appellants relates to the form of the decree that was passed by the trial Court and has been upheld on appeal by the learned Subordinate Judge. The trial Court, as I have already stated, has declared the plaintiffs' right to the extent of a 3rd share in the deity. Such a declaration is one that can scarcely be passed in a suit of this nature. One could have understood if any question as to turns of worship had arisen in the suit and a declaration limiting the right of the plaintiffs to a certain fraction of the entire worship had been made by the Court. But the Courts below, as appears from the judgment of the learned Subordinate Judge, did not deal with any question of the turn of the worship at all, the plaintiffs having given up the claim they had made on that footing. The declaration which the plaintiffs should get as regards their right in connexion with the deity would be to the effect that their right to worship the deity will be declared. The other declarations that have been made in the decree of the learned Munsif will stand. What the practical effect of these declarations will be is a matter which it is somewhat difficult to comprehend, but with that we are not concerned so long as the plaintiffs would care to have the decree passed in their favour. The plaintiffs no doubt have in their cross-objec-



tion sought to get a decree free from certain conditions which appear in favour of the defendants, but we are not inclined to accede to the plaintiffs' request in this connexion.

The result is that the appeal and the cross-objection both fail and they are both dismissed, subject only to this that in lieu of the words in the decree that has been passed in this suit "that the plaintiffs proprietary right to one-third share in the deity be declared" the words "it be declared that the plaintiffs are entitled to worship the deity" be substituted. There will be no order as to costs either in the appeal or in the cross-objection.

**Garlick, J.**—I agree.

S.L./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 240

RANKIN, C. J. AND MUKERJI, J.

*Kamiruddin Mallik*—Appellant.

v.

*Sm. Bishupriya Chowdhurani*—Respondent.

Appeal No 1724 of 1926, Decided on 2nd August 1928, from appellate decree of Dist. Judge, Midnapur, D/- 1st April 1926.

: Limitation Act, S. 5—Revenue Officer by his final order rejecting application by appellant to adduce further evidence and making correction in record against him—He appealing only against first portions of his order honestly believing that he would thereby get full relief but appeal was dismissed—He preferring present appeal against latter portion of order after about 17 or 18 days after dismissal—Under S. 14, Limitation Act, only period during which suit or proceeding was prosecuted will be deducted—As appellant acted bona fide in preferring his first appeal, there was sufficient cause within S. 5—Period of 17 or 18 days is not unreasonable or such as would show that appellant was negligent—His appeal therefore will be protected by S. 5—Limitation Act, S. 14.

Under S. 5 two matters have got to be considered (1): whether there was sufficient cause for not preferring the appeal within the time prescribed by law, and (2) whether there are circumstances which would justify the Court in exercising the discretion that is granted to it under that section for extending the time for preferring the appeal. [P 241 C 2]

A revenue officer rejected the application of appellant to adduce further evidence and made final order making correction in the record as against appellant. Appellant first appealed against the portion of the order rejecting his

application believing bona fide that he would thereby get the whole relief that he wanted. The appeal, however, was dismissed. About 17 or 18 days after the appeal was dismissed he again appealed against the other portion of the order whereby correction in the record was made against him.

*Held*: that S. 14 constitutes sufficient cause within the meaning of S. 5, but that section would entitle one to the deduction of the period during which the suit or proceeding was prosecuted: *A. I. R. 1917 P. C. 156, Rel. on.*

*Held further*: that S. 14 is not exhaustive of all the circumstances that may constitute sufficient cause. In this case as the appellant acted bona fide in preparing his first appeal, there was sufficient cause for him for not preferring the present appeal within time. And this case is fit for the Court to exercise its discretion under S. 5, since the 17 or 18 days that elapsed between the dismissal of the first and the preferring of the present appeal is not a period which can be called unreasonable or which would show that there was any want of diligence on the part of the appellant in preferring the appeal. [P 241 C 1, P 242 C 1]

*Apurba Charan Mukherjee*—for Appellant.

*Narendra Nath Seth and Radhika Ranjan Guha*—for Respondent.

**Mukerji, J.**—The question that arises for consideration in this appeal is whether the appeal which the appellant had filed in the Court below was time barred. The facts necessary to be set out for the purposes of this appeal are these: After a good deal of litigation in connexion with an application under S. 105, Ben. Ten Act, the final order was passed on 18th April 1925 by which the Revenue Officer made certain corrections in the record as against the appellant after rejecting an application which the appellant had made for an opportunity to adduce some further evidence. On 18th May 1925, an appeal was taken from this decision of the Revenue Officer to the Special Judge being Special Appeal No. 2 of 1925. This appeal was disposed of by the Special Judge on 31st October 1925 the learned Judge holding that the appeal was not competent as it had been filed against that portion of the order of the Revenue Officer by which he had rejected the appellant's application for an opportunity to adduce further evidence. He, however, held that an appeal as against the order making the correction would be maintainable and to use his own words, he said "can appeal against the entry now that it is against him". Acting upon this last-mentioned observation of the learned Special Judge, the ap-



pellant preferred an appeal on 18th November 1925. It is this appeal that has been dismissed by the learned District Judge upon the ground that it was time barred.

In the application which the appellant filed for getting an extension of the time prescribed for the filing of an appeal, the appellant appears to have relied both upon Ss. 5 and 14, Lim. Act, though neither of these sections was expressly mentioned in the application. S. 14, no doubt, is not in its terms applicable to the present case, the case being one of appeal. But, as has been pointed out by the Judicial Committee in the case of *Brij Indar Singh v. Kanshiram* (1), the provisions of S. 14 are not altogether irrelevant for the purpose of considering a case under S. 5, Lim. Act. It has been held in that case that, though S. 14 may not be applicable to any particular case in its terms, if the circumstances mentioned in S. 14 are made out, they would constitute sufficient cause within the meaning of S. 5. The present case, therefore, has got to be looked at from the point of view both of Ss. 14 and 5, Lim. Act. Looking at it from the point of view of S. 14, it seems to me that the learned Judge was right in holding that all that the appellant was entitled to get as deduction of the amount of time taken by him in preferring the appeal was the period during which he was prosecuting with diligence the Special Appeal No 2 of 1925. The argument of the appellant that he is entitled to a deduction of the time that was necessary for the purpose of obtaining a copy of the order which he had to obtain in order to prefer Special Appeal No. 2 of 1925 does not appear to me to be well-founded. It was distinctly laid down by their Lordships of the Judicial Committee in the case to which I have already referred that, upon the current of decisions in this country, the period during which a suit or proceeding was prosecuted is the period of which the appellant would be entitled to a deduction. S. 14, however, is not exhaustive of all the circumstances that may go to constitute "sufficient" cause within the meaning of S. 5, Lim. Act. In order to consider the matter from the point of view of S. 5, the finding of the learned Judge would have to be taken into ac-

count. The learned Judge held that the appellant acted bona fide in preferring an appeal from that part of the order of the Revenue Officer by which his application for an opportunity to adduce further evidence was rejected and that the said advice that had been given by the pleader to the appellant was also bona fide. In other words, the learned Judge was prepared to hold that there was sufficient cause on the part of the appellant for not preferring the appeal within the time prescribed by law. Now, under S. 5, Lim. Act, two matters have got to be considered : (1) whether there was sufficient cause for not preferring the appeal within the prescribed period and (2) whether there are circumstances which would justify the Court in exercising the discretion that is granted to it under that section for extending the time for preferring the appeal.

Upon the findings of the learned Judge inasmuch as the appellant's appeal from a part of the order of the Revenue Officer was bona fide, it goes without saying that the appellant thought that he would be able to get all the redress that he wanted, by preferring that appeal and that it was not necessary for him to prefer another appeal from the other part of the order by which the correction was made. Sufficient cause, therefore, upon the findings of the learned Judge, has been made out in the case.

Now the other question whether the discretion should or should not have been exercised in favour of the appellant turns upon the view that the learned Judge has taken of the appellant's conduct subsequent to the date on which the Special Appeal No. 2 of 1925 was dismissed and before he filed the present appeal. As I have already stated, the special appeal was dismissed on 31st October 1925 and the present appeal was filed on 18th November 1925. The appellant, therefore, has got to account for the period of 17 or 18 days that intervened. The learned Judge, as appears from his judgment, was prepared to make an allowance in favour of the appellant as regards three days that were taken in obtaining a copy of the order from which the appeal was preferred. He was prepared also to allow the appellant a deduction of 2 or 3 days for taking advice from Calcutta as to whether that appeal should be filed or whether a second

(1) A. I. R. 1917 P. O. 156=45 Cal. 94=44 I. A. 218 (P.O.).



appeal should be filed as against the decision of 31st October 1925. He was prepared also to grant the appellant a further deduction of 2 or 3 days for the preparation of the grounds of appeal. These periods added up together would account for 9 or 10 days. There would remain a balance of 8 days which, according to the learned Judge, has not been sufficiently accounted for. Now, in making these calculations, I am of opinion that the learned Judge has applied to the case far too exacting a standard and, although the discretion which a Court exercises in connexion with an application under S. 5, Lim. Act, should not be lightly interfered with, I am of opinion that the delay of 17 or 18 days, under the circumstances aforesaid, is not one that can be considered as unreasonable or in other words, I am not satisfied that, in point of fact, there was any want of diligence on the part of the appellant in preferring the appeal.

For these reasons, I am of opinion that the view which the learned Judge has taken of this matter is not right. I would, therefore, allow the appeal, set aside the decree from which it has been preferred and direct that the appeal be sent back to the lower appellate Court to be heard and disposed of in accordance with law.

There will be no order as to the costs of this appeal.

**Rankin, C. J.**—I agree.

S.N./R.K. *Appeal allowed.*

### A. I. R. 1929 Calcutta 242

RANKIN, C. J., AND BUCKLAND, J.

*Sujauddin*—Accused—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 934 of 1928, Decided on 20th December 1928.

**Criminal P. C., S. 195—Propriety of action—Complaint of forgery impleading certain persons—Complaint for the same offence against another is sometimes justified when in public interest—Criminal trial.**

In a criminal prosecution a certain document produced in the defence was alleged to be the subject-matter of forgery within the meaning of the Penal Code. Thereupon the complainant in the case applied to the Magistrate to make a complaint against three persons. The Magistrate refused and in appeal the High Court made a complaint against two

persons, which came on for hearing before another Magistrate who directed the Public Prosecutor to make an application to the Court which had tried the case for a complaint against a third person under Ss. 193, 465, 471 and 109, I. P. C.

*Held*: that under the circumstances the complaint against the third person was justified in public interest. [P. 243 C 2]

*Mrityunjay Chatterjee and Monindranath Banerjee* 2—for Appellant.

*D. N. Bhattacharjya*—for the Crown.

*Satindra Nath Mukherjee and Satyendra Kumar Ghose*—for Complainant.

**Rankin, C. J.**—This is an appeal by one Sujauddin against an order directing a complaint to be preferred against him for having committed offences under Ss. 193, 465, 471 and 109, I. P. C. It appears that one Padam Prosad was in August of last year acquitted on a charge under S. 372, I. P. C., of selling a minor girl and that at the trial of that accused a certain certified copy was produced from the register of births at Benares. It is said that the copy which was produced by the defence had been tampered with and that it was a false document the subject-matter of forgery within the meaning of the Code. Thereupon the complainant in the case applied to the Magistrate who tried the matter against three persons two of them were named, Padam Prosad and Behari Lal, and one was unnamed but his character and description were indicated, namely, that he was a clerk in the office of the Registrar of Births at Benares. The Magistrate directed a police investigation and after considering the whole matter made up his mind that he would not prefer any complaint. The complainant appealed to the High Court and the High Court made a complaint against Padam Prosad and Behari Lal. Thereupon the complaint so preferred came on for hearing or investigation before the Chief Presidency Magistrate and he after a lapse of some time, namely, in October last, directed the Public Prosecutor to apply to the successor of the Magistrate who had tried the case for a complaint to be made against the present appellant, Sujauddin and one Kanhaiyalal. On 11th October this complaint was made.

The appellant appeals and he takes his stand upon the circumstance that the question whether any complaint should be made was discussed before the Magistrate who had actually tried the case and



the matter having gone to the High Court a complaint was directed against two persons only and not against him.

Mr. Bhattacharjya for the Crown says, first of all, that it is not necessary when once a complaint has been made against certain persons in respect of an offence that another complaint should be made against other persons whom the Magistrate finds to be necessary parties as persons implicated in the offence. He contends before us that complaints are not made against specific offenders but of offences and that once a complaint is made the Magistrate conducting the enquiry has to proceed under S. 200, Criminal P. C., and there is no objection whatsoever to his directing summonses to issue against persons other than those specifically named in the complaint if he finds that this is necessary for the ends of justice. In support of this contention he refers to the decision of a Division Bench of this Court *Giridhari Lal v. Emperor* (1). He further contends that even if it be not the case that this complaint is supererogatory, the Magistrate in the present case was well warranted in making a complaint against Sujauddin.

It appears that Sujauddin is one of several accused persons who are about to be put on their trial before the present High Court Session, an order of commitment having been made. Mr. Chatterjee has pointed out to us that an order was made to the effect that until this appeal was heard no order of commitment would be made to the High Court Session and, on an examination of that matter, I think the only bearing of it is this that it would not be right, for the purposes of this appeal, to regard Mr. Chatterjee's case as prejudiced on the score of being late. I do not propose to take that fact against the appellant in the present case at all.

Now, the question whether a complaint made as required by S. 195 of the Code by virtue of S. 476, is necessary or not where the same offence has already been made the subject-matter of a complaint mentioning other persons is not an easy one. Had it been necessary to go into that matter on principle and at length I would have required further time to do it justice, and I do not think it necessary in this case to attempt to come to a final conclusion.

The principle that a complaint is in respect of offences and not in respect of offenders is a kind of proposition that may be very sound and at the same time may be pushed too far; and in this matter a very careful examination of the relevant sections of the Criminal Procedure Code would have to be undertaken before the law could be properly laid down. I think it is just possible also that the offences complained of in this case which I have already mentioned at the beginning of this judgment might not all be in the same position for the purposes of this argument. However that may be, I am of opinion that this appeal must fail on the short ground that, assuming another complaint to be necessary, I am not satisfied that there was anything wrong in making a complaint in the circumstances of this case against Sujauddin.

The first principle to be considered in this matter is that it is the public interest which is paramount in the matter. I should be slow to say anything that would encourage a complainant to ask for a complaint against a person and being refused to make another attempt to get the same order. Magistrates would be very well advised to deal with such applications very firmly. In this case the real truth of the matter is that the application to the trial Magistrate was not an application against or in respect of Sujauddin at all. His name came into the matter incidentally and only because the Magistrate having directed a police investigation the question of this man's name with others arose. That Magistrate having refused to make any complaint the complainant appealed to this High Court and I am quite clear that any such appeal would not be regarded as an appeal against the refusal of an order against Sujauddin. The High Court having made an order against two of the three people against whom the complaint was asked for cannot, in my judgment, be regarded as having refused to make a complaint in the circumstances against Sujauddin. When the matter came before the Chief Presidency Magistrate after the High Court's complaint he found that it was necessary, to get to the bottom of this matter, to have other parties added as persons to be charged; and, having regard to principle and to the public interest, I am not of

(1) [1917] 21 C. W. N. 950=42 I. C. 133=18 Cr. L. J. 901.



opinion that the previous proceedings at the instance of the complainant afford any reason why the complaint against Sujauddin should be set aside. In my judgment, the appeal must be dismissed.

**Buckland, J.**—I agree.

M.N./R.K.

*Appeal dismissed.*

**\* A. I. R. 1929 Calcutta 244**

RANKIN, C. J. AND BUCKLAND, J.

*Debendra Narayan Chakravarty*—Accused.

v.

*Emperor*—Opposite party.

Jury Ref. No. 51 of 1928, Decided on 14th January 1929.

(a) Criminal P. C., S. 307—Scope — Criminal P. C., S. 428.

High Court has power under S. 307 read with S. 428 to call further evidence.

[P 276 C 1]

\* (b) Criminal Trial — In murder cases medical evidence must be given *viva voce* before the jury — High Court refused to order examination of medical witness.

In cases of murder or of a man-slaughter it is unreasonable to expect the jury to convict if a proper exposition and explanation of the medical evidence is not given *viva voce* by a doctor who can deal with the matter and satisfy the jury. The jury are quite entitled to be fully satisfied. Until one has gleaned all the facts that one can get from the medical report, one is not really in a position to say what parts of the other evidence can be relied upon. Where the medical evidence was not given the the High Court refused to examine or order examination of the doctor under S. 428.

[P 246 C 1, 2]

*Mrityunjoy Chatterji* and *Monindra Nath Banerjee*—for Accused.

*Khondkar*—for the Crown.

**Rankin, C. J.**—In this case the accused man was put on his trial before the learned Sessions Judge of Murshidabad and a jury of five upon a charge that about midday on 14th April 1928, he committed culpable homicide by killing his wife. The wife's name was Kiranbala and it would appear that she was a mere girl of some 15 years of age. She had been married to the accused since about 1924.

Now the evidence on the part of the prosecution consists first of all of a considerable amount of evidence to the effect that the accused used from time to time to ill-treat his wife. There is a certain amount of evidence but not of a character which can be said to be in

any way substantial to the effect that the accused man was carrying on an intrigue with the widow of an uncle who lived next door and that this might have had something to do with the animosity between the husband and the wife. There is some further evidence as to which it is a matter of opinion whether it is substantial or not to the effect that this girl may have been acting imprudently if not carrying on an intrigue with the witness Srikrishna. But the evidence which matters and which may be regarded as the evidence upon which the prosecution sought to bring the charge home to the accused is, in the first place, the evidence of some 4 or 5 witnesses who say that in the middle of the day on the 14th April as they passed near by to the accused's hut they heard his wife crying out for help saying that she was about to be killed, and one witness at least speaks to words of threat and intention to kill on the part of the accused man. Sometime afterwards it appears that the accused is seen by certain witnesses going on to the top of his kitchen with an instrument what has been called a crowbar and breaking down a part of the wall. When the accused man makes up his mind to call in persons from outside the body of the wife is discovered lying on the floor with certain parts of the earthen wall lying round about her and certain parts lying on her body, and the story that is given out by the husband is this that he was away from the house in the morning but that when he came back in the afternoon he found this state of affairs, and his suggestion was that he knew nothing as to what occurred and that it would appear that a part of this wall had fallen down upon the girl and she had met her death while cooking in that room. It would appear further that a few days before the occurrence a fire in the thatch of this house had taken place and it is suggested that the damage done at that time may have accounted for the collapse of this earthen wall.

The condition of the body of the girl and the clods make it extremely difficult to suppose that any such accident happened as that the wall collapsed on the top of the girl and killed her. It appears that only a small portion of the wall collapsed at all. In addition to that there is the evidence of witnesses



who say that the man was seen breaking down a part of the wall with a crowbar. One clod at least was produced in Court and the learned Judge was satisfied that it showed marks that it had been forced off by a crowbar. If, therefore, the question in this case was—whether or not the accused man has shown that this girl had met her death by the wall falling on the top of her—there would be very little doubt of the finding which is against him.

The real question which arises is whether in these circumstances this Court can rely upon the evidence which tends to show that the girl met her death at the hands of the man, that the man was in the hut with her in the middle of the day and was ill-treating her in such a way that she came by her death.

As I have said, there is evidence of 4 or 5 witnesses called to say that they heard the screams and called to say that the man himself was heard to shout. One witness indeed says that he stepped up and peeped in and saw what was happening and that the man threatened him with this instrument or crowbar.

I confess that on reading the evidence of these witnesses for the first time I rather thought that these witnesses were intending to say that they heard sounds of the man beating his wife or sounds that pointed to this. On re-reading their evidence I find that it is not clear that they go so far. They all speak merely to hearing something being cried out or said.

The question is one which requires to be carefully examined in the light of the injury report and of medical evidence. The first thing that one sees from the medical evidence is that it would appear to be equally inconsistent with the view that the wall fell down upon the girl and killed her and with the view that she was beaten to death with any instrument. There is one abrasion below the right angle of the lower jaw. There is another about an inch below the right side of the neck of the dimension of a pice. There are some indications that the girl died from asphyxia and so far as can be seen if this girl met her death she probably died from being suffocated. The back of her legs and other portions of her body and a small portion of the throat are described by the expression "skin removed," but no indication is

given of the probable character of the agency by which it was done. The opinion of the doctor is that there was probably an unnatural death and the medical officer who conducted the post-mortem said that all the signs pointed to asphyxial death.

If that were all it would be a somewhat formidable case to leave to the jury against the accused on the basis that the shouts and cries that had been heard at that time were shouts and cries by the man at a time when the man was either strangling her by pressing her throat or otherwise endeavouring to choke her. But most unfortunately and by what appears to be the greatest imprudence no doctor was called before the jury at all. The only thing that was done to satisfy the jury in this case—a case where everything depends upon the medical evidence and upon the jury being able to satisfy themselves as to what the medical facts really were—was that the medical officer Sris Chander Sarkar was called before the Committing Magistrate and his deposition was put in as part of the evidence for the prosecution at the trial. When that comes to be examined one finds that the doctor is recorded to have given the opinion that death might have taken place not less than three days before the date of the post-mortem examination. He does definitely say, taking that sentence, at its ordinary meaning, that in his opinion death could not have been less than three days before the date of the post-mortem examination. Whether that is what he said and, if so, whether that is what he meant is another matter. But at the time this trial was held before the learned Sessions Judge and a jury the prosecution had no right to stand merely upon that deposition in its recorded form and it seems to me to be unpardonable, carelessness in a case of this character that with a statement utterly inconsistent with the prosecution evidence given as a medical opinion by the doctor who held the post-mortem no endeavour was made either to call the medical officer himself or to give any medical evidence in the hearing of the jury.

When one comes to look in detail at the report of the post-mortem one finds that the post-mortem was conducted on the very next day after the alleged occurrence. The girl is said to have been lying dead on the midday of 14th April. The



doctor who held the post-mortem on 15th says or appears to say that he thinks that she must have been dead for at least three days. When one examines the injury report one sees that a great many of the organs specified in the usual form are described one after another as "decomposed," and one would presume that what is meant is that these organs are in such a condition that no useful information can be gathered by inspection and one certainly would think from the post-mortem report that there was ample material for the opinion that the girl must on the 15th have been dead for three days. If that be so, then the evidence of the doctor given before the jury was absolutely inconsistent with the witnesses' story as to what they heard on the 15th and the case is left to the jury as appears from the learned Judge's heads of charge without any comment being made upon that circumstance; nor does the learned Judge give it a place in his letter of reference. The charge of the learned Judge and the letter of reference are both lucid and admirable and I have nothing to say against them—excepting this that they in no way say that there is any difficulty arising out of the evidence of the doctor.

In these circumstances we have to regard the verdict of the jury in a manner which is quite different from the way in which we might feel ourselves obliged to regard a verdict which has no basis or justification in the recorded evidence. The jury were, if this was a point present to their minds, quite right to say that they could not be asked to convict the accused man with evidence in that condition. They were entitled to say to themselves:

"Suppose the doctor has been called, suppose he came before us and it had been put to Dr. Sris Chandra Sircar that this girl was alive on 14th April and suppose he had said 'Well, in my opinion, from what I saw on the 15th I say that is quite impossible';

no jury could have convicted upon the evidence in this case. It seems to me that that is exactly the position in which this Court now is upon this reference.

It is true that we have power under S. 307, Criminal P. C., read with S 428, to call further evidence. It would perhaps be possible to have Dr. Sris recalled and the whole matter gone into again. Then the case would come back before this Court after a perfectly proper acquittal by the unanimous verdict of the jury who

tried the case. It would come back before this Court on a different state of the evidence and in that case we should have no doubt power to do what we think right. Speaking for myself I am entirely unable to accede to the suggestion that further evidence on this matter should be called.

I wish that it could be impressed upon Public Prosecutors and upon the Sessions Judges that in cases—serious cases of murder or of man-slaughter it is unreasonable to expect the jury to convict if a proper exposition and explanation of the medical evidence is not given viva voce by a doctor who can deal with the matter and satisfy the jury. The jury are quite entitled to be fully satisfied. Indeed not until one has gleaned all the facts, one can from the medical report, is one really in a position to say what parts of the other evidence can be relied upon. In my opinion, it may or may not be a mere mistake in expression of opinion or that the doctor was mistaken or was misinterpreted, but it is impossible for us to do anything save to take this solemn opinion as it is. I do not know, as this is not the first time on which I have had occasion to make this criticism or complaint, whether this will have any effect upon the conduct of cases of this character in the mofussil, but the one circumstance which seems to me to make this case worthy of attention is that it is a very plain illustration of the fact that a jury will sometimes find points which are really against the prosecution but which escape the notice of learned Judges and of Public Prosecutors.

Thinking as I do that in this case the jury were entirely in the right, in my opinion, this reference ought to be rejected and the accused acquitted and if he is in custody he must be released.

If he is on bail his bail bond should be discharged.

**Buckland, J.**—I agree but I desire to make a few observations as to what has been disclosed at the hearing of this reference.

To me it is shocking that what may be a serious miscarriage of justice should occur by reason of what the learned Chief Justice has described, and I entirely concur, as unpardonable carelessness on the part of those charged with the prosecution. Ordinarily it is the practice to



call the doctor as a witness in the Sessions Court when the death of a person is involved. That being so I do not understand why it was not followed on this occasion for the Public Prosecutor must have been fully aware of what the doctor had said. Similarly with regard to the Sessions Judge, who could under S. 509 (2), Criminal P. C., have required the doctor to be summoned and examined as a witness and I am wholly at a loss to understand why he did not insist upon the doctor being called.

We were asked to send the case back to the Sessions Judge to have the doctor further examined or to examine him ourselves. The question as to how long before the post-mortem examination the death had actually occurred is, as regards the doctor, a matter of opinion. The facts upon which the doctor formed his opinion must have been fresher and far more readily present to his mind at the time when he gave his evidence in the Magistrate's Court than they possibly could be now. If he were to repeat his former opinion time and expense would have been wasted. If, on the other hand, he were to give an opinion more favourable to the prosecution it could not fail to be subjected on behalf of the accused to strong adverse comment, in the circumstances I do not think it would be fair to the doctor to send the case back for or to take further evidence and it is extremely doubtful if it would serve any useful purpose.

Finally I desire to make one observation with regard to the post-mortem report. I observe that that it is chiefly confined to facts observed by the doctor but there is, however, a place at the foot where the medical officer is required to record his opinion as to the cause of death. Though my experience of cases of this kind is limited it appears to me that it probably would be useful that he should also be required to record the length of time which in his opinion has elapsed since death took place. This is a matter as to which I apprehend that in every case the medical man who conducts the post-mortem examination should be able to express an opinion, either with or without qualification. It would be preferable that he should be required to record his opinion at the earliest possible moment than that he should be asked to give it at a later stage when he has not

the same opportunity to observe the fact upon which he must form his conclusion  
V.V. *Reference rejected.*

### \* \* A. I. R. 1929 Calcutta 247

PAGE AND MALLIK, JJ.

*Beni Madhab Mandal* — Plaintiff — Appellant.

v.

*Rai Charan Abi and others*—Respondents.

Appeal No. 755 of 1926, Decided on 7th August 1928, from appellate decree of 2nd Sub-Judge, 24-Parganas. D/- 20th November 1925.

\* \* Civil P. C., S. 47—Questions relating to execution, discharge or satisfaction of decrees—Parties or representatives not only cannot raise such questions by separate suit but not even in separate suit except by way of defence when judgment-debtor was kept out of knowledge of execution proceedings, until after suit was brought, by fraud of decree-holder.

All questions between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree must be raised and determined in the execution proceedings as provided by the Code and not otherwise, and the parties or their representatives are precluded from raising or canvassing any such question in any separate suit or proceeding, except by way of defence in a separate suit when the judgment-debtor has been kept out of knowledge of the execution proceedings, until after the suit has been brought, by the fraud of the decree-holder or judgment-creditor; 34 *Bom.* 546; 19 *Cal.* 683; 12 *Mad.* 19 (*F.B.*); 8 *All.* 146; 28 *All.* 273; 34 *Cal.* 199 and *A. I. R.* 1927 *Cal.* 106, *Expl.*  
[P 249 C 2]

*Anilendra Nath Choudhuri and Basanta K. Mukherji*—for Appellant.

*Satindra Nath Roy Choudhuri*—for Respondents.

**Page, J.**—This case raises a question of some importance with respect to the rights of auction-purchasers at a Court sale in execution of a decree. The plaintiff obtained a money decree against defendants 1 to 4, the sons of one Pitambar Ari to whom the plaintiff had lent money upon the security of a promissory note, to the extent to which the defendants were in possession of assets belonging to Pitambar's estate. On 16th April 1919 the plaintiff himself purchased the property in dispute at a Court sale in execution of the decree. No objection to the sale of this property was raised by the defendants or any of them under S. 47 or O. 21, Civil P. C., or otherwise



and in due course an order confirming the sale was passed under O. 21, R. 92. Thereupon the sale became absolute, and the property was deemed to have vested in the plaintiff as from the date of the sale. (S. 65, and O. 21, R. 92). The plaintiff thereafter took actual possession of the property, but having been ousted by the defendants 1—4 he brought the present suit to recover possession of the property on establishment of his title thereto.

At the trial the defendants contended that the property in suit had been sold in execution of an earlier decree against their father Pitambar; that on 15th December 1915, they had purchased it at a Court sale in execution of that decree; and that the property was not liable to attachment or sale in execution of the decree which the plaintiff had obtained in 1919.

Both the lower Courts have held that the sale to the defendants was proved and that the sale to them was valid, and the plaintiff's suit has been dismissed. The plaintiff, however, in the lower Courts and also in the present appeal has contended that inasmuch as the defendants did not prefer any objection to the sale in the execution proceedings they were precluded from challenging the validity of the sale by way of defence to the present suit by the auction purchaser for possession. Now, although the defendants pleaded that they had no knowledge of the decree or of the execution proceedings which culminated in the sale of the disputed property to the plaintiff, no issue was raised in that behalf and no finding was obtained by the defendants in either Court that they were not aware of the decree and of the execution proceedings, or that their want of knowledge was due to the fraud of the plaintiff, and for the purposes of this appeal it must be taken that at all material times the defendants were fully cognizant of the steps that the plaintiff was taking to enforce his claim against the property in suit. In support of his contention the appellant referred to a number of authorities to the effect that all questions relating to the execution, discharge or satisfaction of a decree between the parties to the suit or their representatives must be raised and decided in the execution proceedings, and that:

"the penalty imposed on a negligent judgment-debtor is set out in R. 92, and it is that the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. This amounts to a judicial determination that none of the objections exists on which the validity of the sale could have been questioned."

(per Walmsly and Subrawardy, JJ. in *Jagneswar Sikhdar v. Kailas Mandal*; (1).

See also *Durga Charan Mandal v. Kali Prasanna Sarkar* (2), *Sheikh Murullah v. Sheikh Burullah* (3), *Dwarka Nath Pal v. Tarini Sankar Roy* (4), *Basiram Malo v. Katyani Debi* (5), *Mohon Singh Choudhuri v. Panchanan Sadhukhan* (6) *Gokul Singh v. Kisan Singh* (7) *Umed v. Jas Ram* (8). On the other hand the respondents relied upon a line of authorities in which the Court, strictly following the language of S. 47, Civil P. C. (5 of 1908) pointed out that the legislature had not prohibited the determination of such questions in but by a separate suit, and therefore, held that all objections to the sale that might have been but were not raised in the execution proceedings by the judgment-debtor might be pleaded by way of defence in a suit by the purchaser for possession of the property that had been sold in execution of the decree. *Bhiram Ali v. Gopi Kanth Shaha* (9), *Nil Kamal Mukherji v. Jahnavi* (10), *Durga Charan v. Karmat Khan* (11) *Chandramani Saha v. Halijennessa Bibi* (12) *Suradhani Dutta v. Sitoo Sheikh* (13) *Venkataramachariar v. M. Sundaram Iyar* (14) *Chuia Dandasi v. Pedda Tatiah* (15). Now, if either rule is applied in its full rigour injustice may result. On the one hand it would be unjust that a judgment-debtor, who by reason of the fraud of the decree-holder or judgment-creditor had remained unaware of the execution

(1) A. I. R. 1925 Cal. 81.

(2) [1899] 26 Cal. 727=3 C. W. N. 586.

(3) [1905] 9 C. W. N. 972.

(4) [1907] 34 Cal. 199=5 C. L. J. 294=11 C. W. N. 513.

(5) [1911] 38 Cal. 448=10 I. C. 305=15 C. W. N. 795.

(6) A. I. R. 1927 Cal. 106=53 Cal. 837.

(7) [1910] 34 Bom. 546=7 I. C. 457=12 Bom. L. R. 539.

(8) [1907] 29 All. 612=4 A. L. J. 519=(1907) A. W. N. 193.

(9) [1897] 24 Cal. 355=1 C. W. N. 996.

(10) [1899] 26 Cal. 946.

(11) [1903] 7 C. W. N. 607.

(12) [1909] 9 C. L. J. 464=4 I. C. 168.

(13) A. I. R. 1922 Cal. 311.

(14) [1909] 19 M. L. J. 1=1 I. C. 193.

(15) A. I. R. 1921 Mad. 272.



proceedings until after the auction purchaser had brought his suit for possession, should be debarred from raising objections to the sale as a defence to the claim for possession. On the other hand, it would be unjust to an auction-purchaser at an execution sale, who bona fide and in due course of law had obtained an order confirming the sale, that the right to objection to the validity of the sale should depend upon whether the judgment-debtor was the plaintiff or the defendant in a separate suit, or that the validity of the absolute title that had vested in him under S. 65 and O. 21, R. 92 of the Code should remain open to objection by the judgment-debtor until the auction purchaser had obtained possession of the property.

Now, are the divergent rulings upon this subject to which I have referred incapable of reconciliation? I think not. And I am the more disposed to take this view because I find that Mitra, Walmsley and Suhrawardy JJ. have each of them expressed an opinion in favour of the one view as well as of the other. In my opinion when the matter is proved more deeply the true rule will be found to lie between the two extremes.

There can be no doubt as to the object that the legislature had in view when enacting the provisions of the Code relating to execution. It was to provide machinery whereby an auction-purchaser at a sale in execution of a decree should be able to obtain an absolute and conclusive title to the property sold in a simple and expeditious manner.

"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244." (now S. 47) per Lord Macnaghten in *Prosonna Kumar Sanyal v. Kalidas*, (16) (at p. 687).

"If there was really a ground of complaint, and if the judgment-debtor would have been injured by these proceedings in attaching and selling the whole of the property while the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well but of which the execution creditor or decree-holder might

be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed."

(Per Sir Richard Couch in *T. R. Arunachellam v. V. R. Arunachellam Chetti* (17) at p. 174 of 15 I. A.).

See also *Basti Ram v. Fattu* (18), *Behari Singh v. Mukat Singh* (19), *Gokul Singh v. Kisan Singh* (7), *Dwarka Nath Pal v. Tarini* (4), *Mohan Singh v. Panchanan* (6). In my opinion, the true rule to be collected from the authorities is this, that all questions between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree must be raised and determined in the execution proceedings as provided by the Code and not otherwise, and that the parties or their representatives are precluded from raising or canvassing any such question in any separate suit or proceeding, except by way of defence in a separate suit when the defendant has been kept out of knowledge of the execution proceedings until after the suit had been brought by the fraud of the decree-holder or judgment-creditor.

In the circumstances obtaining in the present suit, in my opinion, the respondents were precluded from raising the defence that the property in suit was not liable to be sold in execution of the plaintiffs' decree, and as against defendants 1—4 the appeal succeeds, and the decrees of the lower Courts will be set aside.

The plaintiff is entitled to a declaration of his title, and to a decree for possession as prayed as against defendants 1 to 4. As against defendant 5 the decree of the lower Court stands and the suit is dismissed. The respondents, defendants 1 to 4, will pay the appellant's costs in all the Courts.

**Mallik, J.**—I agree.

S.N./R.K.

*Decree set aside.*

(17) [1889] 12 Mad. 19=15 I. A. 171=5 Sar. 265 (P.C.).

(18) [1886] 8 All. 146=(1886) A. W. N. 37.

(19) [1906] 28 All. 273=3 A. L. J. 140=(1906) A. W. N. 3.

(16) [1892] 19 Cal. 683=19 I. A. 166=6 Sar. 209 (P.C.).



## \* \* A. I. R. 1929 Calcutta 250

RANKIN, C. J., AND MUKERJI, J.

*Biswanath Chakravarti* — Plaintiff—Appellant.

v.

*Rabija Khatun and others* — Defendants—Respondents.

Letters Patent Appeal No. 21 of 1928, Decided on 3rd August 1928, from decree of Mitter, J., D/- 17th February 1928, in Second Appeal No. 25 of 1926.

\* (a) Limitation Act, Arts. 138 and 144—Purchaser in execution suing judgment-debtor's co-tenants—Art. 144 and not Art. 138 will apply.

When a purchaser at Court sale sues the co-tenants of the judgment-debtor, Art. 138 will not apply for that Article applies only against judgment-debtor and persons claiming through him. The suit will be governed by Art. 144.

[P 250 C 2]

\* (b) Limitation Act, Art. 144—(*Per Rankin, C. J. and Mukerji, J.*)—Purchaser of one co-tenant's share—Other co-tenants in possession obstructing purchaser taking possession—Possession becomes adverse to purchaser not from sale or its confirmation but from obstruction (*Mitter, J. contra*).

*Rankin C. J. and Mukerji, J.*—If A and B together own property of which A is in actual possession, and B sells his moiety to C the possession of A immediately becomes the possession of C also.

[P 252 C 1]

A purchaser at court-sale of a co-tenant's share got his sale confirmed, but when he tried to obtain actual possession of the share he was obstructed by other co-tenants. He brought a suit for possession after twelve years from the date of sale or its confirmation but before twelve years from obstruction to possession.

*Held*: that other co-tenants' possession from the time of sale to the time of obstruction to possession was on behalf of and not adverse to the purchaser. The period of twelve years under Art. 144 would run not from the sale or its confirmation but from the time when possession was actually obstructed. The suit was within time *contra* (*Mitter, J. contra*): 4 Cal. 327; 16 Bom. 722 and 23 Bom. 137 (F.B.), Dist.

[P 252 C 1, 2]

*Chandra Sekhar Sen*—for Appellant.*Narendra Kumar Das*—for Respondents.

[The judgment against which the L. P. appeal was filed is as follows:]

*Mitter, J.*—The only question argued in this appeal is the question of limitation. The plaintiff, now appellant, purchased in execution of a money decree against Khadim Ali the land in suit on 8th December 1903. The sale was made absolute on 14th January 1910 and symbolical possession was taken on 2nd March 1913. The defendants, now respondents were cosharers with Khadim Ali in the disputed land. They contend that the present suit is

barred by limitation as it was not instituted within 12 years from the date of sale. The Munsif held that there was no allegation in the plaint that Khadim Ali was in possession of the disputed land jointly with the defendants and found the issue of limitation against the plaintiff and dismissed his suit. On appeal the learned District Judge of Chittagong held that time should begin to run from the date of the sale and not from the date of delivery of symbolical possession as was contended for by the plaintiff. The learned District Judge dismissed the appeal. Art. 138, Sch. 1 to the Limitation Act cannot govern the present case as the article applies only against judgment-debtors and persons claiming through them. The defendants in the present case do not claim through the judgment-debtor Khadim Ali, so Art. 138 does not apply. Art. 144 which is the residuary article applies and the question arises as to when the possession of the defendants became adverse to that of the plaintiff. It is argued by the learned vakil for the appellant that as the possession of the defendants was possession on behalf of their cosharer Khadim Ali at its inception it did not become adverse till the plaintiff who had stepped into the shoes of Khadim Ali was resisted in obtaining actual possession. In other words it is said that the possession became adverse from the date of the delivery of symbolical possession.

In my opinion this contention is not sound for the same rights and privileges which a cosharer has as against his other cosharers are not enjoyed by his assignee. It is true that in the case of a cosharer the possession of one cosharer is the possession of all and that if one of them sets up a prescriptive title against the others he must prove that his possession was openly hostile but it is difficult to understand how an assignee can by mere fact of assignment become a cosharer if his rights are denied by the other cosharers. It is beyond controversy that if the assignor has not transferred possession of the property assigned to his assignee the latter in order to succeed in a suit for possession must sue within 12 years from the date of his assignment and that a suit against his assignor would be barred if he comes into Court after that period. It would seem logically to follow from this position that the claim which would be barred against the assignor would also be barred against the other cosharer for otherwise an absurd position would be created. It would indeed be absurd to hold that a claim which would obviously be barred against the assignor would



not be barred if brought against the other co-sharers who do not even recognize the right of the assignor to assign in favour of a third party. This view receives indirect support from the case of *Bhivrao v. Rukmin* (1). Adverse possession depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested whether in a single person or in many jointly. Adverse possession is possession by a person holding the land on his own behalf or on behalf of some person other than the true owner. See the observations of Markby, J., in the case of *Bejoy Chunder Bannerjee v. Kali Prosonna Mukherji* (2). Although the possession of the defendant was not adverse to that of Khadim Ali it became adverse to the plaintiff for it was possession on behalf of some person other than the true owner.

The ownership had passed on the date of the sale from Khadim Ali to the plaintiff and defendants' possession was adverse possession to that of the plaintiff from the date of the sale, for even if he was holding possession for Khadim Ali, he was holding possession on behalf of some person other than the true owner for Khadim Ali's right had been extinguished by the sale either from the date of the sale or from the date when the sale became absolute both of which happened more than 12 years before suit.

No doubt it is true that co-sharers in possession do not exclude each other and that possession of co-sharers is not adverse to the other co-sharers. But an alienee of a co-sharer is not a co-sharer. He is a stranger and he does exclude the others and his possession is adverse : see *Lakshman v. Moru* (3). Although the present case is the converse of the Bombay case, just referred to, the same principle applies for the reasons which I have already given. For the reasons given above the appeal fails and must be dismissed with costs.

Leave has been asked for and is granted. I consider that it is a fit case for appeal.

**Mukerji, J.**—The suit out of which this appeal has arisen relates to seven plots of land. The plaintiff's allegation was that out of these seven plots, plot 1 belonged to one Neamat Ali and defendant 1 in equal shares and plots 2 to 7 belonged to one Khadem Ali and defendant 1 also in equal shares. His case further was that he had purchased the shares of

Neamat Ali and Khadem Ali in execution of a decree for money against them on 8th December 1909, and took delivery of possession against those persons through Court on 2nd March 1913, and when he went to take actual possession Neamat Ali and Khadem Ali went away, but defendant 1 in collusion with some other persons including the defendants 2 to 4 opposed him. He alleged further that the defendants had made certain excavations in and were about to do further damage to the lands. The suit was instituted on 27th February 1923 with prayers for declaration of title, joint possession with defendant 1 and injunction.

The defendants denied the plaintiffs' title and raised some dispute as to the extent of their own title as amongst themselves.

The Munsif held that the plaintiff had failed to make out that Neamat Ali had any title to plot 1, or that Khadem Ali had any title to plot 7. He held that Khadem Ali and defendant 1 were co-sharers in respect of plots 2 to 6. He was able to find the extent of Khadem Ali's share in only two out of these five plots, that is to say, in plots 2 and 6, and he found that share as 1/7th. As regards plots 3, 4 and 5 he was unable to find the extent of Khadem Ali's share. He held that the plaintiff had made out his title to plots 2 to 6 and to the shares mentioned above. He, however, dismissed the suit as in his opinion Art. 138, Sch. 1, Lim. Act applied and the suit had not been instituted within 12 years from 14th January 1910, the date of confirmation of the sale at which the plaintiff had made his purchase. He did not arrive at any finding as regards the extent of the shares, if any, of the different defendants. The plaintiff appealed to the District Judge who affirmed the Munsif's view on the question of limitation and held further that even if Art. 144 applied the same result would follow.

The plaintiff then appealed to this Court. My learned brother Mitter, J., held that Art. 144 applies to the case. Applying that article he held that, as by the sale the title of Khadem Ali was extinguished, the possession of the co-sharers of Khadem Ali became from that point of time adverse to the plaintiff who had by the said sale become the true owner, and such adverse possession hav-

(1) [1899] 23 Bom. 137 (F.B.).

(2) [1879] 4 Cal. 327.

(3) [1892] 16 Bom. 722.



ing continued for over twelve years the suit was barred under Art. 144. The suit, it may be said, was instituted beyond twelve years from 8th December 1909 which was the date of the sale and also beyond the like period from 14th January 1910, which was the date of its confirmation. Mitter, J., accordingly dismissed the appeal and from his decision the plaintiff has preferred this appeal under Letters Patent.

I have examined the evidence in the case and I may state here that if it is to be determined as a question of fact when the defendants' possession became adverse to the plaintiff the question has to be decided in only one way, namely, by holding that such adverse possession commenced only after the plaintiff went upon the land after obtaining possession against the judgment-debtor Khadem Ali through Court on 2nd March 1913. It will have to be seen, however, whether upon any principle of law the possession of Khadem Ali's cosharers became adverse to the plaintiff from and by reason of the sale itself.

Now, to constitute a tenancy-in-common, there must be an equal right to the possession of every part and parcel of the subject matter of the tenancy; joint possession is not necessary, unity of right of possession being all that is required. As a general proposition the entry of one co-tenant, in the absence of clear proof to the contrary, enures for the benefit of all. The law makes a presumption that the relation between co-tenants is amicable rather than hostile; and regards the acts of one co-tenant as being in subordination of the title of all the co-tenants, for by so regarding they may be made to promote the interest of all. This rule prevails not merely on behalf of those who are co-tenants when the entry was made, but extends to all who afterwards acquire undivided interests in the property. In *Freeman on Co-tenancy and Partition*, 2nd Edition, S. 167, the following illustration appears:

"If A and B together own (personal) property of which A is in actual possession, and B sells his moiety to C, the possession of A immediately becomes the possession of C also."

My learned brother Mitter, J., has referred to certain cases to which it is necessary to advert in order to see whether they in any way militate against the aforementioned view. In one of these

cases, *Bejoy Chunder Bannerjee v. Kally Prosonna Mukherji* (2), Markby, J., said:

"By adverse possession I understand to be meant possession by a person holding the land on his behalf or of some person other than the true owner, the true owner having the right to immediate possession."

But with the extinguishment of the right to possess the unity of the right to possession ceases, and as soon as the title passes to the purchaser, it is the latter in whom vests the right to possession, and the purchaser becomes a tenant-in-common with the vendor's co-tenants. It would be a fundamental misconception to think that one co-tenant in the absence of any thing to the contrary is, in any sense, in control or possession of the share of his co-tenants. The case of *Lakshman v. Moru* (3), explains what is meant by "adverse possession," but does not profess to touch the present question. The case of *Bhivrao v. Rukhmin* (1), has also little bearing upon this question as it was a case where certain members of a joint Hindu family alienated by sale and mortgage specified plots of lands "out of their share," giving boundaries of the plots and covenanting for title; and what was really decided was that the purchaser entered as owner and not as a co-sharer, and being in such possession for over twelve years was able to defeat under Art. 144 the title of the coparceners of the vendors or mortgagors.

With all deference, I am of opinion that the view taken by my learned brother Mitter, J., is not correct. I would accordingly allow the appeal and setting aside the decisions of all the Courts below direct a decree to be entered in plaintiff's favour declaring his right by purchase and awarding him joint possession with the defendants in plots 2 to 6 mentioned in the plaint, the share of the plaintiff being  $\frac{1}{7}$ th in plots 2 and 6, and the extent of his share in plots 3, 4 and 5 not being determined. The other reliefs asked for by the plaintiffs in respect of these plots should be refused as there are no materials on which they may be granted. The suit in respect of plots 1 and 7 should be dismissed in toto. The plaintiff will get half his costs in all the Courts.

**Rankin, C. J.**—I agree.

S.N./R.K.

*Appeal allowed*



## A. I. R. 1929 Calcutta 253

SUHRAWARDY AND GARLICK, JJ.

*Golbar Bibi and others*—Defendants 4 to 7—Appellants.

v.

*Aswini Kumar Sinha Roy and others*—Plaintiffs 1 to 4—Respondents.

Appeals Nos. 1787 and 1788 of 1926, Decided on 9th August 1928, from decree of 2nd Sub-Judge, Tipperah, D/- 11th May 1926.

(a) Bengal Tenancy Act, S. 22 (2) (amended by Act I of 1908)—Transferable occupancy holding purchased by cosharer landlord—He holds it not as raiyat, but as tenure-holder subject to payment of fair rent to other cosharers.

If a cosharer landlord purchases a transferable occupancy holding, he is entitled to hold it not as a raiyat, but as a tenure-holder in the right which he has in the tenure, subject to payment of a fair and equitable rent to the other cosharer: *A. I. R. 1923 Cal. 210, Rel. on.* [P 254 C 1]

(b) Occupancy holding—Nontransferable holding—Cosharer landlord purchasing nontransferable occupancy holding—Another cosharer subsequently purchasing same and obtaining possession—Latter's possession is wrongful and former can recover possession of holding except latter's share.

When a cosharer landlord takes an unlawful possession of the holding, another cosharer purchaser of the holding is entitled to recover possession from him except to the extent of the share of the cosharer.

[P 254 C 2]

A cosharer landlord purchased a nontransferable occupancy in execution of a money decree. Subsequently another cosharer landlord purchased the same holding in execution of his money decree and obtained possession:

*Held*: that the possession of the latter was wrongful and the former was entitled to recover possession of the holding except to the extent of the share of the latter: 42 Cal. 172 (F.B.); 26 Cal. 553 and 21 C. L. J. 441, Ref.; *A. I. R. 1924 P. C. 144, Expl.* [P 254 C 1]*Jogesh Chandra Roy and Sasadhar Roy*—for Appellants.*Basak and Bepin Chandra Basu*—for Respondents.**Suhrawardy, J.**—These are appeals by defendants 4 to 7 against the decree of the Subordinate Judge of Tipperah dated 11th May 1926. Defendants 1 to 3 had a jote under a sikmi taluk in which the respondents, the appellants and some others are jointly interested. In execution of a money decree the plaintiffs purchased the holding in 1912. But it appears that they did not get possession of the same. In 1914 the appellants obtained a money-decree against the same tenants and sold the holding and obtained possession thereof. Thereupon the plaintiffs brought these two suits for recovery of possession of the lands included in the holding from the defendants. The defence was that the plaintiffs had no right in the sikmi and that the plaintiffs being part-owners of the sikmi were not legally entitled to evict the defendants who were also proprietors of the same taluk and were in possession by virtue of their auction-purchase. It was also pleaded that the tenancy being nontransferable the plaintiffs had acquired no right to it. Both the Courts below made a decree in favour of the plaintiffs minus the defendants' share which is two annas three gandas.Defendants 4 to 7 have appealed and it is argued on their behalf that the view of the law taken by the Courts below is wrong. It is contended that the tenancy being a nontransferable occupancy holding, S. 22, Ben. Ten. Act, does not apply and that the plaintiffs by virtue of their purchase have acquired no right. In support of this contention reliance has been placed upon *Girish Chandra Chowdhury v. Kedar Chandra Roy* (1) and *Lakhi Kanta Das v. Balbhadra Prosad Das* (2). These cases were, however, decided on the law as it stood before the amendment of the Bengal Tenancy Act in 1908. The law as is now laid down by the authorities on this point will be considered later. Though the defendants in their written statement said that the tenancy was a nontransferable occupancy holding, the trial Court proceeded upon the assumption that S. 22 applied to the case. This was due to the fact that in the Record-of-Rights on which the defendants base their claim the defendants were recorded as being in possession as cosharer maliks under S. 22, Ben. Ten. Act. In this state of things the case proceeded under S. 22 and the judgment of the Court below does not give any indication whatsoever that the question of transferability or nontransferability of the holding was ever mooted. The case in the lower appellate Court seems to have been argued on the basis of S. 22 and the decision arrived at by that Court is also passed

(1) [1900] 27 Cal. 473=4 C. W. N. 569.

(2) [1914] 19 C. L. J. 400=25 I. C. 546.



with reference to that section. I will, therefore, first of all examine the correctness of the decision of the Court below with reference to S. 22, Ben. Ten. Act. Cl. (2) as amended by Act 1 of 1908 East Bengal and Assam is :

"if the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, such person shall have no right to hold the land as a raiyat, but shall hold it as proprietor or permanent tenure-holder, as the case may be, and shall pay to his cosharers a fair and equitable sum for the use and occupation of the same."

It means in simpler language that if a cosharer landlord purchases an occupancy holding which should be a transferable occupancy holding, he is entitled to hold it not as a raiyat, but as a tenure-holder in the right which he has in the tenure subject to payment of a fair and equitable rent to the other cosharers. The object of the amendment has been explained in *Purna Chandra Roy v. Mathura Mohan Saha* (3), where the law is thus stated :

"The effect of the amended section is that the occupancy holding disappears, and the purchaser holds the land as a joint proprietor or joint tenure-holder, as the case may be. To put the matter briefly, the purchaser enjoys the land in his character of proprietor or tenure-holder and not as a raiyat. But, as upon the disappearance of the tenant right, all the holders of the superior interest would prima facie be entitled to possession, that one amongst them who is allowed to keep exclusive possession of the land is made to pay his cosharers a fair and equitable sum for such use and occupation."

By the plaintiffs' purchase in 1912 they acquired the holding divested of its character as an occupancy holding and also obtained under S. 22 the right to possess the land subject to payment of a fair and equitable amount to their cosharers. By their purchase of the same holding in 1914 the defendants did not purchase anything because whatever interest the tenants had in the land had already been sold to the plaintiffs in 1912. The defendants must, therefore, be taken to be trespassers and this position has not been seriously denied. Under S. 22 the plaintiffs had the right to the recovery of possession of the entire land from the defendants. But the Courts below have given them a decree in respect of the land less the defendants' share and they were satisfied with it.

Now, assuming that the holding was a

(3) A. I. R. 1923 Cal. 210.

non-transferable occupancy holding, according to the decision of the Full Bench case of *Dayamoyee v. Ananda Mohan* (4), the plaintiffs by their purchase acquired a good title to the land against every person except the landlord. The Full Bench decision does not particularly deal with the case of a cosharer landlord, but it cannot be disputed that by 'landlord' is meant 'the entire body of landlords' or 'the 16 annas landlord.' A cosharer landlord can only object to the sale of the holding to the extent of his own share. By the sale of a nontransferable occupancy holding a raiyat is not entitled to question the legality of the sale; the only person who can challenge its validity is the landlord. It is hardly to be presumed that a cosharer landlord is entitled to object to the sale of the entire holding for it is possible the other cosharers have acquiesced in the sale or accepted the transfer. It has been held that where a cosharer landlord purchases a holding, another cosharer has a right to recover possession of the property to the extent of his own share. *Dilbar Sardar v. Hosein Ali Bepari* (5) and *Kanchan Mandar v. Kamala Prosad* (6). In the last case the law is thus stated :

"In the event of a sale of a nontransferable occupancy holding, the purchaser can be evicted by any of the cosharer landlords to the extent of his own share, and if possession of the entire holding has been acquired by some of the cosharers the other cosharers are entitled to joint possession thereof."

The logical conclusion from this view is that when a cosharer landlord takes an unlawful possession of a holding another cosharer purchaser of the holding is entitled to recover possession from him except to the extent of the share of the cosharer. Looking at the question as it has been raised before us, it does not seem to have been discussed in any of the reported cases. From all points of view the decree of the lower appellate Court seems to be unassailable.

A good deal of argument was founded on same observations of their Lordships of the Judicial Committee in the case of *Midnapur Zemindary Co. v. Naresh Narayan Roy* (7): at p. 296 (of 51 I. A.) their Lordships say :

(4) [1915] 42 Cal. 172=20 C.L.J. 52=27 I.C. 61=18 C.W.N. 971 (F.B.).

(5) [1893] 26 Cal. 553.

(6) [1915] 21 C.L.J. 441=23 I.C. 734.

(7) A.I.R. 1924 P.C. 144=51 Cal. 631=51 I.A. 293 (P.C.).



"No cosharer can, as against his cosharers, obtain any jote right, a right of permanent occupancy, in the lands held in common. nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them."

This is a reproduction of Cls. 2 and 3 of S. 22. Later on their Lordships observe:

"Even if the Midnapur Company purchased any jote rights in lands held in common by the cosharers, such a purchase would in law be held to have been a purchase for the benefit of all the cosharers, and the jote rights so purchased would by the purchase be extinguished."

A great deal of stress has been laid upon the word 'benefit' in the passage quoted. What their Lordships meant is that if a cosharer purchases land held in common by him and his cosharers, he would hold by virtue of such purchase the land to the benefit of the other cosharers, namely, he would be liable to pay fair and equitable rent to them; but the jote right so purchased would be extinguished. Even if the word 'benefit' in their Lordships' judgment means 'on behalf of' or 'subject to the right of the joint possession by the other cosharer landlord, the plaintiffs' suit for recovery of possession against the defendants would not be affected by what their Lordships said. The defendants being trespassers and having no right to remain on the land and the plaintiffs claiming recovery of possession of the land under a semblance of title which gives them the right to present possession plaintiffs are entitled to succeed. If in future other cosharers come in and claim possession of their shares from the plaintiffs and if it is proved that the land is a nontransferable occupancy holding, they will be under the law entitled to obtain joint possession with the plaintiffs to the extent of their shares.

The result is that the appeals fail and are dismissed with costs.

**Garlick, J.**—I agree. The plaintiffs purchased the holding, and the defendants, as cosharers of the taluk, can only object to the plaintiff's possession of the land of the holding so far as their own share of the taluk is concerned.

S.N./R.K.

*Appeals dismissed.*

## A. I. R. 1929 Calcutta 255

RANKIN, C. J., AND MUKERJI, J.  
*Adu Mandal and another*—Defendants  
—Appellants.

v.

*Hira Lal Mistry and others*—Plaintiffs—Respondents.

Appeal No. 1583 of 1926, Decided on 27th July 1928.

**Bengal Tenancy Act, S. 103-B**—Presumption under S. 103-B may be rebutted by reference to proceedings before revenue authorities making entry.

It is quite open to a party who seeks to rebut a presumption arising out of an entry in the settlement records to show by a reference to the proceedings that had been taken by the revenue authorities that the entry itself is wrong or is one which should not be taken at its face value: 27 C. L. J. 107 *Foll.*; A. I. R. 1927 Cal. 268, *not Foll.* [P 256 C 2]

*Hemendra Ch. Sen*—for Appellants.

*Harendra Nath Mukerjee*—for Respondents.

**Mukerji, J.**—This appeal arises out of a suit for declaration of title and recovery of possession. The plaintiffs have been successful in both the Courts below and the defendants have thereupon preferred this second appeal.

The plaintiffs' case was that the land in suit appertained to a jama which they held under certain zemindar called the Mitras, that they had leased out the land to one Sonatan and that Sonatan had been dispossessed by the defendants in 1919. The defence, on the other hand, was that the land appertained to a jama of the defendants themselves which they held under certain zemindars called the Hatbaria zemindars.

The learned Subordinate Judge in concurrence with the trial Court found that the plaintiffs' case that the land appertained to their jama under the Mitras, that the same had been leased out to Sonatan and that Sonatan had been dispossessed by the defendants had been made out. He came to this conclusion on a consideration of the evidence that there is on the record. This conclusion unquestionably is a conclusion on a question of fact.

The appellants, however, contend that this finding of the learned Judge had been arrived at upon a consideration of a piece of evidence which is not admissible. Their complaint is that the learned Subordinate Judge has referred to and relied upon in his judgment a document (Ex. 12) which was the decision of the



Attestation Officer as between the plaintiffs and the defendants in a certain dispute that was filed in connexion with the settlement proceedings. In support of the contention that this decision is not admissible in evidence or that it cannot be relied upon for the purpose of rebutting the entry in the settlement records which is in favour of the defendants, reliance has been placed upon the decision of this Court in the case of *Lakhi Nath Bera v. Nabadwip Chandra Nandi* (1). The passage in that decision upon which reliance has been placed on behalf of the appellants as aforesaid runs in these words:

When the Record-of-Rights has once been finally published, it cannot be attacked on the ground that certain procedure adopted by the revenue authorities in arriving at the final conclusion does not support the entry as finally published. If the party aggrieved by that entry takes objection under the provisions of S. 105 or 106, they might be considered by the Revenue Officer. But when a Record-of-Rights is challenged in a civil Court, the party challenging this record must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings prior to the final publication before the Revenue Officer. It is well known that the settlement authorities may come to certain conclusions at one time of the proceeding which they may modify during the course of the preparation of the record."

The facts on which these observations were made are not very clear from the report of the case as it appears in *Lakhi Nath Bera v. Nabadwip Chandra Nandi* (1). From the reference that is made in those observations to the procedure which was adopted by the Revenue authorities, it seems probable that what was contended before the learned Judges was that the entry in the Record-of-Rights was not to be given its due effect under S. 103-B, Ben. Ten. Act, because the revenue authorities had not adopted the proper procedure or because there was some defect in the procedure that was adopted by them. In my opinion, whatever may be said as regards the correctness of the aforesaid dictum of the learned Judges as applicable to the facts of the case before them, the proposition cannot be taken as one of universal application. In the case before the learned Judges in which these observations were made, it appears that the Court had not taken into account the presumption which arose upon the entry in the Record-of-

Rights, but, on the other hand, held that no presumption attached to the said entry by reason of what was found to be wrong in connexion with the procedure that had been adopted by the revenue authorities. It further appears that in that case the decision of the Revenue Officer was the only material by which the presumption as to the correctness of the Record-of-Rights was sought to be rebutted. On the other hand, there are decisions of this Court amongst which reference may be made to the cases of *Bagha Mowar v. Ram Lakhan* (2) and *Rama Nath Smt v. Official Trustee of Bengal* (3), in which it has been clearly laid down that the presumption under S. 103-B Ben. Ten. Act, may be rebutted either by adducing evidence external to the settlement proceedings or evidence of matters apparent on the face of those proceedings. Upon these authorities, it is clear that it is quite open to a party who seeks to rebut a presumption arising out of an entry in the settlement records to show by a reference to the proceedings that had been taken by the revenue authorities that the entry itself is wrong or is one which should not be taken at its face value. On principle, it is difficult to find how it can be said that the materials upon which the entry has been made cannot be looked into for the purpose of determining whether the entry itself is correct or not. The question of sufficiency or insufficiency of those materials is, of course, different. For these reasons, I am of opinion that this contention that has been urged on behalf of the appellants must fail.

I may mention here that, in the case before us the learned Judge has merely referred to the judgment Ex. 12 to which exception has been taken but his findings are really based upon other materials which he has fully and properly discussed in his judgment, and it is upon a consideration of those materials that he has come to the conclusion that the presumption in question has been rebutted and that the plaintiffs have succeeded in establishing their case.

In my opinion, the appeal fails and must be dismissed with costs.

**Rankin, C. J.**—I agree.

S.N./R.K.

*Appeal dismissed.*

(1) A. I. R. 1927 Cal. 268.

(2) [1918] 27 C.L.J. 107=41 I. C. 804.

(3) A. I. R. 1925 Cal. 799.



**A. I. R. 1929 Calcutta 257**

SUHRAWARDY, J.

*Panchanan Mukherjee* — Accused —  
Petitioner.

v.

*Emperor*—Opposite Party.Criminal Revn. No 208 of 1928, De-  
cided on 26th April 1928.(a) Calcutta Police Act (4 of 1866), S. 78-A  
— Statements made by complainant under  
S. 78-A must be allowed to be used in evi-  
dence.A statement by the complainant during in-  
vestigation to a Police Inspector reduced into  
writing and entered in a diary must be pro-  
duced before the Court and allowed to be pro-  
ved by the defence. [P 257 C 2](b) Criminal P. C., Ss. 162, and 172 — Ap-  
plicability.Sections 162 and 172 do not apply to Cal-  
cutta Police. [P 257 C 1,2]*J. M. Sen Gupta, H. M. Bose & Satin-  
dra Nath Mukherjee*—for Petitioner.

**Judgment.**—This rule was obtained on the ground that a certain statement made by the prosecution to the Sub-Inspector of Police at the Park Street Police Station was not allowed to be proved by the defence. It appears that the girl was found in the house of the accused at Utterpara and brought down to the Calcutta Police Station at Park Street where she made a statement to Mrs. Mac Gilchrist who had brought the girl up from her childhood and after having a talk with her made a statement to the Police Sub-Inspector. Thereafter the accused was charged under S. 376, with rape on the girl and under S. 354 for outraging her modesty. The trial Court in its judgment says that the statement was not proved because it was entered in a confidential diary of the Police Sub-Inspector. The Crown has not appeared in this case and I have, therefore, to decide the question raised on the law and facts placed before me by the learned counsel for the accused. He has referred to S. 78-A, Calcutta Police Act (4 of 1866) under which the police Sub-Inspector investigating a cognizable offence may examine orally any person attending at the investigation and may reduce it in writing and such person shall be bound to answer all questions relating to the case put to him. That is the only section which deals with the power of the Sub-Inspector to record the statement of a person in connexion with a criminal charge. In the Police Act there is no section corresponding to S. 162, or

S. 172, Criminal P. C., which do not apply to the Calcutta Police. In the Act itself I do not find mention of any confidential diary which is privileged and cannot be reached by any party in a criminal case. This rule was issued on the ground that the trial Court was wrong in not having the diary in which the statement of the girl was entered before it and to have it used in evidence. The learned Sessions Judge on this point only remarked that the complaint of the girl was entered in a confidential diary and since it was not produced it was not necessary to notice it further. If the book was not privileged and there was no justification for holding it back, the defence had legitimate grievance in not being able to get hold of it and use it for its own purpose. That statement was very important as it was the first statement made to a responsible police officer. It has been pointed out to me that the girl was in charge of the Bengal Police for about a day but she made no statement there. The statement which she first made relative to this matter accordingly assumes great importance. If the record of the statement was not privileged, it was the duty of the prosecution to place all the evidence it had in its possession before Court. The withholding of this document naturally suggests that it is not favourable to the prosecution. It is not a private prosecution and I cannot too strongly protest against Crown prosecutions degenerating into private cases. This rule must be made absolute on the ground on which it was issued.

The only question that now remains is whether the matter should be sent back to the trial Court for a retrial of the case after admitting the statement made by the girl to the police. The case has been hanging on for about two years. The accused was originally charged with committing rape upon the girl. According to the girl's story the rape must have continued for a considerable time. During the course of the trial the trying Magistrate before charge was framed held that no case of rape could be made out and discharged the accused under that charge. The girl was examined medically and the result of the examination does not prove that there was any actual rape. All that the medical evi-  
dence goes to show is that the girl's pri-



vate parts are fairly developed but there was no indication of complete coition. This disproves the charge of rape and the accused was accordingly discharged of that charge. He has now been convicted under S. 354, I. P. C., for outraging the modesty of the girl. In a case where the accused is charged with rape it is possible to convict him only under S. 354, I. P. C., if the charge of rape or attempt at rape fails. But in this particular case the accused was said not to have committed rape on any particular occasion or only once but of having lived with the girl for sometime and ravished her on more than one occasion. According to the girl's story the accused had committed rape upon her. But according to the medical evidence it must be held that so far as the charge of rape is concerned the story was false. I do not say that the evidence on the record directly relating to the charge under S. 354, I. P. C., is not sufficient for a conviction. But I am only considering the desirability of sending the case back to the trial Court to reopen the prosecution from the beginning and to have another protracted trial in this case when the accused has been sentenced to pay a fine of Rs. 1,000 only. Considering the nature of the case and that the prosecution has lasted for such a length of time and that the accused is a man of social position and that he has been sufficiently punished, if he has committed any offence, by the ignominy, agony and suspense which must have been caused to him, I think it will not be in the interest of justice to order that the accused should be retried.

I accordingly make the rule absolute and acquit the accused. The fine if paid will be refunded.

S.N./R.K.

*Rule made absolute.*

### A. I. R. 1929 Calcutta 258

SUHRAWARDY AND JACK, JJ.

*Bistupada Bera*—Appellant.

v.

*Srinath Chandra Mandal and others*—Respondents.

Appeal No. 2141 of 1926, Decided on 7th December 1928, against the appellate decree of 1st Addl. Dist. Judge, 24 Perganas, D/- 9th July 1926.

(a) Bengal Tenancy Act, S. 12—Transferee.

There is nothing in law to make it obligatory upon the landlord to treat as tenant any person of whose interest he may have had notice but who is not a transferee under S. 12. [P 259, C 2]

(b) Bengal Tenancy Act, S. 12—Release if amounts to transfer.

It is doubtful if a release is a transfer of a permanent tenure by sale, gift or mortgage within the meaning of S. 12 which the landlord would have been bound to recognize: 33 Cal. 967 and 43 Cal. 790, Ref. [P 260, C 1]

(c) Bengal Tenancy Act, S. 12—Transferee.

It cannot be laid down as a universal proposition of law that whenever the landlord gets notice of interest of any other than the transferee, even if it is admitted by the transferee, he is bound to recognise such person as his tenant. [P 260, C 1]

(d) Bengal Tenancy Act, S. 12—Landlord knowing of other person's interest in tenure but suing transferee for rent—Suit is a rent suit.

Suit for rent brought against the person who is a transferee and of whose purchase the landlord has received notice under S. 12 is a suit for rent properly framed and is binding on the tenure though the landlord may have, subsequently to the transfer, known of the interest of other persons therein. [P 260, C 2]

*Braja Lal Chakravarty and Shyama Das Bhattacharya*—for Appellant.

*Apurba Charan Mukerji*—for Respondents.

**Suhrawardy, J.**—The facts of this case are that one Adarmani held the tenure in suit under the landlord defendant 1. The plaintiffs' case that the heirs of Adarmani sold the tenure to the plaintiffs and defendant 2, the conveyance being obtained in the name of defendant 2 alone. Thereafter the landlord obtained a decree for rent against Adarmani's heirs and defendant 2 and in execution of the decree purchased the tenure himself. The plaintiffs thereupon brought the present suit for a declaration of their two-thirds right in the tenure. Defendant 1 contended that the disputed land was purchased by defendant 2 alone and not by the plaintiffs and defendant 2 as alleged in the plaint. Both the Courts below have passed a decree in favour of the plaintiffs. The decision of the lower appellate Court is based on the finding that after the purchase of the tenure the plaintiffs and defendant 2 went to defendant 1 to have themselves recorded as tenants, but he did not acknowledge any one as tenant but granted a rent receipt describing defendant 2 as marfatdar of the original tenant. The



learned Judge seems to have been further impressed by the fact that the suit was not brought against defendant 2 alone but also against the heirs of the original tenant showing that the landlord had not fully recognized the transferee as tenant. It has been found that the tenure as a matter of fact was purchased by the three brothers. The question, therefore, that arises for decision is whether the decree obtained by defendant 1 was a rent decree or whether it was a money decree which affected the right, title and interest of defendant 2 only. It is argued on behalf of the appellant defendant 1 that though he had the knowledge of the claim of the plaintiffs to a share in the tenure he was not bound to look for his rent beyond the transferee of the tenure. On the other hand, it has been argued on behalf of the respondents that the landlord having come to know of the interest of the plaintiffs in the tenure and it having been found that the tenure was purchased by all the three brothers he was bound to bring a suit for rent against all the three brothers and that the decree obtained against one of them is a money decree.

It is conceded that there is no legislative enactment compelling the landlord to recognize the interest of any person appearing before him and claiming an interest in the tenure. The question of recorded or non-recorded tenant is not material in the case of transfer of a tenure, unless it arises in connexion with the question of representation. Before the enactment of Ss. 12, 13 and 15, Bengal Tenancy Act, the landlord had the option of demanding exorbitant fees to recognize transfers or succession. In order to give relief to a tenure-holder and his successors it was enacted that the transfer of a permanent tenure must be by a registered instrument and that the notice of the transfer should be given to the landlord by the Collector with a fee due to the landlord. Under the law as it stands the landlord has no option left in the matter and from the moment he receives notice under S. 12 the liability of the former tenant to rent ceases to exit. *Surapati Roy v. Ram Narayan Mukerji* (1). Similarly liability of the transferee arises whether the landlord recognized him as his tenant or not.

Now the question is if the landlord is informed of the interest of any one other than the transferee in whose name the deed of transfer stands is he bound to treat such person as tenant and is he bound in law to bring a suit for rent against the tenure by making such person a defendant? As I have stated there is nothing in law to make it obligatory upon the landlord to treat as tenant any person of whose interest he may have had notice but who is not a transferee under S. 12. To hold that the landlord should or is, in such circumstances bound to treat a person other than a transferee as his tenant would make his position extremely unenviable. A tenure for example is sold to A, subsequently A and B may both go to the landlord and say that B is the real owner of the tenure and A is merely a benamdar. Suppose the landlord brings a suit against B alone and obtains a decree in execution of which the tenure is sold. A may thereafter turn round and say that he was the real owner and that he was induced by fraud or by some other means to acknowledge the title of B. The landlord may in such a case find himself in great difficulty to realize rent from the tenure.

Take another common example. If a person comes to the landlord and tells him that he has some interest in the tenure which stands in the name of another person as transferee, can it be said that the landlord in such a case is bound to treat such a person as tenant? The fact that the person in whose name the property stands admits the interest of another person will not make the matter very clear for the landlord and will not make him immune from future disputes if the transferee chooses to disown the right of another person in the tenure. Besides, the landlord will find himself at the mercy of unscrupulous persons able to command perjured evidence. After a tenure is sold in execution of a decree against the ostensible transferee the latter may defeat the purchaser by colluding with the landlord or by proving that the landlord had notice of other persons' interest in it.

In this connexion one must not forget the well-known doctrine that a release is not a transfer: *Jadunath Poddar v. Rup Lal Poddar* (2), *Mathura Mohan*

(1) A. I. R. 1923 P. O. 83 = 50 Cal. 68 = 50 I. A. 155 (P. O.).

(2) [1906] 33 Cal. 967 = 4 O. L. J. 22 = 10 O. W. N. 650.



*Saha v. Ram Kumar Saha* (3). If in the present case defendant 2 had executed a document (much less by word of mouth) releasing two-thirds of the property in favour of the plaintiffs I doubt very much that it would amount to a transfer of a permanent tenure by sale, gift or mortgage within the meaning of S. 12, Bengal Tenancy Act, which the landlord would have been bound to recognize.

Under the law it seems to me that as soon as a tenure is transferred under S. 12 the outgoing tenant ceases to have any liability for rent and the incoming tenant is the person whom the landlord must look to for realization of rent. If rent is actually due from a tenure and the person in whose name the transfer is made is one who represents the tenure any other person having any title in the tenure cannot compel the landlord to treat him as tenant along with the person who is the ostensible transferee. If this were not so, the landlord may be deprived of his fee in cases of successive oral transfers. The transferee may come to the landlord after selling a portion of his tenure privately and say that another person has also got an interest in the property. In this way he may go on selling parcels of the tenure to others without paying the landlord's fee and getting such persons recognized by the landlord as his tenants. Taking the common sense view of the matter as well as considering the object of Ss. 12 and 13, I do not think that it can be laid down as a universal proposition of law that whenever the landlord gets notice of interest of any other than the transferee, even if it is admitted by the transferee, he is bound to recognize such person as his tenant.

Assuming the plaintiffs' case to be true, they had allowed defendant 2 to represent them in the matter of purchase of the tenure, that they had in fact told the landlord that defendant 2 was the person who would represent the tenure, but they did not pay the landlord's rent and the tenure was put up for sale. They are not in equity or fairness entitled to say that the suit which the landlord has to bring for his rent should also be brought against them.

There is an observation by the trial Court that the plaintiffs paid their share

of the rent to defendant 2. But the lower appellate Court has not come to any finding on this point. To my mind even if there were such a finding it would have made no difference in the application of the law for if the plaintiffs were anxious to protect their interest they should have seen that the rent reached the landlord. In my judgment the suit for rent brought against the person who is a transferee and of whose purchase the landlord has received notice under S. 12, Bengal Tenancy Act, is a suit for rent properly framed and is binding on the tenure. In this view of the law this appeal is allowed and the decrees of the Courts below are set aside with costs in all Courts.

Jack, J.—I agree.  
D.D.

*Appeal allowed.*

## A. I. R. 1929 Calcutta 260

MUKERJI AND BOSE, JJ.

*J. Ezekiel*—Plaintiff—Appellant.

v.

*British India Steam Navigation Co., Ltd.* and *another*—Defendants—Respondents.

Appeal No. 1027 of 1926, Decided on 17th July 1928, from appellate decree of the Dist. Judge, Chittagong, D/- 21st December 1925.

(a) Bill-of-lading — Shipper accepting without protest bill-of-lading different from prior agreement — He is ordinarily bound by such bill-of-lading—Mere production of forwarding note will not suffice to prove that contract made was different from that in bill-of-lading.

Whatever the prior express bargain has been, a shipper is free to accept any bill-of-lading he chooses. If, therefore, he has chosen to receive without protest a bill-of-lading in a certain form he should ordinarily be bound by it: *Armour & Co. v. Leopold Walford* (London) (1921) 3 K. B. 473, *Foll.* The mere production of the forwarding note will not help the shipper to prove that the contract actually made was something different from that contained in the bill-of-lading. [P 262, C 2]

(b) Evidence Act S. 115—Consignor taking delivery of goods on strength of bill-of-lading and basing his suit on it—He cannot say he is not bound by its terms.

When the consignor has taken delivery of the goods on the strength of the bill-of-lading and has really brought his suit on the basis of it, he cannot be heard to say that he is not bound by its terms: *Glyn v. East and West India Dock Co.*, (1882) 7 A. C. 591, *Rel. on.* [P 262, C 2]

(3) [1915] 43 Cal. 790 = 23 C. L. J. 26 = 35 I. C. 305 = 20 C. W. N. 370.



*Chandra Sekhar Sen*—for Appellant.

*S. M. Bose, Panna Lal Chatterjee, Satya Charan Sinha and Amulya Charan Sen*—for Respondents.

**Judgment.**—The plaintiff is the owner of a business in miscellaneous stores in Akyab. In August 1921 he sent a wire to Messrs. Lipton Limited in Calcutta for despatching to his Akyab firm 25 cases of Lipton's white label tea. Messrs. Lipton Limited received the order on 23rd and on the next day i. e., the 24th, they booked at the office of the Rivers Steam Navigation Co. Ltd. at Jagannathghat a consignment of 25 cases, each case containing 64 one pound tins, of tea. The total weight of the consignment as entered in the forwarding note was 34 mds. 31½ seers, and the value was declared to be Rs. 1,850 and it was entered therein that the consignment was to be carried to Akyab via Chittagong. The cases were carried on a ship belonging to the Rivers Steam Navigation Co. Ltd. up to Chittagong, where they were transhipped to a ship belonging to the British India Navigation Co. Ltd. which carried them to Akyab on 14th September 1921. The plaintiff's agent at Akyab was informed by the coolies who carried the goods from the ship to the wharf that the weights of the cases were remarkably low. On that the agent demanded an open delivery which, however, was refused. The agent then approached the Collector of Customs and the Wharf Superintendent, and ultimately the cases were opened and an inspection of the goods held and it was found that of the 25 cases, 6 cases were entirely empty of tea, but filled with various sorts of rubbish, six cases were quite in tact as regards their contents, while the contents of the remaining 13 cases had been partly abstracted. The plaintiff instituted this suit for a breach of the contract of carriage and prayed for recovery of Rs. 931-15-0 being the value of the quantity of tea abstracted and Rs. 207-8-0 being the damages caused by non delivery. The suit was laid against the British India Steam Navigation Co. Ltd. as defendant 1 and the River Steam Navigation Co. Ltd. as defendant 2.

It has been found as a fact by both the Courts below that the goods were lost in transit between Chittagong and Akyab. The trial Court absolved defendant 2 and

passed a decree for Rs. 936-4-0 with costs against defendant 1. The latter preferred an appeal with the result that the District Judge who heard the appeal allowed it and dismissed the suit but made no order for costs.

The District Judge, while finding all the facts in plaintiff's favour held that the consignment was covered by a bill-of-lading issued by the British India Steam Navigation Co. Ltd. which contained amongst others the clause:

"The company shall not be liable for loss, damage or delay directly or indirectly resulting from any of the following causes or perils howsoever, occasioned; viz., act of God, King's enemies, piracy, robbery, theft or pilferage with or without violence on board or elsewhere, and whether by persons in the service of the company or not, &c. &c."

The plaintiff has then preferred the present appeal. His contention is that defendants are bound by the conditions that are mentioned on the back of the forwarding note, and it is those conditions and not the conditions in the bill-of-lading that represent the contract of carriage, and that the risks in respect of which the bill-of-lading absolved the companies being different from and somewhat inconsistent with those mentioned on the back of the forwarding note were not those that had been bargained for when the goods were consigned, the bill-of-lading having in fact been delivered to the consignor several days after the goods were consigned. It is also contended that when the goods were consigned a cutcha receipt called the Mate's receipt was given to the consignor which was subsequently taken back in exchange for the bill-of-lading, and as the same was not produced by the defendants, an inference should be drawn against the defendants and it should be held that the goods were consigned on a different contract. Lastly, it is argued that defendant 2 is, in any case liable as the bill-of-lading was issued by defendant 1 only and the forwarding note was the only document that passed between the plaintiff and defendant 2.

The two defendant companies have appeared separately in the appeal and have replied to these arguments.

Now, the goods were consigned on 24th August 1921 and the forwarding note contained the following clause which was signed by Messrs. Lipton, Limited:



"I hereby certify that I have satisfied myself that the description, marks, weight and quantity and class of goods consigned by me and all entries have been correctly entered in the forwarding note and the goods have been marked by the Company's staff on my identification and also that no undeclared jewellery and/ or excepted articles as notified in the Schedule to the Common Carriers Act are contained in these goods and/ or luggage and I agree to abide by the conditions endorsed hereon."

The forwarding note remained with defendant 2 and what was given to the consignor was a Mate's receipt. This Mate's receipt was within two or three days as the evidence shows, returned by the consignor in exchange for the bill-of-lading that he obtained, the bill-of-lading which bore date 24th August 1921 and purported to cover the entire journey from Calcutta to Akyab via Barisal and Chittagong and referred to Invoice No. 78 of 24th August 1921. The bill-of-lading was issued by defendant 1 and expressly stated that the goods were to be carried and delivered "subject to the terms and conditions of this bill-of-lading." It may be said here that the bill-of-lading enlarges upon the forwarding note as regards the risks that are to be excepted.

The first question that arises upon the aforesaid facts is what was the contract between the parties. The abstract question whether the bill-of-lading is a conclusive statement of the contract between the shipper and the shipowner, or is only one piece of evidence, helping with others to show what that contract is—a question which is dealt with in Carver's Carriage by Sea, 7th Edition, S. 56, and is a matter upon which there is some conflict of authority—does not call for an answer in the present case. If it concludes the parties, defendant 1 is at once absolved covering as it does the entire journey. If other or extraneous evidence is admissible to prove the agreement between the parties the mere production of the forwarding note will not help the plaintiff, but some evidence will necessarily have to be given to show that the consignor did not expect the terms and conditions of the bill-of-lading to be incorporated into the contract or that the terms and conditions are out of the ordinary or that the circumstances are such as would indicate that the consignor did not bind himself to abide by all or any of those terms

and conditions. It may also be, as has been said in the passage referred to above, that as the bill-of-lading is not usually signed until after the goods have been shipped, it may contain terms not agreed upon at the time of shipping, or that it varies or omits some of the terms as then understood. Of all these, however, there is not a particle of evidence on the record. On the other hand, the consignors being exporters on a large scale must be presumed to have been aware of the terms and conditions, which are nothing but quite ordinary in a bill-of-lading of sea-going vessel. Moreover as observed by McCardie, J. in *Armour & Co. v. Leopold Walford (London)* (1) at p. 477:

"Whatever the prior express bargain has been, a shipper is free to accept any bill-of-lading he chooses; if therefore he has chosen to receive without protest a bill-of-lading in a certain form he should ordinarily be bound by it."

Further than that, the plaintiff suffers from a further infirmity. Far from repudiating the contract as contained in or at least evidenced by the bill-of-lading, he, as endorsee of the bill-of-lading, produced it as entitling him to the goods and took delivery of the goods on the strength of it. In para 2 of the plaint he set out this through bill-of-lading from Calcutta to Akyab via Barisal and Chittagong and as referring to Invoice No. 78 dated 24th August 1921. Indeed it is on the basis of this of this bill-of-lading that he has instituted this suit, and he cannot be heard to say that he is not bound by its terms. In *Glyn v. East and West India Dock Co.* (2) at p. 596 Lord Selborne said:

"Every one claiming as assignee under a bill-of-lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill-of-lading, although by mercantile law and usage it is a symbol of the right to property in the goods, is to express the terms between the shipper and the shipowner."

In the above view of the matter no other contention of the appellant need be considered. The appeal, in our opinion, cannot succeed and must be dismissed, but we do not propose to make any order for costs.

S.N./R.K.

*Appeal dismissed*

(1) [1921] 3 K. B. 473.

(2) [1882] 7 A. C. 591=52 L. J. Q. B. 146=31 W. R. 201=47 L. T. 303.



## \* \* A. I. R. 1929 Calcutta 263

MUKERJI AND BOSE, JJ.

*Kala Chand Mukherjee and another—*  
Defendants 1 and 2—Appellants.

v.

*Jatindra Mohan Banerjee and others—*  
Plaintiffs—Respondents.

Appeals Nos. 556 and 624 of 1926, Decided on 4th July 1928, from appellate decrees of 1st Sub-Judge, Dacca, D/-12th September 1925.

(a) Civil P. C., O. 41, R. 2—One appellant dying—Co-appellant can rely on his grounds.

When one of the appellants dies, his co-appellant is competent to rely on all such grounds upon which the deceased appellant could have resisted and did resist the claim.

[P 263 C 2]

\* \* (b) Transfer of Property Act, S. 14—Contract of pre-emption between contracting parties and binding on their successors offends rule against perpetuities—Contract cannot be enforced against even contracting parties.

An agreement, creating mutual rights of pre-emption between the contracting parties and their heirs and representatives-in-interest being obnoxious to the rule against perpetuities, is one that the law considers to be unlawful and therefore is not capable of being enforced even as between the contracting parties. (*Case law discussed*). [P 269 C 1]*Gunada Charan Sen, Rajendra Chandra Guha and Charu Ch. Chowdhury—*  
for Appellants.*Brojo Lal Chakravarti, Upendra Lal Roy, Jitendra Kumar Sen Gupta and Asitaranjan Ghose—*for Respondents.

**Judgment.**—These appeals have arisen out of a suit instituted by the plaintiff to enforce a right of pre-emption. The plaintiff and defendant 2 were cosharers in respect of a homestead, the plaintiff having a 12 annas share and defendant 2 the remaining 4 annas share. Then there was an agreement between the parties, the relevant terms whereof are set out below, and the substance thereof was that neither party would be competent to sell his share in the homestead but to the other. Thereafter defendant 2 mortgaged his 4 annas share in the homestead to the plaintiff and afterwards sold it to defendant 1. The plaintiff then instituted this suit for a declaration that the sale held as aforesaid in contravention of the agreement was ineffectual as against him, and for a sale-deed being executed in his favour on receipt of the value of the share minus the money due

on the mortgage, and for other reliefs. The main defence of the defendants was that the agreement was void as being due to undue influence, and misrepresentation and that defendant 1 was a bona fide purchaser for value. The Courts below have decreed the suit in a modified form. The defendants as well as the plaintiff have then appealed to this Court, the appeal of the defendants being S. A. No. 556 of 1926 and that of the plaintiff, S. A. No. 624 of 1926. It will be convenient to deal with the appeals separately.

S. A. No. 556 of 1926.

Appeal No. 556 of 1926 was preferred by both the defendants; but defendant 1 died and his heirs have not come forward to be substituted in his place. The position therefore is that the part of the decree of the Court below which declared that the sale by defendant 2 to defendant 1 was invalid and inoperative as against the plaintiff stands unchallenged. The appeal in so far as it is at the instance of defendant 2 is directed against, and its scope is limited to, the part of the decree which runs in these words:

"Defendant 2 is further directed to execute a deed of sale to the plaintiff in respect of his 4 anna share in the homestead in suit within a month of the deposit into Court by the plaintiff of Rs. 600 as the price of the sale to the credit of defendant 2. One month's time is allowed to the plaintiff for the deposit. On failure to make the deposit, so much of the decree as directs the sale-deed in favour of the plaintiff will be treated as cancelled."

The principal ground on which the decree is challenged on behalf of the appellant, namely, defendant 2, is:

"that the agreement is void as it offends against the rule against perpetuity and is bad on the ground of remoteness."

The plaintiff respondent contends that this contention of the appellant as also his other contentions to which reference will be made hereafter, should not be entertained as his only defence in the trial Court was that the agreement was void as vitiated by undue influence and misrepresentation; but we think we must overrule this objection as, in our opinion defendant 1 being dead, defendant 2 is competent to rely on all such grounds upon which defendant 1 could have resisted and did resist the plaintiff's claim.

To deal with the aforesaid contention of the appellant it is necessary in the first instance to set out the relevant portion of the agreement. It runs thus:

"This agreement shall be binding against us, our heirs and our representatives-in-in-



terest. Any act done contrary to this agreement will be considered ineffectual and will not be acceptable to a Court of Justice . . . . We settle the price of the entire property given in the schedule below to be Rs. 2,400. Any of our cosharers or any cosharers of our heirs willing to sell his or any portion of his share shall be bound to sell it, for a price proportionate to the price fixed above to the other cosharers and the other cosharer shall be bound to purchase the same. The intending seller shall on no account be competent to sell his share to a third party except as provided below. Any sale contrary to this proviso will be invalid and the other cosharer will be competent to nullify the same by suing for a kabala within three years of the sale on depositing in Court the price with interest at 4 per cent per annum."

There were provisions made as to the circumstances under which a sale could be effected in favour of a third party, but they need not be set out here as admittedly those conditions have not been complied with.

Now, it appears that prior to the Transfer of Property Act (4 of 1882) the Indian Legislature recognized that a contract for the sale of immovable property created an equitable interest in the property and made the purchaser the owner of it in equity: See illustration (g) to S. 3, illustration (a) to S. 13, and S. 27, Cl. (b), Specific Relief Act I of 1877; S. 17 Cl. (2), Registration Act 20 of 1866; and S. 17 Cl. (b), Registration Act 3 of 1877; and the judgment of Kanga, J. in *Dinakarrao Ganpatrao v. Narayan Vishwanath* (1) (at pp. 213 to 215 of 47 Bom). In the case of *Maharaj Bahadur Singh v. Balchand Choudhury* (2), in which case the facts were that the proprietor of a hill had in 1872 agreed with a Society of Jains, that if the society would require a site thereon for the erection of a temple, he and his heirs would grant a site free of cost, and had thereafter alienated the hill in favour of a third party, and the society then sued the alienees for possession alleging that they had given notice to the proprietor requiring the site and further alleging that they had taken possession but had been dispossessed, their Lordships of the Judicial Committee observed as follows:

"For the appellants (the Society) to succeed it is essential to show that this agreement created in them some present estate or interest which would prevent the Raja from having made the grant. That could only be effected

by reading the compromise as creating in the Jains Society a grant in perpetuity of the Parasnath Hill. This cannot, however, be supported, because subject to the provisions of the agreement, the Raja is left in control of the hill, and the Raja has power from time to time to dispose of such portions as he thinks fit, and it would be impossible to challenge the right of any person who took under him unless it could be shown that the covenant upon which the appellants rely was a covenant which was in the circumstances enforceable, not merely against the Raja but against his assignees. Such a covenant as this does not, and cannot run with the land, and could not be so enforced. Further, if the case be regarded in another light namely an agreement to grant in future whatever land might be selected as a site for a temple as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest in presenti, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

This pronouncement is sufficient authority for the proposition that a covenant for pre-emption prior to the Transfer of Property Act, at any rate, was within the mischief of the rule against perpetuities. It was said by Bhasyam Ayyangar, J., in the case of *Ramasami Pattar v. Chinnan Asari* (3), though the question did not directly arise or at any rate was not argued in that case, that though under S. 54, T. P. Act, a contract for the sale of immovable property does not of itself create any interest or charge on such property, and in S. 17 Cl. (b), Registration Act, the same view is adopted and S. 14, T. P. Act formulating the English doctrine of perpetuities with some modifications is not applicable to a covenant for pre-emption, yet Cl. (d), S. 2, T. P. Act, expressly provides that nothing in Ch. 2 of the Act, in which S. 14 occurs, shall be deemed to affect any rule of Hindu law. The learned Judge pointed out that in the matter of making a gift inter vivos or by will, the power of a Hindu is, under the Hindu law, more restricted than under the English doctrine of perpetuities and the corresponding provision enacted in S. 14, T. P. Act. He pointed out that in the decision of the Judicial Committee in the case of *Chundi Churn Barua v. Sidheswari Debi* (4) the doctrine that no Hindu can either by act inter vivos or by will make a gift in

(1) A.I.R. 1922 Bom. 84=47 Bom. 191.

(2) A. I. R. 1922 P. C. 165=6 Pat. L. J. 163=48 I. A. 376 (P.C.).

(3) [1901] 24 Mad. 449.

(4) [1889] 16 Cal. 71=15 I. A. 149=5 Sar. 231 (P.C.).



favour of a person not in existence at the time when the gift is made or at the death of the testator as the case may be. *Jotindra Mohun Tagore v. Ganendro Mohun Tagore* (5) was held applicable to transferees for consideration. He was doubtful whether the English doctrine of perpetuities and S. 14, T. P. Act, which applied only to transfer of interest in land would apply to contracts for sale of land in India and ultimately observed:

"But it must be admitted that there is really no substantial difference between English and Indian law in respect of contract of sale of immovable property and it does seem reasonable and in accordance with the principles of general jurisprudence that there should be some limit of time beyond which the performance of contracts for the transfer of property by way of sale, pre-emption or otherwise must not be allowed to be held in suspense or postponed. Although S. 14 deals only with transfers, the provisions of that section could in some cases be practically defeated if covenants are not held to be void for remoteness on the ground that by themselves they create no interest in property. But the result of extending the rule against perpetuities to covenants may possibly be that, in the case of Hindu, a covenant which would not necessarily vest the future interest, contemplated to result from the covenant, in a person who is in existence at the time of the covenant, would be void. I am glad to be able to refrain from expressing any opinion on this difficult and important question of the application and the limits of the application of the doctrine of perpetuities to covenants, as it has not been really argued in the case and as in fact it is unnecessary to consider and decide it in this case."

In India, on the one hand the substantive law of property namely the Transfer of Property Act 4 of 1882 does not recognize equitable interest in land, and the rule of English law that a contract for sale of real property makes the purchaser the owner in equity of the estate has no application to those parts of India where the Transfer of Property Act is in force: see *Maung Shwe Goh v. Maung Inn* (6) while on the other hand S. 27 (b), Specific Relief Act, recognizes that contracts with regard to land can be specifically enforced against third parties in certain cases, and S. 91, Trust Act, also lays down that a transferee taking with notice of a prior contract in favour of another must hold the right obtained under the transfer as a trustee for the

previous promisee. The result is that one who has obtained a promise for the conveyance of land as a substantial interest in it, and contracts of this description stand in a class by themselves. A series of judicial decisions have now settled the view that contracts of this description, if they purport to do indirectly what the law forbids to be done directly, are void, and the principles applicable to them are the same in India as in England.

In England what may now be considered to be the leading case on the point is that of *L. & S. W. Ry. v. Gomm* (7). In that case the facts were these: The plaintiff company in 1865 conveyed a land to Powell in fee, and Powell covenanted with the company that he, his heirs and assignees, would at any time on receipt of £ 100 reconvey the land to the company. In 1879 Gomm purchased the land from Powell with notice of the covenant; in 1880 the company demanded a conveyance and, upon Gomm's refusal, sued for specific performance. Kay, J., took the view that the rule against perpetuities was a branch not of the law of contract but of property and held that

"a contract not creating any estate or interest properly so called in property, at law or equity, is not obnoxious to the rule;"

and as the contract in that case did not run with the land at law and a purchaser without notice would not be bound by it, he held that it was not within the rule against perpetuities at all and made a decree for specific performance. Gomm thereupon appealed. The Court of appeal (Sir George Jessel, M. R. and Sir James Hannen and Sir Nathaniel Lindley, L. JJ., all of them dealing with the point) reversed the decree holding that the option to purchase gave an equitable interest which was within the rule against perpetuities. The authority of this decision is supreme at the present moment and it is unnecessary to deal with the subsequent decisions which have explained or followed this principle. Of these may be mentioned, *Trevelyan v. Trevelyan* (8), *Woodall v. Clifton* (9), *Worthington Corporation v. Heather* (10), *Edwards v.*

(7) [1882] 20 Ch. D. 562=51 L. J. Ch. 530=46 L. T. 449=30 W. R. 620.

(8) [1885] 53 L. T. 853.

(9) [1905] 2 Ch. 257 (261)=74 L. J. Ch. 555=93 L. T. 257=21 T. L. R. 581=54 W. R. 7.

(10) [1906] 2 Ch. 532=75 L. J. Ch. 761=4 L. G. R. 1179=22 T. L. R. 750.

(5) [1872] 9 B. L. R. 377=18 W. R. 359=I. A. Sup. Vol. 47=2 Suther. 692=3 Sar. 82 (P.C.).

(6) A. I. R. 1916 P. C. 139=44 Cal. 542=44 I. A. 15 (P.C.).



*Edwards* (11). Another principle that should be borne in mind is that in construing a covenant from the point of view of the doctrine of perpetuities or to test it on the ground of remoteness it is the invariable practice of the English Courts to pay regard to all possible contingencies and not to actual events only: *Gunganon v. Smith* (12) and *Jee v. Audley* (13) and this practice has been followed in Indian Courts, e.g., *Srimati Bramamayi Dasi v. Jages Chandra Dutt* (14) at 407; *Soudaminy v. Jogesh Chunder Dutt* (15) at p. 268 and *Nabin Chandra v. Rajani Chandra* (16). As Bacon, V. C., put it in the case of *Trevelyan v. Trevelyan* (8), in respect of a covenant which provided that certain land should be restored on terms mentioned, at any time during the continuance of the settlement:

"Why is not the settlement to continue? Who can prescribe for me, or help me to guess the time at which the settlement will come to an end? It is said that if there were a tenant in tail he might have barred the continuance of the settlement. No such thing could happen. It was not necessary that it should happen. . . . This is not a lawful covenant: It is a covenant tending to a perpetuity which the law does not allow, and, which, therefore, cannot be enforced."

Indeed in the case of reciprocal promises one forming the consideration for the other, it is impossible to separate the different parts of a promise and treat one part of a promise on the one hand as forming the consideration for the whole or a part of the promise on the other.

Now, contracts of the present nature may be of various kinds according as the promise is made by one person in favour of another, or by one person for himself and his heirs etc., in favour of another or in favour of another and his heirs, etc., and there may be also further varieties caused by the promise on the side being made by one person or by one person for himself and his heirs, and so on. There is nothing inherently wrong or objectionable in a contract between persons tying up property for a limited time for a definite purpose or for the sake of mutual convenience. Phear, J., observed in the case of *Radhanath v. Tarruck Nath* (17):

"I need hardly say, however, that it is not competent for the owners of property in this country by any arrangement made in their own discretion to alter the ordinary incidents of the property which they possess, for instance in this particular case, to say that the joint property shall remain the joint property of the joint family in perpetuity, but shall not possess the incident which the law of the country attaches to property in such condition, namely, that every independent parcener is entitled at any time to have his share divided off from the rest. No doubt any one member of the family, and therefore all might for sufficient consideration, bind themselves to forego their rights for a specified time and definite purpose by a contract which could be enforced against them personally."

A plain and simple case in which A and B agree between themselves that if either of them is desirous of selling and the other is willing to buy at a proper price or fixed price, sale to a third party shall be invalid, hardly presents any difficulty. To a personal covenant of this nature, the doctrine of perpetuities or of remoteness has no application. Such was the case of *Kalimuddin Bhuya v. Reazuddin Ahmed* (18). The agreement there was in these terms:

"Any of the parties desirous of selling the lands allotted to his share shall sell the same to the other party willing to buy the same at the proper sale price. Sale to any body else shall be invalid. But if the parties do not purchase at the proper sale price, the other party shall be entitled to sell to others. Let it be known that the value of the property is or will be Rs. 600."

In breach of this covenant one of the parties had sold to a third party and the other party then sued to enforce his right of pre-emption. It was held that it could not be argued that the covenant was invalid against the covenantor himself. So also an agreement by a mortgagor to give the mortgagee a preference of pre-emption in case of sale was upheld and given effect to against the covenantor, it being held, there was nothing in the covenant which was contrary to public policy and the argument that the covenant offended against the rule against perpetuities was ignored: *Haris Paik v. Jahruddi Gazi* (19). The same view was taken of a covenant giving a mortgagee right of pre-emption in the case of *Bimal Jati v. Biranja Kuar* (20), it being held on authority of *Biggs v. Hoddinot* (21),

(18) [1903] 10 C. L. J. 626=1 I. C. 743=14 C. W. N. 295.

(19) [1897] 2 C. W. N. 575.

(20) [1900] 22 All. 238=(1900) A. W. N. 47.

(21) [1898] 2 Ch. 307=67 L. J. Ch. 510.

(11) [1909] A. C. 275=78 L. J. Ch. 504=100 L. T. 84.

(12) [1845] 12 Cl. & F. 546=10 Jur. 721.

(13) [1787] 1 Cox. 324=1 R. R. 46.

(14) [1871] 8 B. L. R. 400.

(15) [1877] 2 Cal. 262.

(16) A. I. R. 1921 Cal. 162.

(17) [1875] 3 C. W. N. 126.



*Santley v. Wilde* (22) and *Orby v. Trigg* (23) that it is prima facie a good covenant and enforceable by the mortgagee, there being nothing in the nature of vagueness, uncertainty or unreasonableness attaching to it.

On the other hand, a covenant binding one party and his successor to sell to another and his successors is a covenant for pre-emption unlimited in point of time and has been held not to be enforceable, in numerous cases in the different Courts in this country. One of the earliest cases was that of *Sreemati Tripoora Soonduree v. Juggernath Dutt* (24). In that case four brothers on making a partition of their joint property, covenanted with each other that if any one of them, or their heirs, had to sell his share, he should offer to sell the same to one of the co-sharers. One of the brothers having died, his widow sold the share which she had inherited without such an offer to the surviving brothers who thereupon sued her and the vendee upon payment of what they alleged to be the value of the property. Markby, J., (Morris, J., concurring) said :

"We are also desirous not to be understood as in any way assenting to the proposition that this covenant was binding upon the widow to whom a share in the property had descended from the original covenantor. She was not a party to the covenant, and if we hold that she was bound by it, we must then hold that every person to whom this land may pass by inheritance will also be bound by it. But this would be to create a perpetual covenant as to the disposition of land for which we have not been shown any precedent. A similar covenant was before the Master of the Rolls in *Stocker v. Dean* (25) and he doubted whether it could be enforced after the death of the owner who entered into it. We also consider it extremely doubtful how far such a covenant can be enforced."

It will be observed that the passage aforesaid is no authority on the question whether as between the original covenantors the agreement would be enforceable. In *Stocker v. Dean* (25) the facts were as follows : Deborah Setchfield was the owner of a shop and premises and of an adjoining cottage and premises called the Globe, both of which were vested in Fisher as trustee for her. By one agreement Fisher with the consent of Deborah

Setchfield agreed to sell the shop and premises to plaintiff Stocker for £1,000 and it was further agreed that in case Deborah Setchfield should wish to sell the adjoining messuage (the Globe) she would request Fisher (who thereby promised to accede to such request) to surrender or convey the adjoining messuage (the Globe) to the plaintiff Stocker and his heirs or appointees for £200. By a contemporaneous agreement of the same date and made between Fisher and Deborah Setchfield on the one part and the plaintiff on the other part it was agreed that if the Globe be not surrendered to the plaintiff before a certain date, the same should be surrendered and conveyed to Deborah Setchfield and that she should enter into a covenant, at the expense of the plaintiff and Deborah Setchfield for herself, her heirs and assigns at all times thereafter to give to the plaintiff, his heirs and assigns, the right of pre-emption of the Globe with the appurtenances, at the price of £200. The purchase of the shop, etc., was completed, and thereafter the Globe was conveyed to Deborah Setchfield. She died leaving her trustee to sell the Globe. The Globe was put up to auction and the plaintiff in ignorance of his rights bid for the property up to £360, but it was ultimately bought in for £450. The plaintiff then sued for specific performance insisting that as at the time of her death Deborah Setchfield was desirous of selling the Globe his right of pre-emption had arisen. The Master of the Rolls construed the first agreement as meaning that it was a right of pre-emption to be exercised during the life of Deborah Setchfield only, because it was manifest that the parties anticipated that something was to be done by Deborah Setchfield personally when the contract was to be carried into effect, and this limited the right to the case of her wishing to sell in her lifetime. Referring to the second agreement he said :

"The other agreement is this. It is at all time thereafter to give the plaintiff, his trustees and assigns the right of pre-emption. It has I think been properly argued, that this is in addition to the first contract or a distinct agreement independent of and superseding it. I think I cannot treat it as superseding the former contract. If I could treat it as a distinct and separate contract, I should require much more argument to convince me that a contract which gives a right of pre-emption "at all times" hereafter is one

(22) [1899] 2 Ch. 474=68 L. J. Ch. 681=81 L. T. 393=15 T. L. R. 528=48 W. R. 90.

(23) [1722] 9 Mod. 2.

(24) [1875] 24 W. R. 921.

(25) [1852] 16 Beav. 161.



which could be enforced after the death of the owner of the property . . . . . On the whole I am of opinion that the contract was to be enforced in the life of Deborah Setchfield, in case she should, during that period, wish to sell the property."

Referring to this case *Sundara Ayyar, J.*, said with great nicety in the case of *Kolathu Ayyar v. Ranga Vadhyar* (26):

"An unconditional contract to sell would no doubt ordinarily be enforceable against the heirs of the covenantor as if he had said: 'I and my heirs shall convey;' but the question is can an agreement in the words, 'I promise to convey to you if I sell the land' be held to bind the heirs as if the promisor said, 'I promise that I or my heirs shall convey to you if I or they sell'? In other words, is an agreement to convey enforceable when the option to sell is exercised by the heirs, when the document says: 'If I sell?' It seems to us that there is much reason in the view that such a contract is not enforceable against the heirs."

Whatever that may be, *Stocker v. Dean* (25) can hardly be read as an authority for the view that an agreement which as a whole infringes the rule against perpetuities is enforceable as good as against the covenantor himself, and in my opinion there is no justification for regarding it as an authority which may be taken as indirectly supporting such a view.

That a covenant of the description such as we are concerned with in the case before us by which A and B respectively for themselves and their heirs for all times agree to a right of pre-emption for each other and their heirs is bad as offending against the rule against perpetuities and on the ground of remoteness requires no argument. It is a covenant which amounts to an agreement to convey immovable property upon the happening of an event which might occur at a more remote period than the lives in being and eighteen years afterwards.

Instances in which the Courts have refused to enforce such or similar covenants when they were sought to be enforced by or against the successors in interest of the covenantors themselves are common, but those decisions do not really help us in deciding the present case in which the offending covenant is sought to be enforced as between the contracting parties themselves. Amongst such instances may

be cited: *Nobin Chandra v. Nawab Ali Sarkar* (27) in which case in a conveyance executed by the plaintiffs in favour of the defendants' father it was provided that if the latter sold the property subsequently, he would be bound to give preference to the plaintiff and the covenant was sought to be enforced against the defendants who were the sons of one of the contracting parties: *Rash Behari Ganguli v. Shatharanjan Samaddar* (28) in which the covenant was between the plaintiff and the father of the defendants who were members of a family and it was to the effect that if any member of the family had to sell any portion of the family property, he must offer it for sale in the first instance to the other members of the family and it was stipulated that the agreement would be binding between the parties and their heirs: *Nabin Chandra Sarma v. Rajani Chandra Chakravarti* (16) in which a Hindu transferred certain immovable property to his son-in-law, reserving a condition that if the transferee or his successor found it necessary to sell the property, he must sell it to the vendor or his nephew or his heirs at a specified price, and the son of the son-in-law having sold the property to strangers, the nephew sued for enforcement of his right of pre-emption; *Kolathu Ayyar v. Ranga Vadhyar* (26) in which a covenant in respect of a right of pre-emption as between two persons was sought to be enforced against the heirs of one of them; *Dinkarrao Ganpatrao v. Narayan Vishwanath* (1) in which case the covenant in the sale-deed executed by a vendor was in these words:

"In case you or your heirs have to sell the said plot, the same is to be sold back to me for the above mentioned value. It is not to be sold to any other person. In case you are informed in writing that I or my heirs or vahivatdars or donees from them are not going to purchase it, then only you can sell to any other person if you like. But I do not give right to the purchaser from me. And similarly I do not give this right to purchaser from any of my heirs or vahivatdars or from any donee from them. When you want to sell the building that you are going to build on the same plot, you or your heirs or your vahivatdars are to accept from me or my heirs or vahivatdars or donees the price of that building that may be settled amicably between ourselves or through Panch. The said land is sold to you on the condition that

(26) [1913] 38 Mad. 114=24 M. L. J. 84=18 I. C. 203=(1913) M. W. N. 163.

(27) [1898] 5 C. W. N. 343.

(28) [1921] 64 I. C. 1001.



I am to pay as the price of the land only as such amount as is taken from you now. This sale-deed is agreed to by our heirs, representatives, etc."

The suit in this case was between 'the heirs of the vendor and the heirs of the vendee.'

The question with which we are really concerned in the present appeal is whether an agreement of this nature is enforceable as between the contracting parties. Giving the matter all the considerations that I possibly can, I think I must answer the question in the negative, because the covenant itself being obnoxious to the rule against perpetuities, it is one that the law considers as unlawful and it is impossible to hold that it is capable of being enforced even as between the contracting parties. As pointed out by Bhashyam Ayyangar, J., in *Ramasami Pattar v. Chinnan Asari* (3):

"the decision in *London and South Western Railway Co. v. Gomm*. (7) does not proceed on the ground that the covenant cannot be enforced against the legal representative or assignee of the covenantor, but on the ground that it was void for remoteness and, therefore, not binding on the covenantor himself."

*South Eastern Railway v. Associated Portland Cement Manufacturers Ltd.* (29) merely decided that if a man promises that he and his heirs will convey, the promise may be enforced against himself, that is to say that the promise may be treated as divisible so as to make it enforceable against the heirs. The case is no authority for the proposition that the rule against perpetuities may be got over by ignoring a part of each of the reciprocal promises and making a new contract for the parties which would not be obnoxious to the rule against perpetuities. That a covenant which is affected by the vice of remoteness is void and ineffectual even as between the immediate parties thereto has been held in this Court in 'the case of *Anath Nath Meitra v. Keshab Chandra*. (30).

For the foregoing reasons I am of opinion that the appellant's main contention must succeed.

In this view it is not necessary to deal in detail with the other arguments that have been advanced on behalf of the appellant which are to the effect

(29) [1910] 1 Ch. 12=79 L. J. Ch. 150=54 S. J. 80=74 J. P. 21=101 L. T. 865=26 T. L. R. 61.

(30) [1910] 14 C. W. N. 601=5 I. C. 487.

first that the plaintiff was not entitled to a decree as he did not deposit the price of the property before instituting the suit as she should have done in accordance with the terms of the agreement; 2nd that the sale by defendant 2 in favour of defendant 1 having been found to be collusive should be regarded as no sale at all and so the plaintiff was not entitled to a decree, there having been really no cause of action for his suit: (vide *Parsashth Nath Tewari v. Dhanai Ojha* (31) and 3rd that the defendant was entitled to the amount of interest at the rate of 4 per cent per annum on the price between the date of the sale and the institution of the suit. In my opinion there is no substance in the first and second contentions as the omission to make the deposit could not deprive the right which the plaintiff may have under the contract, and the finding as regards collusion does not amount to a finding that the sale was not operative as between the parties. As regards the contention, I am of opinion that it is well founded.

In the view that I have expressed as regards the main contention in the appeal, the appeal succeeds. The result is that the decrees of the Courts below being set aside in so far as they are against defendant 2, the suit as against him is dismissed with costs in all the Courts.

S. A. No. 624 of 1926.

In view of the result of the other appeal this appeal which has been preferred by the plaintiff for a decree for recovery of possession must fail. It is accordingly dismissed but without costs.

M.N./R.K.

Decree set aside.

(31) [1905] 32 Cal. 988=9 C. W. N. 874.

### \* A. I. R. 1929 Calcutta 269

SUHWARDEY AND JACK, JJ.

Satyabhama De—Appellant.

v.

Jatindra Mohan Deb and others—Respondents.

Appeal No 2676 of 1926, Decided on 6th December 1928, against the appellate decree of Addl. Dist. Judge, Dacca, D/- 17th May 1926.

(a) Partition Act (4 of 1893), S. 8—Lower Court allowing sale—Order of appellate Court reversing it is a decree and is appealable.

Where the trial Court allows a sale but the appellate Court refuses to pass an order for



sale reversing the trial Court's order the appellate order is a decree and is appealable if the requirements of second appeal under Civil P. C., S. 100 are fulfilled. [P 271 C 1]

(b) Partition Act (4 of 1893), S. 4—Application can be made any time during suit or appeal.

An application under S. 4 can be made at any stage of a suit, even in the appellate Court: 22 C. W. N. 515, *Ref.* [P 272 C 1]

\* (c) Partition Act (4 of 1893), S. 4—Party in partition suit is both plaintiff and defendant—Defendant claiming share may be treated as plaintiff.

A party in a partition suit whether a plaintiff or a defendant is at the same time a plaintiff as well as a defendant. This dual capacity of a party in a partition suit does not preclude even a defendant who claims a share in the dwelling house from being treated as plaintiff for the purposes of S. 4: 12 C. L. J. 525, *Ref.*; A. I. R. 1922 Bom. 121, *Dist.* [P 272 C 1]

*Prokash Chandra Pakrashi*—for Appellant.

*Bireswar Bagchi and Jatindra Nath Sen*—for Respondents.

**Judgment.**—This appeal is by defendant 9 in a partition suit. The facts are that the plaintiffs brought a suit for partition of a dwelling house and some agricultural lands. In the plaint they prayed that if their share was not allowed in the dwelling house they might be allowed a proportionate parcel of the agricultural lands in lieu of their share. The appellant did not appear at the earlier stages of the suit but her husband defendant 10 appeared and filed a written statement in which he said that the plaintiffs' share in the dwelling house might be valued and defendant 10 be allowed to purchase it, he being a member of an undivided family. In view of the pleadings the preliminary decree, which was passed on 5th December 1921, directed that the plaintiffs could not get any share in the dwelling house but they should get a share in the lands of the value of the share they had purchased in the property. On the same day namely 5th December 1921, defendants 14 to 19, who are respondents in this appeal, filed an application in which they prayed that their possession might be maintained and that they might be given a separate saham including the portion in their possession. These defendants claimed to be in possession of a portion of the dwelling house and asked that that portion might be allotted to them on partition. After the prelimi-

nary decree a final decree was also passed in terms thereof. At the instance of defendant 10 the final decree was subsequently set aside. Before another final decree could be passed the appellant appeared in Court on 14th December 1925 and filed an application under S. 4, Partition Act (Act 4 of 1893) praying to be permitted to purchase the shares of the plaintiffs and of defendants 14 to 19 all of them being strangers to the family. The trial Court allowed the application and directed that the appellant should be permitted to purchase the shares of the plaintiffs and of defendants 14 to 19 in the homestead described in Sch. ca of the plaint. Against that order an appeal was taken to the District Judge of Dacca and the Additional District Judge by his judgment dated 17th May 1926 dismissed the appeal so far as it related to the plaintiffs' share but allowed the appeal in respect of the shares of defendants 14 to 19 holding that the lower Court was in error in permitting defendant 9 to purchase the shares of these defendants. From the decree of the District Judge two appeals were preferred to this Court, one by the plaintiffs against the order of sale of their share of the dwelling house and the other the present appeal by defendant 9 against the order dismissing her prayer to purchase the shares of defendants 14 to 19. We have already allowed the plaintiffs' appeal and held that in the circumstances of this case defendant 9 is not entitled to claim relief under S. 4, Partition Act.

Now in this appeal the appellant's contention is that the defendants 14 to 19 are strangers who had purchased shares in the dwelling house from some of the defendants' cosharers and that the appellant should be permitted under the provisions of S. 4, Partition Act to purchase their share in the dwelling house. The learned Judge has disallowed the appellant's prayer on the ground that the Partition Act does not authorise the original shareholder to purchase the share of a stranger to the dwelling house other than the stranger who sues for partition. The effect of this order is that because the respondents are not plaintiffs in the case their shares cannot be purchased by the defendants under the law. We have considered this matter carefully and we have come to the con-



clusion that the order of the lower appellate Court cannot be supported.

Before entering into the substantial question raised in the suit we should dispose of a preliminary objection which has been taken on behalf of the respondents. It has been argued that under S. 8, Partition Act, an appeal lies from an order for sale made by the Court under S. 4. This appeal is against an order made by the District Judge refusing to pass an order for sale and therefore, it is not open to appeal. We do not think that this contention ought to prevail. The first Court passed an order for sale and that order was appealable under S. 8, Partition Act. The original order being open to appeal any order passed by the appellate Court should be held open to second appeal unless there is anything in law to prevent it. The order passed in this matter is a decree and has been appealed from as such. Under the Code of Civil Procedure a second appeal is allowed against a decree if the other conditions mentioned therein are fulfilled. We hold that the second appeal is competent.

Now we come to the merits of the case. It has been argued on behalf of the respondents that as the respondents have not brought a suit for partition S. 4 does not apply in their case. S. 4 says that where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition the Court shall, etc. The appellant contends that though the respondents did not bring a suit yet having applied for a share in the dwelling house they should be treated as having sued for partition of the dwelling house.

Section 44, T. P. Act, excludes the right of a stranger purchaser of a share in a dwelling house to joint possession. As has been observed in *Kshirode Chunder Ghosal v. Saroda Prasad Mitra* (1) S. 4, Partition Act, is a logical sequel of or corollary to S. 44, T. P. Act. The latter Act denies the right of joint possession to a stranger purchaser who is left only with the right to sue for partition. It was felt that the partition of a dwelling house, specially of small dimensions would divide it into unsuitable parcels and may in some cases introduce undesirable neighbours. The Partition Act

1893 accordingly came to the rescue of the members of an undivided family and gave them the right to purchase the shares obtained by strangers to the family. If effect is given to the respondents' contention the result will defeat the object of the legislature to secure indivisibility of a dwelling house. It is possible that two persons outside the family buy two shares of two members of the family and one of them brings a suit for partition making the other a defendant and if his right to purchase the share of the dwelling house fails on any account the stranger defendant may yet be given a share in the dwelling house because he does not happen to be a plaintiff in the suit. This is certainly not what the legislature intended and we must try to put a reasonable construction on the acts of the legislature. This matter came up for consideration in the Bombay High Court in *Khanderao Dattatraya v. Balkrishna Mahadev* (2). There the plaintiff a stranger to the family brought a suit for partition of a dwelling house making defendant 3 another stranger cosharer a defendant. Defendant 2 claimed to purchase the shares of the plaintiff and of defendant 3 and his application was allowed.

It does not appear from the report if defendant 3 appeared in the suit and claimed a share in the dwelling house as has been done in the present case by the respondents. But he appealed against the order of the lower appellate Court giving permission to defendant 2 to buy him up. The learned Chief Justice held that as defendant 3 cannot be said to be the person who has sued for partition defendant 2 should not be permitted to buy his share. Upon the particular facts of the case the decision seems to be unexceptionable. The learned Judge's view was based upon the fact that defendant 2 having been allowed to purchase the plaintiff's share, if he does so there is an end of the suit and the question with regard to the purchase of share of defendant 3 will not arise. But if defendant 3 wants to have the partition he will be relegated to the position of a plaintiff and his act will then attract the operation of S. 4, Partition Act. That decision does not meet the difficulty that arises in this case for two reasons. In the first place it seems to be the opinion of the Bombay

(1) [1910] 12 O. L. J. 525=7 I. C. 436.

(2) A. I. R. 1922 Bom. 121=46 Bom. 341.



High Court that an application under S. 4, Partition Act should be made before a preliminary decree is passed whereas this Court has held: see *Pran Krishna Bhandari v. Keshah Chandra Roy* (3) that such an application can be made at any stage of the suit, even in the appellate Court. In the second place, in the case before us the suit has not been dismissed and cannot be dismissed because the plaintiff had been allowed partition of the lands other than the dwelling house and there is a preliminary decree that a partition should be made of the joint properties. The effect of the decree when it becomes final will be that a commissioner will be appointed with instructions given him according to form No. 10 of Sch. 1, Civil P. C., with power to divide all the properties including the dwelling house according to the shares of the parties. If the appellant or defendant 10 had made an application under the Partition Act and bought up the plaintiffs the present question would never have arisen. But the preliminary decree directs partition of the joint properties and there having been no appeal against it, it is binding between the parties.

As has been observed above the plaintiffs' prayer for a share in the dwelling house on partition was disallowed by the trial Court and he was instead given a share in the land other than the dwelling house. The respondents applied for a saham in the dwelling house and it will not be stretching too much the language of the law to treat the respondents as plaintiffs within the meaning of S. 4, Partition Act. This view is supported by the well-known principle that a party in a partition suit whether a plaintiff or a defendant is at the same time a plaintiff as well as a defendant. This dual capacity of a party in a partition suit does not preclude even a defendant who claims a share in the dwelling house from being treated as plaintiff for the purposes of S. 4, Partition Act. By their application of 5th December 1921, the respondents claimed a share in the dwelling house and they should be treated as suing for partition of the dwelling house.

The difficulty in this case may be solved by having resort to a course which

(3) (1918) 45 Cal. 873=45 I. C. 604=22 O. W. N. 515.

seems reasonable. In the final decree which is to be passed in this case a direction may be given that the respondents' share in the joint properties may be allotted to them out of the lands other than the dwelling house; and if it is not entirely covered by such allotment the members of the undivided family may be directed to compensate them for deficiency. The result of these considerations is that the trial Court may adopt any of these two courses. It may either allow defendant 9 to purchase the share of the respondents or direct the commissioner when passing the final decree to allot to the respondents a share out of the lands other than the dwelling house. This appeal is accordingly allowed. The decree of the lower appellate Court is set aside. The appellant will be entitled to her costs in this Court and in the Courts below.

M.N./R.K

*Appeal allowed.*

### \* A. I. R. 1929 Calcutta 272

RANKIN, C. J. AND MUKHERJI, J.

*Indu Bhusan Chowdhury and others—*  
Plaintiffs—Appellants.

v.

*Moazam Ali Biswas and another—*  
Defendants—Respondents.

Appeal No. 799 of 1926, Decided on 9th August 1928, from appellate decree of Dist. Judge, Faridpur, D/- 2nd December 1925.

\* (a) Lessor and lessee—Lessee claiming abatement of rent for eviction by title paramount—He must prove not only that he had to leave part of land demised against his will but also that he had to do so at the instance of one having title superior to lessor's—Transfer of Property Act S. 108 (b) and (c).

In order to succeed in getting abatement of rent by the application of the principle of eviction by title paramount, it is essential for the lessee to make out, not merely that he had to leave a part of the land demised, not merely that he had to do so against his will, but that he had to do it at the instance of a person who has a right to interfere with his possession, his title being superior to that of the lessor: *Matthey v. Curling* (1922) A. C. 180; *Mayor of Poole v. Whit*, 15 M & W. 571 and A. I. R. 1921 Cal. 532, *Rel. on.* [P 275 C 2]

(b) Transfer of Property Act, S. 108 (c)—Cl. (c) being covenant would entitle lessee for damages but not for abatement of rent.

Clause (c), S. 103, is a covenant on the face of it, and it means that the lessor will be bound in damages, but lessee is not entitled to claim abatement of rent under it: [P 275 C 2]



\* (c) **Transfer of Property Act, S. 108, Cl. (c)**—Cl. (c) includes lawful acts of third persons as well as of lessor or persons claiming under him but not wrongful acts of third party.

The scope of the covenant for quiet enjoyment contained in Cl. (c) includes within its scope lawful acts of third persons as well as of lessor or persons claiming under him, but not trespasses or wrongful acts of a third party; for no lessor can guarantee that his lessee will not be subject to trespass or wrongful acts on the part of a third party: 26 C. W. N. 143 and 49 Cal. 948, *Foll.* [P 276 C 1]

\* (d) **Transfer of Property Act, S. 108 Cl. (n)**—Cl. (n) does not show that lessor owes any duty to lessee—On the other hand it throws duty on lessee so that lessor may protect his interest.

Under Cl. (n) lessor does not owe a duty to the lessee to protect him from legal proceedings which would interfere with his possession, but that clause really throws a duty upon the lessee in order that the lessor may, if he chooses, protect his own interest and may be safeguarded against the results of a collusive eviction submitted to by the lessee.

[P 276 C 1]

*Braja Lal Chakraborty, Ramani Mohan Chatterji and Biraj Mohan Roy*—for Appellents.

*Sarat Chandra Roy Choudhuri and Apurba Charan Mukherji*—for Respondents.

**Rankin, C. J.**—In this case, the plaintiffs appeal from a decree of the learned District Judge of Faridpur modifying the decision of the Subordinate Judge in a suit for rent under a kabuliati dated 9th Aswin 1322 B. S. It appears that the tenant under this kabuliati was really a cosharer in certain lands with the plaintiffs and that the lands having been diluviated and having thereafter reformed the defendant entered into possession in the exercise of his joint title. Thereafter a certain dispute arose between the parties and it was finally accommodated by the kabuliati which is now in suit—a kabuliati whereby the plaintiffs gave a lease of certain lands which were described therein so far as their eight annas share was concerned to the defendant. It will be observed that at the time this kabuliati was entered into, the defendant was a person who had been on the land and was in possession and was in a very good position to know exactly what lands he was in possession of.

The questions which arise in the present suit arise because, first of all, the defendant says that from a certain portion of the lands of the kabuliati he has been dispossessed by the plaintiffs. The

learned Judge on that has held that it has not been shown that he has been dispossessed by the plaintiffs but that the amount of land that the tenant has been in possession of has undoubtedly decreased. Accordingly, independently of any question whether or not it is the action of the plaintiffs that has deprived their tenant of this land, he has held that an abatement of rent is to be given under the general provisions of the law. Now, the only question which arises upon that is this: It has been found that the tenant is in possession of certain other lands, namely, 43.68 bighas and the appellants complain before us that the learned District Judge was wrong in giving an abatement for 41 bighas and odd of land by which the amount of land in the possession of the tenant has been reduced without taking into account the additional land of 43.68 bighas. As to that, there can be no doubt that this kabuliati, though it mentions the boundaries, mentions boundaries which are not necessarily the same to-day and to-morrow and a year hence, and if it can be shown that that extra land in question is contiguous to the suit land and is possessed by the defendant under colour of the plaintiffs' right, it would no doubt be unjust to take account of the extent to which the land under the kabuliati has shrunk on one side without taking into account the extent to which it has increased on the other. The finding of fact, however,—I wish it had been more clear and more detailed—is that this area of 43.68 bighas has no connexion with the demised land and Mr. Roy Choudhuri on behalf of the defendant respondent informs us that the commissioner in the suit had made an enquiry and found that it was distant from the boundaries mentioned in the kabuliati. If this land had no connexion with the land of the kabuliati but was an independent trespass upon the land of somebody else, this question of extra land has no bearing upon the question whether the lands mentioned in the kabuliati have decreased as alleged. I am, therefore, of opinion that it is not open to us in second appeal to interfere on this point with the decision of the learned District Judge.

The next point for consideration arises from an allegation by the tenant defendant that the Government in connexion with a certain neighbouring khas mehal



has taken possession of an area of 314 big-has—half of which will be 157 bighas which may be attributed to the plaintiffs' share. The question is whether with regard to this fact the tenant is entitled to an abatement of rent. Now, I propose to consider this question upon two lines—I propose to consider, first, whether the tenant has a good case on the principle of eviction by title paramount and I propose to consider, in the second place, whether he can make a good case for abatement of rent by virtue of anything contained in Cl. (c), S. 108, T. P. Act. I would point out that these two questions are really distinct and the principle of eviction by title paramount has never rested upon the covenant for quiet enjoyment. The covenant for quiet enjoyment at common law does not extend beyond the acts of the lessor or of persons claiming through or under him and the question of eviction by title paramount is entirely independent of any wider express covenant for quiet enjoyment which can constantly be found in leases.

The facts appear to be as follows: In 1915, the tenant took this lease of the land of which at that time he was in possession. He made no complaint at the time to the effect that the lessors had not put him in possession of all the lands to which he was entitled. As a matter of fact, no such claim could be made with any great show of justice in the circumstances. It appears that even before this time the tenant had been in various ways recognizing the right of Government to certain of the lands which are now in dispute. Be that as it may, there is no pleading in this case and there is no contention before us that the defendant is entitled to a suspension of rent on the principle that the landlords have failed to comply with Cl. (b) mentioned in S. 108, T. P. Act. We must, therefore, take it that the tenant got possession in 1915 of whatever he was entitled to get. In 1918, we find that the khas mehal authorities were taking steps to settle the boundary between the khas mehal on one side and the plaintiff's land on the other, under the Survey Act and there was an order by the Collector fixing the boundary in such a way as to lessen the amount of land attributed to the plaintiffs by the area which is now in question. The provisions of the Act are that the Collector is to proceed to determine

the boundaries according to actual possession and that the order of the Collector, until it is reversed or modified by a competent authority, is to have the force of an order of any civil Court declaring the party to be in possession of the land in accordance with the boundaries as determined by the Collector. I will take it that the facts are that thereupon the tenant in this case was obliged no longer to trespass on or to exercise any right over the land beyond the boundaries. As a matter of fact, the order shows that at that time he was not in possession of land beyond the boundary. The order does not purport to evict any one. It purports to declare the extent of possession of the parties. The effect of that order is that it is established against the defendant that he was not in possession beyond the boundaries in 1918: why he was not in possession is a question which is not answered by a mere reading of the order. The order having been made, the tenant took no steps to get it set aside; and he now says that because the plaintiffs had taken no steps to get it set aside, because the claim by the Government was a claim to a title paramount and because after the order it was legal for the khas mehal officers to treat the disputed land as part of the khas mehal, he is entitled to the benefit of the doctrine which gives an abatement of rent upon eviction by title paramount.

On the other hand, it is contended by Mr. Chakravarti on behalf of the plaintiffs appellants that the case so made fails on a most particular point because there is no proof before the Court that the Government had in respect of this land a title superior to that of the plaintiffs and had a right to enter upon the land demised. Upon that, it is quite clear to me that there is no proof in this case of any defect in the plaintiff's title. It was open to the defendant to raise that question and to show that the plaintiffs had no title and thereby to show that it would have been vain on his part to seek to question by suit the validity of the Collector's order. Had he done so and had he succeeded in proving that, then, in my judgment, he would have brought himself within the principle of eviction by title paramount because the law requires nobody to bring a vain suit. If it is clear that any suit



brought by the defendant to set aside or overcome the difficulty raised by this order would have been dismissed, there could be neither reason nor convenience in requiring him to bring any such suit. The question is whether, in the absence of any evidence at all on behalf of this defendant to show that there was a defect in the plaintiffs' title, he can claim an abatement on the basis of the order and the other facts found in this case. I am clearly of opinion that he cannot. It is essential for the application of this principle that it should be made out not merely that the tenant has had to leave a part of the land demised, not merely that he has done so against his will but that he has done so at the instance of a person who has a right to interfere with his possession. That this has been the law in England is recognized by the judgment of the learned Judge and, in my opinion, there can be no doubt that that is so. Among the cases on the point, I may refer, first, to the case of *Matthey v. Curling* (1), a decision of the House of Lords where the circumstances were very strong. It was a case where the War Office at the time of the war under the powers conferred by the Defence of the Realm Regulations entered on premises which had been let to the lessee and after occupying them for a substantial time left those premises in a state of very great disrepair and the premises were also burnt down by fire. In that case, the House of Lords laid strong emphasis upon the necessity of showing actual defect in title. Lord Buckmaster said:

"There has been throughout the case some confusion as to what constitutes a defence on the ground of eviction by title paramount. It is assumed that this means by an act which the lessee could not control; but there is no trace of such a doctrine in any of the authorities. Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant and with it the corresponding liability for payment of rent."

That this doctrine is old and well settled may be found from the case of *Mayor of Poole v. Whit* (2). In that case, it was said:

"The plea also states that the Sheriff delivered the demised premises to Parr under the *elegit* and that, by virtue of the delivery

aforesaid, Parr entered and expelled the defendant. This bound the defendant to prove that Parr did enter and evict by virtue of that *elegit*. I doubt if that must necessarily mean that he entered and dispossessed the defendant by the forms of an ejectment, for the party might yield without that pressure if he chose. But the defendant was bound to show that Parr, the party claiming had such a title as conferred a right to eject him."

This is consistent with the law as laid down in this Court by N. R. Chatterjea, J., in the case of *Banka Behari Ghose v. Madan Mohan Roy* (3). Where the tenant had been ejected by a suit by another party, and his landlord had not been impleaded in that suit, the Court held that that fact by itself availed nothing; it did not even throw the onus of proving title upon the lessor but the onus of proving the lessor's defect in title still remained with the lessee. In these circumstances, it appears to me that the appellants' case must succeed as regards the contention of eviction by title paramount.

I come then to consider whether in India Cl. (c), S. 108, T. P. Act, gives rise to a different result. S. 108, T. P. Act is an endeavour to state in a series of clauses the rights and liabilities of lessors and lessees and I shall endeavour to omit from consideration as far as possible the circumstance that nearly all these clauses are expressions of well-settled principles familiar in the law of England. The first clause with which we are concerned is this:

"The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption."

That is a statutory form of covenant for quiet enjoyment. It is wider than the covenant in England which is limited under the common law because it is not limited to the acts of the lessor himself or of a person claiming through or under him. It is the equivalent of an express covenant for quiet enjoyment commonly, I do not say usually, put in leases. We have, therefore, to examine its meaning. On the face of it it is a covenant. It is a thing which sounds in damages. It is not a statement that it is the duty of the lessor as between himself and the lessee to take steps actively to protect the lessee's possession. Such a doctrine is wholly alien to the laws of England and it would be wholly unworkable and im-

(3) A. I. R. 1921 Cal. 532.

(1) [1922] A. C. 180.

(2) 15 M. & W. 571.



practicable. What it means is that the lessor will be answerable in damages if the event contemplated should occur. Cl. (n) has been pointed to as showing that the lessor owes a duty to the lessee to protect him from legal proceedings which would interfere with his possession but this is entirely contrary to its real purport and effect. That clause throws a duty upon the lessee in order that the lessor may if he chooses protect his own interest and may be safeguarded against the results of a collusive eviction submitted to by the lessee. Ordinarily the measure of damages for breach of the covenant for quiet enjoyment would not be the amount or a proportion of the rent and it is to take a long step when from this covenant the learned District Judge infers that the tenant can get abatement of rent. Prima facie the two matters are not directly connected and so far as I know there is no authority for connecting them.

The next question is what the events contemplated are: what acts are within this covenant. It is reasonably clear upon the construction which has been put upon it in Indian cases in particular the case to which I have already referred, namely, the case of *Banka Behari Ghose v. Madan Mohan Roy* (3), that the scope of this covenant is to include lawful acts of third persons as well as of the lessor or persons claiming under him. I do not know that this matter can be expounded better than it was expounded in the judgment of Mookerjee, J., in the case of *Uday Kumar Das v. Katyani Debi* (4). It is clear that what is contemplated by the covenant is lawful entry, eviction or interruption of the lessee. No lessor can guarantee that his lessee will not be subject to trespass or wrongful acts on the part of a third party. What he does covenant is that his title is such that no lawful entry or eviction or interruption will occur.

Now it is said in this case that, as the Collector has made an order which stands good until it is set aside, the possession of the Government in this case is lawful. In my judgment, that contention is entirely unsubstantial. The order of the Collector declared possession as he found it. It shows that the Government prior to this order had got into possession. If the Government had no right to get into

possession, the Collector's order operates to prevent the plaintiffs or the defendant from disturbing that possession except by due process of law. But it does not make that possession lawful as against the plaintiffs or the defendant for any of the purposes with which we are now concerned. If a trespasser's possession is confirmed in such a manner, he remains a trespasser for the purposes of the present question. One has to look in all these cases to the real source of injury. One has to see when a man is dispossessed by the process of law whether he is dispossessed by his own fault or by the defect in the title of his lessor. In this case, it is necessary to determine whether the entry by the Government which took place prior to this order was an entry of a person having a better right than the plaintiffs or whether it was a wrongful or tortious act on the part of the Government. Until that question is settled, Cl. (c), S. 108, T. P. Act, is of no use to the defendant. I am, therefore, of opinion that, on that which was the only remaining question in this case, the learned Judge's decision cannot be upheld. The learned Judge has thought that the doctrine as regards eviction by title paramount is different in India from what it is in England and he has relied wrongly upon the covenant for quiet enjoyment in support of his argument.

In my judgment, this appeal must be allowed and we vary his order by disallowing abatement in respect of the area of 157 bighas 9 cattas 13½ chitacks in the plaintiffs' share from which the defendant has been evicted by the Government. The appellants will get their costs in this Court; but in the lower Courts each party will pay its own costs.

**Mukerji, J.**—I agree.

S N./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 276 Special Bench

RANKIN, C. J. AND C. C. GHOSE AND  
PEARSON, JJ.

*Garao Sangma*—Applicant.

v.

*Rangji Mechik*—Non-Applicant.

Reference under S. 20, Indian Divorce Act, dated 7th March 1928, for confirmation of decree in Matrimonial Suit No. 80 of 1927 of the Court of Dy. Commissioner, Garo Hills.

(4) A. I. R. 1922 Cal. 87=49 Cal. 948.



(a) Divorce Act, S. 11—Adulterer must be made party.

In an application by husband for dissolution of marriage on the ground of adultery the co-respondent should be added as a party to the petition. [P 277 C 1]

(b) Divorce Act, S. 50—Personal service should be tried and if not possible substituted service should be effected.

In an application for dissolution of marriage by husband steps should be taken as regards service both upon the wife and the co-respondent and where personal service is not possible it is desirable that an order should be recorded that the matter should be announced in the village by beat of drum and that the proper notice should be put up at the Court house. [P 277 C 1, 2]

(c) Divorce Act, S. 50—Order dispensing with service must be recorded.

Although under S. 50 the Commissioner has a discretion to dispense with the service in a proper case he must record proper order in the matter. [P 277 C 1]

**Rankin, C. J.**—In this case the Deputy Commissioner of the Garo Hills has pronounced a decree for dissolution of marriage, subject to confirmation by this Court, upon a husband's petition. The petition appears to make the wife the defendant and does not appear to have been framed so as to include the co-respondent as a party. It would appear from the judgment of the Deputy Commissioner that summonses were issued upon the wife and the co-respondent, but neither the wife nor the co-respondent could be found in the village. Accordingly, without making any order dispensing with the service, the Deputy Commissioner has proceeded ex parte, and has pronounced a decree for divorce. The case made by the petitioner is that the wife left the village with the co-respondent and neither has been seen or heard of since. The summons to the wife was apparently accepted by her father on her behalf, she being absent. In these circumstances, it does not appear to me that the Deputy Commissioner has proceeded with sufficient formality or has taken sufficient steps to ensure that the proceedings should be brought to the notice of the co-respondent.

It appears to me that the matter must go back, first, in order that the co-respondent may be added as a party to the petition, and secondly, in order that further steps may be taken as regards service both upon the wife and the co-respondent.

The Deputy Commissioner is in a better position than I am to decide as to what steps are practicable. In default of anything else, it would appear to be desirable that an order should be recorded that the matter should be announced in the village by beat of drum and that the proper notice should be put up at the Court house. The case must go back for that purpose. We appreciate that, under S. 50, Divorce Act, the Commissioner has a discretion to dispense with the service in a proper case. He does not appear to have exercised that discretion by recording any proper order in the matter. But apart from that, it does not seem to be right that service should be dispensed with upon the very bare materials laid before the Deputy Commissioner at the time. The case, therefore, will go back for further steps as to service and thereafter, if necessary, for a proper order dispensing with service. The case must be reheard.

**C. C. Ghose, J.**—I agree.

**Pearson, J.**—I agree.

R.K.

*Case sent back.*

### \* A. I. R. 1929 Calcutta 277

SUHRAWARDY AND GRAHAM, JJ.

*Satya Ranjan Bakshi and another—Appellants.*

v.

*Emperor—Opposite Party.*

Criminal Appeal No. 27 of 1929, Decided on 25th January 1929, against order of Chief Presidency Mag., Calcutta.

\* (a) Penal Code, S. 124-A—Article attacking police comes within purview of S. 124-A.

An article attacking the police comes within the purview of S. 124-A since the police is one of the human agencies through which Government acts : 19 Bom. L. R. 211, *Rel. on.*

[P 280 C 1]

(b) Penal Code, S. 124-A — Publisher of article must be deemed to intend the natural result of his words.

A publisher of an article must be deemed to intend that which is the natural result of the words used having regard to the character and description of people expected to read them.

Where an article exceeded all the limits of fair and reasonable criticism, vilified the police as a body, in the most opprobrious language and contained a threat or warning to Government that if the police continue to act as they have in the past the Empire will be



brought to ruin, it must be concluded that the article was clearly intended to create feelings of hostility to Government and create disaffection : 2 *Bom. L. R.* 286 ; *A. I. R.* 1919 *P. C.* 31 *Rel. on.* [P 280 C 2]

*B. C. Chatterji, Mrityunjoy Chattopadhyay and Bhola Nath Roy*—for Appellants.

*N. Sirkar*—for the Crown.

**Graham, J.**—The appellants, Satya Ranjan Bakshi and Pulin Bihari Dhar, Editor, and Printer of the newspaper "Forward" which is printed in English and published in Calcutta, have been convicted by the Chief Presidency Magistrate of Calcutta under S. 124-A, I. P. C., and sentenced to terms of six months and three months simple imprisonment respectively. They were prosecuted in connexion with an article entitled "The Uninformed" which appeared in that paper on 1st December last. The learned Chief Presidency Magistrate found that the article taken as a whole clearly refers to the Government established by law, that the words 'imperial bullies' occurring therein refer to that Government and not to the police, and that the entire article was clearly intended to be an attack upon Government, that it was calculated and intended to bring Government into hatred and contempt, and to excite disaffection towards it. He further found that it did not come within any of the exceptions to S. 124-A.

On behalf of the appellants these findings have been challenged, and it has been urged that the article as a whole does not come within the purview of S. 124-A, that the learned Magistrate erred in construing it and interpreting it in the manner he has, and that in doing so he has relied upon isolated expressions and passages, whereas upon a true construction he should have held that it was merely an attack on the police and not upon Government. On behalf of the Crown the learned Advocate-General contended that however much ingenuity might be employed in endeavouring to explain away the language used, the article taken as a whole was plainly an attack not merely upon the police but upon the Government. The words "imperial bullies" he argued, referred to the Government and not to the police, and the warning at the end was given not to the police, but to the Government that, if they continue to employ the

methods which they have recently adopted, viz., letting loose police hooligans, they will not save the British Empire from ruin.

Which of these conflicting view is correct can only be determined by an examination of the article itself. The article begins with historical reference to the time of the East India Company before the assumption by the Crown of the Sovereignty of India, and refers to various acts of oppression and repression. It then goes on apparently to refer to the mutiny period, and finally to Jallianwalla of recent memory, whose blood-stained walls and blood-stained earth testify, the article says to this day to the sovereignty of brute force.

After this historical retrospect the police and their lathis are introduced and reference is made to Lalaji and Pundits Jawaharlal Nehru and Gobinda Bullabh Punt, and there occurs this passage :

"Prison cage has done its worst. The hangman's rope has done its good part. The imperial bullies at whose mercy we seem to drag our life have tired with the dilatory processes of law and the caricatures of law. The police hooligans have taken the law into their own hands. On numerous occasions they have answered brick-bats with bullets

"Rough tough we're the stuff

We want to fight and can't get enough these bullies cry."

The writer then goes on to find fault with those who merely profess indignation and continues :

"Time has come when we must be prepared to make it clear that a few uniformed goondas cannot save an empire from ruin. Time has come when we must also learn the much needed lesson that passivity is not always wise, and that protests are only the language of cowardice when they do not emanate from consciousness of strength. We must know to respect ourselves. We must know to respect and love our cause. Freedom is an invaluable treasure. It is only when we shall truly respect our honour and our nation's honour that the foreigner within our doors will hesitate thrice to treat us with contempt. The lathi blow that came upon Lalaji and has smitten Pundits Jawaharlal and Govinda Ballabh should serve for the rough work of awakening."

The learned Advocate-General very properly conceded that the accused are entitled to a fair and generous reading of the article, and there can be no doubt that it should be construed as a whole in a fair, free and liberal spirit without at-



taching undue importance to isolated passages or expressions here and there. For this reason I have in order to be fair to the accused, quoted the article at perhaps greater length than would otherwise have been necessary, so as to include certain remarks about patriotism and in praise of freedom which in themselves and apart from their context are unexceptionable.

Mr. Chatterjee on behalf of the appellants strenuously argued that the first part of the article is merely a reference to history, and in support of his contention invited us to refer to various historical books and treatises. As to the remainder he urged that it was an attack upon the police and not upon the government. Adverting to the words "imperial bullies" which the learned Magistrate has held to refer to Government, Mr. Chatterjee contended that from the immediate context it is plain that they refer to the police and that they can have no other meaning. Finally he contended that the warning towards the end of the article was addressed to the police and meant that if they persisted in following such methods, they would instead of saving the British Empire bring about its ruin. In other words the passage in question was according to him not a threat to the Government but rather a well-meant warning to the police not to persist in their evil ways.

With every desire to be fair to the accused and while recognizing that the article is in a language which is not their language and making allowance therefor it appears to me that the construction which Mr. Chatterjee has sought to put upon it cannot be accepted. In the first place it seems to be apparent that, if the article was intended merely to be an attack upon the police, the historical references were superfluous and unnecessary. The manner in which the theme has been developed by Mr. Chatterjee seems to me to be a strained interpretation. Moreover the mention of Jallianwalla brings us down to recent times and the reference there and a little later to "the sovereignty of brute force" can only be to the Government, and to the military authorities who acted on behalf of the Government. It is noteworthy too, as pointed out by the learned Advocate-General, that in animadverting upon the Jallianwalla

affair the writer has not thought it to make any reference to the subsequent condemnation by Government of the action of the military authorities in connexion with that incident.

Then coming to the passage about the 'imperial bullies' Mr. Chatterji urged that, if it is loosely read, it can only refer to the police, and he laid emphasis on the words "these bullies" as referring back to the aforementioned "police hooligans" and "imperial bullies." The references, however, to the "prison cage" and "hangman's rope" seem to make it clear that the words 'imperial bullies' cannot mean the police or at all events cannot be limited to them.

The fact moreover is that it is not always easy to disassociate the Government from the police which represents one of the chief agencies of Government, and, as representing law and order, a most important agency. The term Government is in itself an abstraction, but Government can only work through human agency. To the man in the street and more particularly to the villager (and it may be supposed that a paper like Forward has a circulation in the mofussil) the term Government is vague. But the policemen or parawallah as he is sometimes called is no abstraction, but rather the outward and visible emblem of Government and is in the public mind often associated with Government. Indeed he may be said to represent Government in a concrete form.

Then there is the passage about saving the Empire from ruin. Mr. Chatterjee reads it as merely a warning to the police that they cannot save the Empire from ruin by such methods of violence. But taken in conjunction with the context it appears to me that it contains a threat or incitement and that the meaning intended to be conveyed in that, if the people ceased to be content with mere professions of indignation and adopted more forcible methods, then a few thousand uniformed goondas would not be able to save the Empire from ruin. To interpret this passage as a benevolent hint or exhortation to reform seems to me to be reading into it a meaning which it does not fairly bear. It appears to me too that it is addressed not to the police but to the Government.



Finally there is the reference at the end of the article to "the foreigner within our doors" which serves . . . to emphasize the same point of view, and to show that the article is aimed not at the police but at the Government.

Reading the article as a whole it seems to me to be impossible to arrive at any other conclusion than that it is directed against the Government and that it cannot be explained as being merely an attack on the police. Even, however, assuming for the sake of argument that the article does refer only to the police, I think that it would still come within the purview of the section since the police is one of the human agencies, and as I have said a very important agency, through which Government acts.

As was observed by Batchelor, J., in the case of *Bal Gangadhar Tilak v. Emperor* (1) at p. 264 :

"The Government established by law acts through human agency, and admittedly the civil service is its principal agency for the administration of the country in times of peace. Therefore where . . . you criticise the civil service en bloc, the question whether you excite dissatisfaction against the government or not seems to me a pure question of fact. You do so if the natural effect of your words, infusing hatred of the civil service, is also to infuse hatred or contempt of the established Government whose accredited agent the civil service is. You avoid doing so if, preferring appropriate language of moderation, you use words which do not naturally excite such hatred of Government . . . It is . . . a mere question of fact."

Substituting the police for the civil service it appears to me that these observations apply to the present case with equal force.

As it appears to be now well settled that intention is a necessary ingredient of the offence it remains to be seen whether the intention of the accused was to bring or attempt to bring the Government into hatred and contempt or to excite or attempt to excite disaffection towards the Government. Reading the article as a whole it appears to me that there is no room for any doubt on the point and that the writer was clearly animated by these intentions. As Jenkins, C. J., tersely said : *Queen-Empress v. Luxman* (2) at p. 296 :

"To determine whether the intention of the

(1) [1917] 19 Bom.L.R. 211=39 I.C. 807=18 Cr.L.J. 567.

(2) [1899] 2 Bom.L.R. 236.

accused was to call into being hostile feelings, the rule that a man must be taken to intend the natural and reasonable consequences of his act must be applied ; so that if on reading through the articles the reasonable and natural, and probable effect of the articles on the minds of those to whom they are addressed appears to be that feelings of hatred, contempt or disaffection would be excited towards the Government, then it is justifiable to say that the articles are written with that intent and that they are an attempt to create the feelings against which the law seeks to provide."

The Judicial Committee of the Privy Council have also laid down that in judging the question of intent the publisher must be deemed to intend that which is the natural result of the words used having regard among other things to the character and description of the part of the public who are expected to read the words : *Annie Besant v. Advocate-General of Madras* (3).

Judged by these tests it seems to me that the intention of the article was clearly to create feelings of hostility to Government, and to excite disaffection. Indeed no other conclusion is possible. The article exceeds all the limits of fair and reasonable criticism. It vilifies the police as a body in the most opprobrious language, and contains a threat or warning to government that, if the police continue to act as they have in the past, the Empire will be brought to ruin. It is difficult to calculate the amount of harm which may be caused by an article written in language so intemperate and so devoid of all sense of restraint. It is no doubt perfectly true, as the writer has said, that "Freedom is an invaluable treasure" and so too is liberty of the press which forms part of that freedom. But freedom must not be abused and cannot be allowed to degenerate into license.

For the reasons I have stated I am of opinion that the appeal fails and must be dismissed. The appellants must surrender to their bail and serve out the remainder of their sentences.

**Suhrawardy, J.**—I agree.

S.N./R.K.

*Appeal dismissed.*

(3) A.I.R. 1919 P.C. 31=43 Mad. 146=46 I.A. 176 (P.C.).



## \* A. I. R. 1929 Calcutta 281

SUHRAWARDY AND GRAHAM, JJ.

*Ram Golam Singh*—Complainant—Petitioner.

v.

*Sarat Chandra Ganguly and others*—Accused—Opposite Party..

Criminal Revn. No. 1345 of 1928, Decided on 16th January 1929.

(a) Criminal P. C., S. 200—Cross-complaints—No rule as to which should proceed first can be laid down.

The question as to which of the counter cases should proceed first or whether both of them should proceed simultaneously and contemporaneously is one which has to be decided according to circumstances in particular case. No absolute rule of law can be laid down that a particular course must be adopted : A. I. R. 1925 Cal. 1260, *Ref.* [P 281 C 2]

There was a collision between the parties which resulted in the petitioner's filing a complaint before the Magistrate against the opposite party under Ss. 147, 447, 352, etc., Penal Code, and the opposite party making a similar complaint against the petitioner for similar offences. After recording the petitioner's complaint the trying Magistrate looked into the counter-case in which the information was first lodged with the police and as he found that there were injuries on some persons of the opposite party he directed that the case of the opposite party should proceed and deferred passing any order on the petitioner's complaint :

*Held* : that the Magistrate's discretion in the case should not be interfered with.

[P 281 C 2, P 282 C 2]

(b) Criminal P. C., S. 200—Four courses are open on receipt of a complaint.

Under the law four courses are open to the Magistrate on receipt of a complaint. He may either order an enquiry under S. 202 or dismiss the complaint under S. 203 or issue process under S. 204 or postpone the commencement of the proceeding under S. 344.

[P 282 C 1]

\* (c) Criminal P. C., S. 344—Jurisdiction.

*Per Graham, J.*—The Magistrate has jurisdiction to postpone his enquiry, even apart from S. 344, under inherent jurisdiction.

[P 283 C 2]

*Mritunjay Chattopadhyaya and Sudhan-shu Sekhar Mukherji*—for Petitioner.*Surajit Chandra Lahiry*—for Opposite Party.

**Suhrawardy, J.**—This rule was issued to show cause why the order complained of in the petition should not be set aside and the petitioner's complaint directed to be taken up and proceeded with in accordance with law. What happened was that there was a collision between the parties on 6th September 1928, which resulted in the petitioner's filing a complaint before the Magistrate

against the opposite party under Ss. 147, 447, 352, etc., I. P. C., and the opposite party making a similar complaint against the petitioner for similar offences. After recording the petitioner's complaint the trying Magistrate looked into the counter case in which the information was first lodged with the police and as he found that there were injuries on some persons of the opposite party he directed that the case of the opposite party should proceed and deferred passing any order on the petitioner's complaint. The petitioner moved unsuccessfully before the Sessions Judge and he now contends that he should have been allowed to proceed with his case simultaneously with the case of the opposite party. We have therefore to consider whether in the circumstances of the case the order passed by the trying Magistrate is justifiable. The question as to which of the counter-cases should proceed first or whether both of them should proceed simultaneously and contemporaneously so often arises in the Courts below and has so often come up to this Court that it would be very satisfactory if it should be finally settled either by the authority of rulings of this Court or by legislation. The cases upon this point have been exhaustively discussed in *Makham Mapa v. Manindra Nath Bose* (1), to which I was a party and I adhere to the opinion expressed in that case namely :

"In this state of the case-law we feel that there is no authority which is absolutely binding upon us. The Code is silent with regard to the procedure to be adopted in such circumstances. It should not, therefore, be laid down as an absolute rule of law that a particular course must be adopted. Each case has to be decided according to its requirements."

It is argued by the learned advocate for the petitioner that after examining the complaint in the petitioner's case the Magistrate was bound under the law either to dismiss the complaint if he was not satisfied with the truth of it or to issue a process or order an enquiry. But he could not after examining the complainant defer passing any order under Ss. 202, 203 or 204, Criminal P. C. His contention is that the Magistrate has no power under S. 344 to postpone an enquiry or the trial of the case at that stage but he can only do it after he has complied with the provision of S. 204, Criminal P. C. This contention has no sub-

(1) A. I. R. 1925 Cal. 1260.



stance in it inasmuch as S. 344 empowers the Magistrate not only to adjourn an enquiry or trial but postpone its commencement : and S. 204 is one of the sections which comes under the chapter headed "of the commencement of proceedings before Magistrate." That being so, under the law four courses are open to the Magistrate on receipt of a complaint. He may either order an enquiry under S. 202 or dismiss the complaint under S. 203 or issue process under S. 204 or postpone the commencement of the proceeding under S. 344. In this case it is apparent that the Magistrate has proceeded under S. 344. But under that section he has to state his reasons for postponing the commencement of the proceedings. We have accordingly to see if the Magistrate has stated any reason in support of his order and if the reason given by him is sufficient to justify the order. The reason given by the Magistrate is that on looking into the information given at the thana by the opposite party and the report of the Assistant Surgeon of the injuries on the person of the son of the opposite party, he thought it proper to order that the present case should be put up after the disposal of the counter case.

Mr. Chatterji, the learned advocate for the petitioner, argues that in this case it is proper that both the cases should be tried simultaneously as the point in dispute between the parties is whether the land on which the occurrence took place belonged to the petitioner or the opposite party and that the petitioner as an accused in the counter case will not be in a position to prove his possession or title to the land as he will be debarred from pledging his own oath. As I said in *Makham's* case (1) every case ought to be considered on its own circumstances. But in the present case there does not seem to be any such circumstance which would make it incumbent on the Magistrate to proceed with it along with the case brought by the petitioner. I can conceive of cases in which it may be desirable that the accused in a case who is the complainant in another case should be given an opportunity of proving his case also during the prosecution of the case against him. But the present case is not one of such a character. It is possible that the dispute may concern land, possession or title to which can only be

proved by the accused and there may be documents in his favour which he is not able to prove except by his own examination. In such a case the Magistrate will exercise sound discretion in allowing the accused in a case to proceed with the counter case. Some of the decided cases have proceeded upon the idea that if a complainant who is an accused person in a counter case expresses his desire to proceed with his case, the Magistrate should not prevent him from doing so. In some other cases it has been said that if the accused in a case desires that his counter case should not be proceeded with along with the case against him, he should not be compelled to go on with his case before the counter case is finished. But these are considerations which should not be taken into account in laying down the law on this point, when there is no relevant procedure in the Criminal Procedure Code. These are considerations which may enable the Court to pronounce in a certain case that a certain procedure is proper.

In the present case the only allegation made in the petition before us is that it is eminently desirable that both the cases should be taken up simultaneously as otherwise the petitioner will be seriously prejudiced in his defence in the counter case as he will not be able to give his evidence therein. But he has not given more details as to how the prejudice will be caused and whether such prejudice cannot be avoided by the Magistrate adopting the course which I suggest in cases of persons bringing counter cases against each other. The apprehension which the petitioner entertains about his inability to prove his case before the counter case is decided may be removed by the Magistrate proceeding with the counter case first as he proposes to do and then defer passing orders on it till he has also finished the petitioner's case. He will, of course, not be entitled to refer to the evidence of one case in deciding the other. But he will be in a position to form a correct judgment as to the real nature of the dispute between the parties. In this view I think that it is not a proper case where we should interfere with the discretion of the Magistrate at this stage and I will accordingly discharge this rule.

**Graham, J.**—In this case a rule was issued to show cause why the order of



the Magistrate dated 10th September 1928 should not be set aside and why the petitioner's complaint should not be directed to be proceeded with according to law. The order in question is in these terms:

"Seen copy of the information at the thana by the complainant of the counter case and the Assistant Surgeon's report of the injury on the person of the son of the complainant of the counter case. Put this case up after the disposal of the counter case."

On behalf of the petitioner it has been submitted that this order is illegal, and that after examining the complainant the Magistrate had one of the three alternative courses open to him either firstly to dismiss the complaint, or secondly, to issue process, or thirdly to enquire into the case, or direct an enquiry to be made. It is clear in the present case that the Magistrate did not adopt either of the first two alternatives. What apparently he contemplated was the adoption of the third course. But for the reasons which he has given he postponed his enquiry. The question is whether this procedure is warranted by law. In this connexion reference may be made to S. 344, Criminal P. C. Reading that section in conjunction with S. 202, Criminal P. C., it seems to me that the Magistrate undoubtedly had jurisdiction to postpone his enquiry; and even, apart from this section, the Court must, I think, be held to have inherent jurisdiction to make such an order. In my opinion, the order was in accordance with law and having regard to the particular circumstances of this case, it seems to me, that there can be no doubt as regards the propriety of the order. As the learned Magistrate has pointed out in his explanation he purposely avoided dismissing the petitioner's complaint because he desired to be fair to both parties since it was obvious that, until the counter case had been tried and disposed of, it was not possible to say which version was the true one. For the reasons stated, I agree with my learned brother that this rule should be discharged.

D.D.

*Rule discharged.*

## A. I. R. 1929 Calcutta 283

SUHRAWARDY AND GRAHAM, JJ.

*Daulat Ram Bidhan Das*—Petitioner.  
v.

*Corporation of Calcutta* — Opposite Party.

Criminal Revn. No. 1037 of 1928, Decided on 29th January 1929.

(a) *Calcutta Municipal Act (1923), S. 421*—Article ordered to be destroyed—Onus is not on Corporation to prove that the article was intended for human consumption.

It cannot be contended that because S. 418, Cl. (2) puts the burden upon the 'accused' to prove that the article is not intended for human consumption in a case of prosecution under the chapter, it indicates that in all other cases e. g., in a case where the article is ordered to be destroyed under S. 421, the onus will be upon the Corporation to prove that it is intended for human consumption.

[P 284 C 1]

(b) *Evidence Act, S. 114*—Ghee can be presumed to be meant for human consumption.

The Court is entitled to take for granted, when it is not denied, that ghee is an article intended for human consumption. It is possible that it can be employed for remote or extraordinary purposes but the ordinary presumption that ghee is intended for human consumption is not a presumption of law but a supposition based on common sense when there is no assertion to the contrary.

[P 284 C 2]

(c) *Calcutta Municipal Act (1923), S. 418 (2)*—"Prosecution" includes proceedings under S. 421.

*Graham, J.*—The word "prosecution" used in S. 418, sub-S. (2) does not necessarily connote prosecution for an offence, and where it is intended to be so used it is usual to state so in plain terms. Prosecution in its wider or more general sense means a proceeding by way of indictment, or information, and as used in S. 418 (2) it may include such proceedings as those taken under S. 421 of the Act.

[P 284 C 2, P 285 C 2]

*N. Sarkar, P. K. Sandell, Mrityunjoy Chattopadhyaya and Sachindra Nath Banerji*—for Petitioner.

*B. C. Mitter, D. N. Bagchi and Gopendra Krishna Banerjee*—for Opposite Party.

**Suhrawardy, J.**—This rule has been pressed on one point. Some tins of ghee were found in a godown belonging to the petitioner and the article was ordered to be destroyed by the Municipal Magistrate under S. 421, Calcutta Municipal Act of 1923. It is not disputed that the ghee is adulterated and unfit for human consumption. It is also not disputed before us that it was in the possession of the petitioner and that if the con-



tention of the petitioner before us fails it is liable to destruction under S. 420 or 421.

The point that has been argued in this case on behalf of the petitioner is that there is no evidence and that it has not been proved by the Corporation that the ghee seized was intended for human consumption. It is said that under S. 418 read with Ss. 420 and 421 the article to be destroyed must be a thing intended for human consumption. The question therefore is whether the ghee was intended for human consumption. It is argued that under S. 418, Cl. (2) if a prosecution is instituted under Chap. 28, Calcutta Municipal Act, the burden shall rest with the party charged to prove that the article is not intended for human consumption. It is submitted that in a case where there is no prosecution the onus will be on the party who seeks to exercise the power vested in him under Ss. 420 or 421 to prove that the article was intended for human consumption.

It is necessary to refer to the facts of the case in order to see whether it lies in the mouth of the petitioner to raise the point before us. It is admitted that the ghee was purchased somewhere in the Punjab and was being taken to Rangoon. In the course of its transit it was brought to Calcutta to the petitioner's godown for making some repairs to the tins. No question as to what use the ghee would ultimately be put to was raised before the learned Magistrate and it was tacitly admitted before him that it was intended for sale at Rangoon. The learned Magistrate remarks in his judgment "it is rather admitted that the ghee was intended for sale in Rangoon."

The point that has been raised before us seems to be an afterthought. Now to come to the question whether it is incumbent upon the Corporation to prove that the ghee was intended for human consumption. I do not agree with the contention that because S. 418, Cl. (2) puts the burden upon the accused to prove that the article is not intended for human consumption in a case of prosecution under the chapter, it indicates that in all other cases the onus will be upon the Corporation to prove that it is intended for human consumption. Ghee is ordinarily intended for human consumption and it does not require the assistance of Acts or Statutes to presume that it is meant

for human consumption. The reason why S. 418, Cl. (2) indicates that it is for the party to prove that the article is not intended for human consumption is probably to meet an argument that may be raised on behalf of the accused under prosecution that the prosecution should ordinarily prove every element constituting an offence. It does not necessarily indicate that a Court cannot make a presumption where there is nothing to suggest otherwise. Sir Binod Mitter on behalf of the Corporation has argued that the action taken by the Corporation in this matter is a prosecution within the meaning of S. 418. There is a great deal to be said in support of this view but I do not think it necessary in the present case to decide the point as I am of opinion that the Court is entitled to take for granted, when it is not denied, that ghee is an article intended for human consumption. It is possible that it can be employed for remote or extraordinary purposes but the ordinary presumption that ghee is intended for human consumption is not a presumption of law but a supposition based on common sense when there is no assertion to the contrary. In this connexion our attention has been drawn to S. 106, Evidence Act, which says:

"When any fact is especially within the knowledge of any person the burden of proving that fact is upon him."

It seems to me that this section read with the illustrations under it lays down nothing more than the ordinary rule of reasoning consistent with common sense. In my opinion, there is no substance in the point raised before us and this rule must be discharged. Let the order complained against be executed at once.

**Graham, J.**—I agree. Ghee comes within the definition of food as given in S. 3 (31), Calcutta Municipal Act, and is ordinarily used for human consumption. That being so, apart from anything contained in S. 418, sub-S. (2) of the Act, the ordinary presumption would be that the ghee was intended for human consumption. If the petitioner alleged the contrary it was for him to prove it. But apart from this view of the matter it may be observed that the word "prosecution" used in S. 418, sub-S. (2), does not necessarily connote prosecution for an offence, and where it is intended to be so used it is usual to state so in plain terms



Prosecution in its wider or more general sense means a proceeding by way of indictment, or information, and as used in S. 418 (2) it may include such proceedings as those taken under S. 421 of the Act. I agree that the rule should be discharged.

D.D.

*Rule discharged.*

## A. I. R. 1929 Calcutta 285

GARLICK AND BASU, JJ.

*Jogendra Kumari Dassya and another*  
—Plaintiffs—Appellants.

v.

*Jogendra Nath Dutt and others*—De-  
fendants—Respondents.

Appeal No. 2096 of 1926, Decided on 31st August 1298, against appellate decree of Dist. Judge, Bankura, D/- 12th May 1926.

**Landlord and Tenant — Kabuliat — Construction—Contract providing payment of paddy for ever—Market value of the paddy should be allowed.**

The terms of a kabuliat were as follows : I am making a settlement to you for ever in dar mukarari right at an annual rent of 7 *maps* of saja paddy on the standard of bankuri pai and 1 kahan straw. You will pay the settled saja paddy and straw to me and after me to my heirs every year in the month of Magh without any increase or diminution from the year 1291 B. S.' It contained a clause "*Ukta ek kahan vara mulyadin taka dhaner mulya atash taka haibey.*"

*Held* : that what had been fixed for ever was the paddy rent and not the price of the paddy and, therefore, the landlord was entitled to the market price of the paddy and straw. *Calcutta Second Appeal No. 2488 of 1923, dated 10th February 1926, Dist.* [P 285 C 2, P 286 C 1]

*N. C. Sen Gupta and Urukramdas Chakravarti*—for Appellants.

*Panchanan Ghose and Sailendra Nath Banerjee*—for Respondents.

*Ramendra Mohan Mazumdar for Biraj Mohan Mazumdar*—for Dy. Registrar.

**Basu, J.**—This is an appeal from the judgment and decree of the District Judge of Bankura reversing the judgment and decree of the Munsiff at Bankura in a suit for recovery of arrears of rent in kind. The learned Munsiff decreed the suit in full. He held that the plaintiff was entitled to the market price of the paddy and not the price stated in the kabuliat. The learned District Judge held that the plaintiff was entitled to the price stated in the kabuliyat and not the market price as followed by the Munsiff.

The plaintiffs prefer this appeal. The question involved in the appeal is whether the plaintiff is entitled to the market value of the paddy and straw reserved as rent in the kabuliat or the price of the same as stated in it. The material portion of the kabuliat is as follows :

"I am making a settlement to you for ever in dar mukarari right at an annual rent of 7 *maps* of saja paddy on the standard of bankuri pai and 1 kahan straw. You will pay the settled saja paddy and straw to me and after me to my heirs every year in the month of Magh without any increase or diminution from the year 1291 B. S. You will enjoy the said land from generation to generation according to your will in your own jote either by settling the jote or by settling after constructing huts. You will not get reduction of settled rent for any reason such as drought, etc. If you fail to pay saja paddy, you will pay excess at the rate of 2 *salis* for each *map* for each year. In future the rent of the said land will never be increased or decreased. On these terms after accepting kabuliat for ever, dar mokerari patta is granted for ever".

The clause in the sentence :

"*Ukta ek kahan vara mulyadin taka dhaner mulya atash taka haibey*"

has been translated on the side of the appellant as 'the price of the aforesaid 1 kahan of straw is estimated to be Rs. 2 and the price of the aforesaid paddy is estimated to be Rs. 28.' On the side of the respondent it is said that it should be translated as

"the price of the aforesaid 1 kahan of straw will be Rs. 2 and the price of the aforesaid paddy will be Rs. 28."

What has been fixed for ever is the paddy rent and not the price of the paddy. No money rent is fixed in the patta nor is there any stipulation in the patta to the effect that in the event of the failure of payment of paddy and straw so much money would be paid. It has been urged on the side of the respondent that if it is held that it was intended by the parties that the market price would be paid then it would be seen that the rent was not fixed as the price would vary from year to year. What was intended by the parties was that the paddy rent would be fixed for ever. It clearly goes to show that the clause regarding the price of the paddy which was inserted towards the end of the patta was for other purposes, namely for the purposes of stamp duty and registration. Reference has been made to several rulings of this Court on this point. But each case must be decided upon the terms of the contract



and having regard to the terms of the contract in the present case, we are of opinion that it was intended by the parties that the market price should be paid and that it was never intended that the sum of Rs. 28 as the price of the paddy and Rs. 2 as the price of the straw were fixed for ever. Reference has been made to an unreported decision in appeal from appellate decree No. 2488 of 1923 dated 10th February 1926. The paper-book of that case has been put up before us. The terms of the lease in that case at first sight would seem to be similar to those in the present case. But in the present case the terms are really distinguishable from those in the other case. In that case no doubt it was mentioned that the price of the saja paddy would be Rs. 27. After that clause it was stated that it was to this effect that a dar mukarari patta was granted. In the present case as I have already said there is nothing in the patta after the clause regarding the price of the paddy and straw. In these circumstances we think that we should hold that the plaintiffs are entitled to the market price of the paddy and straw.

Another point has been urged in this appeal to the effect that the decision in Rent Suit Nos. 857 of 1912, 358 of 1916 and 84 of 1920 would operate as res judicata on the question as regards this point. In Rent Suit No. 857 of 1912 and Rent Suit No. 358 of 1916 the question now raised was not raised at all. The subject-matter of the suit in the present case is not the same as in those suits and in rent suits the causes of action are always different. As this question was not raised in the previous suits the decision in those suits would not operate as res judicata. In any of these rent suits there was not a prayer for a declaration that the plaintiffs were entitled to the market price of the paddy as part of the substantive relief and the Court did not declare in these suits that the plaintiff was entitled to the market price of the paddy. In Rent Suit No. 84 of 1920 this question was no doubt distinctly raised but it appears that the present defendant 6 was not a party to that suit. The learned Munsiff has gone into these questions in detail in his judgment. In these circumstances we hold that the decision of the previous suits will not operate as res judicata. For the above reasons the appeal is allowed. The judgment and

decree of the learned District Judge are set aside and those of the Munsiff restored. The appellants will get their costs in this Court as well as in the lower appellate Court.

D.D.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 286

RANKIN, C. J. AND C. C. GHOSE, J.

*Bepin Behary Ghatak and another—Appellant.*

v.

*Ramnath Ghatak and others—Respondents.*

Appeal No. 1602 of 1925, Decided on 25th April 1928, against appellate decree of Dist. Judge, Bankura, D/- 7th April 1925.

**Easements Act S. 15—Right to take water from temporary channel during monsoon can be acquired.**

Where a person is taking water during monsoon through an artificial channel for nearly 32 or 35 years into his own field for irrigation purposes by cutting an *ail* of another's field at a particular place during the monsoon, such user cannot be said to be of a temporary nature and the right to take such water can be acquired by prescription: *Beeston v. Weate* (1856) 5 El. & Bl. 986, Foll. [P 287 C 1]

*Bankim Chandra Mukherji and Malin Kumar Banerji—for Appellants.*

*Sachin Bannerji—for Respondents.*

**C. C. Ghose, J.**—In this case the main contention that has been advanced on behalf of the plaintiffs-appellants is that the defendants have acquired no right of easement by the temporary user of water flowing through an artificial channel and in support of this contention reliance was placed on the case of *Arkwright v. Gell* (1) and the case of *Kena Mahomed v. Bohatoo Sircar* (2).

Now, the facts involved in this appeal are briefly these: The plaintiffs alleged that there was a dahar (low sunken pathway) contiguous on the east of their Dags Nos. 3032 and 3033 and that during the rainy season there is an overflow of the water of this dahar over Dags 3032 and 3033 towards the west, that in 1328 the defendants cut the northern *ail* of Dag 3033 and thereby forced the overflow water to their lands on the north. The plaintiffs alleged that the defendants had

(1) [1839] 5 M. & W. 203=8 L. J. Ex. 201=2 H. & H. 17.

(2) [1863] Marshall's Rep. 506.



no right to take the water in this manner to their lands.

The defendants' case was that, during the rainy season the water from the dahar passed into Dag 3033 through one of the katans in the nala on the south of it, that the water then passed through a katan at station No. 6 in the northern *ail* of 3033 through a nala on the western boundary of Dag 3032 and thence into the land of one Provas Ghose and thereafter into Dag No. 3057 belonging to the defendants. They contended that they had done this for many years and had acquired a prescriptive right to cut the northern *ail* of Dag 3033 and take water into their Dag No. 3057 and other lands towards the north-west of Dag 3033.

The lower appellate Court found on the evidence adduced in this case that for nearly 32 or 35 years the defendants had been taking water into their Dag No. 3057 through a katan at station No. 6 into the northern *ail* of Dag No. 3033 and that this they had done as of right without interruption. The lower appellate Court accordingly held that the defendants had acquired a prescriptive right to cut the northern *ail* of the plaintiff's Dag No. 3033 and take water into their Dag 3057. On appeal before us it is contended that the dahar in question is an artificial channel and that it was only during the monsoon that water could be had and that the temporary user of water through an artificial channel did not ripen into a right of easement.

Having regard to the facts found by the lower appellate Court it cannot, in my opinion, be said that the user in this case was of a temporary nature. The water which flowed through the dahar was available every monsoon, i. e., during all the months of the year when irrigation operations are ordinarily undertaken by agriculturists and there can be no doubt on the facts in this case that the water in question was used for a long series of years for the purpose of irrigating the defendants' lands. That being so, it seems to me that this case comes within the principle of the ruling in *Beeston v. Weate* (3) where the facts were as follows :

"Plaintiff and defendant occupied contiguous portions of land. For more than forty years, and as far back as his living memory

went, the occupiers of plaintiff's land have been in the habit of passing over defendant's land to a brook which lay on the other side of that land, and of damming up the brook, when necessary, so as to force the water into an old artificial watercourse which ran across defendant's land to plaintiff's land. They did this, for the purpose of supplying their cattle with water, whenever they wanted the water, except when the owners of defendant's land used the water, as they did at certain seasons of the year, for irrigation."

It was held by Lord Campbell, C. J., that the jury in that case were warranted in inferring a user as of right by the occupiers of the plaintiff's land of the easement on the defendant's land and that for the interruption of such easement the plaintiff might maintain an action against the defendant. Lord Campbell distinguished the case of *Arkwright v. Gell* (1) and pointed out that there could be an easement to conduct water across a neighbour's close by an old artificial watercourse. Lord Campbell observed that the direction of the Judge in the case of *Beeston v. Weate* (3) that on the facts the jury would be justified in returning a verdict for the plaintiff was correct as such enjoyment and acts, which without the existence of the easement would be tortious were evidence of the right to the water, and the fact of the channel along which the water flowed being artificial did not prevent the right being acquired, there being nothing to show that the artificial channel was made for a mere temporary purpose: See also *Carson on Real Property Statutes*, Edn. 3, p. 7. In the present case having regard to the findings of fact arrived at by the lower appellate Court there cannot be any doubt that the defendants did acquire a prescriptive right to take water in the manner alleged by them. In this view of the matter, the plaintiffs' suit must fail. The result, therefore, is that this appeal must be dismissed with costs.

**Rankin. C J.**—I agree.

N.K./R.K. *Appeal dismissed.*

**A. I R. 1929 Calcutta 287**

RANKIN, C. J. AND MUKERJI, J.

*Emperor*

v.

*Nagar Ali and others*—Accused.

Jury Ref. No. 54 of 1927, Decided on 3rd April 1928.

**Criminal P. C., S. 307—Verdict not unreasonable — High Court should not interfere.**

High Court should not interfere with the verdict of jury, which cannot be said to be unreasonable. To interfere in such a case would

(3) [1856] 5 El. & Bl. 986=4 W. R. 325=25 L. J. Q. B. 115=2 Jur. (N. S.) 546.



mean that the trials by jury would be rendered useless. [P 289 C 2]

*Khondkar*—for the Crown.

*N. K. Bose and Sailendra Mohan Das*—for Accused.

**Rankin, C. J.**—In this case nine accused persons were tried before a jury and the Sessions Judge on charges under Ss. 399 and 402, I. P. C., that is to say, making preparations to commit dacoity and assembling for the purpose of committing the dacoity. Of a jury of five all thought that accused 3 and 8 were not guilty but the verdict acquitting the other seven accused was by a majority of four as against one. The learned Sessions Judge has made this reference thinking that all the accused should be convicted.

The story for the prosecution is that one Monohar Ali prosecution witness 22 who was notoriously a bad character, told the police that a dacoity was about to be committed and that the people were going to assemble in the house of one Sabdar. Thereupon the police got an armed force and went to this man's house at the time of the preparation of the dacoity. When they went there they found a number of torches and other articles, on the strength of which it is said that these people were guilty under Ss. 399 and 402, I. P. C. In answer to that, the defence says first of all that this man Monohar was put up by another man Ananga who had a cause of enmity with Sabdar about a bainapatra and Monohar had been set up by Ananga to cause trouble to Sabdar. It is stated further that accused 1, 2, and 3 are brothers and along with accused 7 who is a nephew of accused 8, were living together, in any case, in that house which is the scene of this occurrence: that of the accused persons five are people who ordinarily would be in that house in any case. Then it is said that accused 4, 5 and 6 were men of a place called Shedlai some 13 or 14 miles away and the accused 9 was of a place called Balina also some miles away. As regards that the defence case is that these people were casual labourers, hired labourers of a neighbour and were being allowed by Sabdar to use the outer house because the man who had employed them had no accommodation for them.

The learned Judge has summed up the matter at very great length and with

great ability as though it was a matter of some difficulty and in the end when the jury gave their verdict he asked them some questions to find out the basis of their verdict. Before we come to that we see that the learned Judge cross-examined every one of the accused persons under S. 342, Criminal P. C., a very elaborate cross-examination putting all sorts of specific points to these accused people and the accused people were within the hearing of the jury and in that way they gave a good deal of explanation or evidence whichever it may be called with which the jury were entitled to be impressed if they thought fit. The learned Judge cross-examined them in much detail. The result may have been that the jury found that the answers given were reasonably satisfactory and sufficed to shake off the prosecution case. The jury were asked by the Judge on what basis they came to their verdict and they said that the case was concocted by Ananga and Monohar Ali. They were asked about the alamsats or pieces of evidence and they said that it was possible to introduce the things into the house. As regards the men from Burichang they found that the men came as labourers to work for Jiamuddin. All I have to say on that basis is this that the matter went to the jury, they considered it and they may have taken a lucky or favourable view of these accused persons. But with evidence in this condition why this Court should be troubled with a matter like this I am entirely unable to discover. I do not see why on evidence such as in this case the High Court should be asked to try the case all over, again. If this Court were to interfere in a case of this description it would mean that trials by jury would be rendered useless. There is no doubt that the jury were entitled to come to the verdict to which they did come. I see no reason whatever why this Court should throw aside the verdict of the jury which cannot be said to be unreasonable. In my judgment this reference is an unprofitable employment of public time. I think that the jury's verdict should be accepted and the accused should be acquitted. If they are on bail they should be discharged from their bail bonds.

**Mukerji, J.**—I entirely agree.

A.L./R.K. *Reference not accepted.*



## A. I. R. 1929 Calcutta 289

DUVAL, J.

*Bhupendra Mohan Pal Choudhuri*—  
Petitioner.

v.

*Jatindra Chandra Bose* — Opposite  
Party.

Civil Revn. No. 802 of 1927, Decided  
on 14th November 1927, against order of  
Small Cause Court Judge, Munshiganj,  
D/- 23rd March 1927.

**Master and Servant—Secretary of School  
provisionally appointing S as teacher—Com-  
mittee at next meeting recognizing him as  
one of staff but deciding to dispense with  
his services—He is entitled to reasonable  
notice or, pay for the period—Secretary  
would not be personally liable under Con-  
tract Act, S. 235—Contract Act, S. 235.**

A person was provisionally appointed as  
teacher by the Secretary of a School. At the  
next meeting of the Committee, it recognized  
him as one of the staff but owing to financial  
stringency it decided to dispense with his  
services from August:

*Held*: that the person was entitled to rea-  
sonable notice or three months' pay in lieu  
thereof under the circumstances:

*Held further*: that the Secretary would not  
be personally liable to pay the compensation,  
for the case was not covered by S. 235, Con-  
tract Act. [P 289 C 2]

*I. B. Sen and Probodh Chandra Mallik*  
—for Petitioner.

*Rajendra Chandra Guha*—for Oppo-  
site Party.

**Judgment.**—In this case the opposite  
party is a school master. He was ap-  
pointed by the petitioner who was the  
Secretary of the Lohajang High School  
provisionally as a teacher in January 1923  
on a pay of Rs. 45 a month and joined  
his post. In the following March the  
Committee resolved that owing to finan-  
cial stringency they could not keep six  
graduates on the staff and so they deter-  
mined that the opposite party's services  
and those of two others be dispensed with.  
No action appears to have then been taken  
in the matter which came up again on  
24th July and then the Committee finally  
dispensed with the opposite party's ser-  
vices resolving that he will not be re-  
quired after 16th August. He then on  
16th August ceased to work and was paid  
up to that date, at the rate of Rs. 45 a  
month. He appears to have claimed that  
he was entitled to some notice and that  
he only got notice on 8th August but  
waiting for sometime just within the

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period of limitation he brought a suit in  
the Small Cause Court to recover six  
months' pay. The learned Small Cause  
Court Judge gave him a personal decree  
against the petitioner for three months'  
pay. A Rule has been obtained on two  
grounds urged: First, that the decree  
should not have been a personal one  
against the petitioner but against the  
petitioner as Secretary of the School and,  
secondly, that anyhow the opposite party  
was not entitled to more than one month's  
notice. Now, there was no written con-  
tract between the parties as to the period  
of notice necessary before the opposite  
party's services could be dispensed with.  
He was, therefore, entitled to a reasonable  
notice. I have carefully considered the  
evidence, and the facts of this case and  
so far as notice is concerned it appears to  
me not unreasonable to give the opposite  
party three months' pay in lieu of a rea-  
sonable amount of notice. It cannot be  
said that six or seven days was sufficient  
notice and it is not likely that he would  
be able to find some other place where  
he would earn his livelihood within even  
one month when he was dismissed in the  
middle of August. So far as that point,  
therefore, is concerned, the Rule must  
fail. As to the other point the learned  
Small Cause Court Judge appears to me  
to have fallen into an error. He says  
that the man was appointed by the Secre-  
tary without the authority of the com-  
mittee and so the committee are not  
liable and he is personally liable as the  
Committee refused to confirm him when  
the matter came up before it. This does  
not appear to be the fact. It appears that  
he was appointed (no doubt provisionally)  
by the Secretary but at the first meeting  
afterwards of the Committee he was recog-  
nized as one of the staff but the Com-  
mittee regretted that they were unable  
to retain him as such owing to financial  
stringency. In my opinion, therefore,  
this is not a case which comes under  
S. 235, Contract Act, so as to make the  
petitioner personally liable for the pay.  
The decree, therefore, will be varied and  
will be against the Secretary and the  
Committee of the School instead of  
against the petitioner personally. In  
the circumstances I allow no costs.

S.N./R.K.

*Decree modified.*



## A. I. R. 1929 Calcutta 290

COSTELLO, J.

*Santasila Dasi*—Applicant.

v.

*Narendra Nath Pal*—Caveator.

Testamentary Suit No. 15 of 1927, Decided on 27th March 1928.

**(a) Will—Testamentary capacity—Attesting witnesses independent and responsible—Will in testator's handwriting—Facts give strong indication of voluntary act.**

The fact that a will itself is a holograph will, i. e., written entirely by the testator in his own handwriting is a very strong indication that the testator was fully cognizant of what he was doing and that what he did was an act of his own volition especially when he has called entirely independent and responsible persons to be the witnesses to his will.

[P 290 C 2]

**(b) Calcutta High Court Rules (Original side), Ch. 35, R. 29—Caveator besides asking executor to prove will also alleging undue influence and forgery—Matter does not come within R. 29—Caveator is liable for costs.**

If a caveator merely intends to require the executor to prove the will in solemn form he must not at the same time set up a defence of undue influence or fraud or any matter of that character.

[P 291 C 2]

The widow applied for probate of the will. The caveator besides entering a caveat filed an affidavit alleging that the deceased at the time he made the will and up to the time of his death was a man of weak intellect with very imperfect knowledge of English, that the will was procured by the widow by undue influence and that the will was not genuine but was in effect a forgery. In the last paragraph of his affidavit the caveator prayed that the will should be proved in solemn form and for liberty to cross-examine the witnesses produced in support of the will.

**Held:** that as R. 29 contained the word "merely" the last paragraph of the affidavit was not sufficient to bring the matter within the terms of R. 29. The caveator pleading undue influence was liable for costs: *Calcutta Suit No. 4 of 1928, Foll.; Ireland v. Rendall, (1866) 1 P. & D. 194; Cleare v. Cleare, (1869) 1 P. & D. 655, Rel. on.*

[P 291 C 1]

*S. C. Bose*—for Applicant.*D. N. Basu and K. C. Chakravarti*—for Caveator.

**Judgment.**—This is an application for the grant of probate of the will of one Surendra Nath Pal, who died on 30th April 1927. The will is dated 15th July 1923, and was therefore made more than four years before the death of the testator.

By that will the testator made certain dispositions of his property and he left the whole of the residue of it to his

widow whom he appointed to be the executrix of that will. When the widow applied for probate of the will in the ordinary course a caveat was entered by a brother of the deceased (named Narendra Nath Pal) who filed an affidavit alleging that his brother was at the time he made the will and up to the time of his death a man of weak intellect and had a very imperfect knowledge of English. He also alleged in effect in his affidavit that the will was procured by the undue influence of the widow. But there was a still more serious allegation in the affidavit in that the caveator contended, or at any rate, stated that the will was not genuine, and in effect he said that it was a forgery.

In the last paragraph of his affidavit he says :

"I therefore insist upon the said will being proved in solemn form and that I be given the liberty to cross-examine the witnesses produced in support of the will."

When the case was called on, the learned counsel who appeared on behalf of the caveator made it clear that he did not intend to rely on any of the matters set out in the affidavit but that he merely required the plaintiff in this suit to prove the will in solemn form.

If ever there was a case where a will might be said to have been executed under thoroughly satisfactory conditions in my opinion it was this case. The will itself is a holograph will, i. e., written entirely by the testator in his own handwriting. That fact of itself is a very strong indication that the testator was fully cognizant of what he was doing and that what he did was an act of his own volition.

If the caveator had taken the elementary precaution of inspecting the will before he recklessly began making charges with regard to his brother's state of mind he must have known perfectly that the will was actually in the handwriting of the brother. More than that, not only did the testator write out the will in his own handwriting but he took the sensible and reasonable course of getting entirely independent and responsible persons to be the witnesses to his will. Apparently the caveator thinks it is a matter for regret and a fact which ought to cast some doubt on the authenticity of the will that the caveator selected



such independent and responsible persons to be witnesses to the will. . . .

I should have thought every reasonably minded person would have seen how much more satisfactory it is to have independent persons to be witnesses to a will. Had the testator adopted the course which the caveator suggests he should have taken, namely, to call in his own relations such as the caveator himself or his sons to witness the will, then it was obvious that some other branch of the family would have immediately alleged that those witnesses had exercised an improper influence on the testator.

The attesting witnesses, who were called, testified that this will is in the handwriting of the testator and that it was duly executed by the testator in the presence of the various gentlemen whose names appear as witnesses.

It is quite clear that all of those witnesses to the will are responsible persons. There is not a shadow of reason, not a scintilla of evidence, for suggesting or for ever having suggested that this testator was not fully cognizant of what he was doing or that this will was not properly executed. A more baseless intervention by a caveator, a more unwarrantable intervention by the caveator than the intervention in this case is to my mind impossible to imagine. There was absolutely no shadow of justification at all for the entering of this caveat.

Now it is argued that the effect of this affidavit is to bring the matter within the terms of R. 29, Ch. 35 of the Rules of this Court. I have had occasion to construe that rule quite recently (*In Re the goods of Cohen; Cursinder v. Cohen, Suit No. 4 of 1928*) and I pointed out that that rule is a reproduction of the English R. 18, O. 21, of the Rules of the Supreme Court in England.

It has been held that under the English rule that a notice such as is contemplated by the rule must be served with the defence and R. 29, of the rules of this Court provides:

"that a party opposing a will may by his affidavit give notice that he merely insists upon the will being proved in solemn form."

It is to be observed that the rule contains the word "merely," and therefore I do not think that the last paragraph of the affidavit in the present case is sufficient to bring the matter within the terms of R. 29, particularly having regard

to the fact that it has been laid down by a very high authority in England that a plea of undue influence or fraud is inconsistent with notice. I refer to the case of *Ireland v. Rendall* (1), also to *Cleare v. Cleare* (2), reported in the same volume at p. 655, but especially to the case of *Harrington v. Bowyer* (3), where at p. 265 Lord Penzance said, referring to the case of *Cleare v. Cleare* (2):

"That case establishes the proposition that where a party setting up a will has to prove affirmatively a fact not merely to negative a charge made by his opponent, where a proof of such fact forms part of the burden, which the party propounding the will takes upon himself, the other party may cross-examine the witnesses upon such matter without liability for costs if the proper notice has been given. The question is, whether under the circumstances of this case, it is proper that I should exercise my discretion as to costs in favour of the defendant. I think the Court should be consistent in exercising its discretion; and as it has been already decided in *Ireland v. Rendall* (1), that under similar circumstances a party pleading undue influence is liable for costs, I shall follow that decision."

These cases show quite clearly that if a caveator merely intends to require the executrix to prove the will in solemn form he must not at the same time set up a defence of undue influence or fraud or any matter of that character. Therefore I hold that in this present case notice was not given in such a way as to bring the matter within the terms of R. 29. But I desire to add that in this particular case the circumstances are such that in any event it would be impossible for the Court to do otherwise than come to the opinion that there was no reasonable ground at all for opposing the will and, therefore, even if the matter had fallen within the terms of R. 29, it would not have followed that the caveator would be entitled to escape liability for costs.

I think it is eminently desirable that persons should be discouraged from recklessly launching probate suits or causing probate suits to be brought especially when there is no other foundation whatsoever for the charges which they recklessly make other than the fact that they feel sore or disappointed because they do not happen to be named as beneficiaries

(1) [1866] 1 P. & D. 194=14 L. T. 574=35 L. J. P. 79.

(2) [1869] 1 P. & D. 655=38 L. J. P. 81=17 W. R. 687=20 L. T. 497.

(3) [1871] 2 P. & D. 264=41 L. J. P. 17=19 W. R. 982=25 L. T. 395.



in the will in question. This in my opinion is essentially a case where a caveator should pay the whole of the costs of the executrix and I make an order accordingly.

I pronounce in favour of the will and direct that grant of probate do issue.

R.K. *Probate granted.*

**\* \* A. I. R. 1929 Calcutta 292**

MUKERJI AND BOSE, JJ.

*Sarat Lakshi Dassya*—Plaintiff—Appellant.

v.

*Narendra Singha and another*—Defendants—Respondents.

Appeal No. 1037 of 1926, Decided on 17th July 1928, from appellate decree of 3rd Sub-Judge, Mymensingh, D/- 19th December 1925.

(a) Limitation Act, Art. 75—Plea that cause of action accrued on first default and limitation was extended owing to payment of interest is inconsistent with plea of waiver—Practice—Inconsistent plea.

In an instalment bond with the condition of exigibility on one default a plaintiff alleged that cause of action arose on the date of the first default, and that the limitation was saved by payments of interest on subsequent dates, which the plaintiff failed to prove.

*Held*: that the plaintiff cannot be allowed to set up a plea of waiver: *A.I.R. 1926 P.C. 85, Foll.*; *41 All. 104, Ref.*; *A.I.R. 1927 P.C. 146, Dist.* [P 293 C 1]

\* \* (b) Limitation Act, Art. 75—Optional right to enforce payment may be waived—Waiver must depend upon definite act or performance—No waiver when inconsistent plea is raised.

Where in an instalment bond with a condition of exigibility on one default there is an optional right given to the creditor to enforce payment of money, such right may be waived, but when it is not waived, or when there is nothing to show that it has been waived, limitation would run from the date when the right accrues on the first default. Mere abstinence to sue on the part of the plaintiff and the mere fact that he slept over his rights would not constitute waiver. The waiver may be effected in a variety of ways and may be inferred from various circumstances. It must, however, always depend upon some definite act or forbearance on the part of the plaintiff. On the other hand, when the plaintiff puts forth pleas which are inconsistent with the fact of waiver, there can be no waiver: (*Case law discussed*). [P 293 C 1, 2; P 294 C 2; P 296 C 2]

*Jogesh Chandra Roy, Rajendra Chandra Guha and Charu Chandra Choudhuri*—for Appellant.

*Atul Chandra Gupta and Satis Chandra Sinha*—for Respondents.

**Bose, J.**—This is an appeal by the plaintiff against the judgment and decree of Subordinate Judge, 3rd Court, Mymensingh, affirming the judgment and decree of the Munsif, 3rd Court, Mymensingh, in a suit brought by the plaintiff for recovery of Rs. 1,442-8-0 alleged to be due on a simple instalment bond executed by defendant 1 in her favour on 27th Pous 1324 B. S., for a consideration of Rs. 950. The plaintiff alleged receipt of Rs. 82 on different dates on account of interest, the last payment having been made on 9th Kartik 1328 B. S., and her case in the plaint was that these payments saved limitation.

Defence was that the suit was barred by limitation. The defendants did not admit the payments as alleged by the plaintiff on the dates specified but he said that he had paid Rs. 110 in all, the last payment having been made in Bhadra of 1326 B. S.

Both the lower Courts found as a fact that no payment was made by the defendant after Bhadra 1326 and so they dismissed the suit as barred by limitation.

The instalment bond in question stipulated for payment of the money covered by it in six instalments falling due on the dates mentioned in the bond, the first instalment falling due on the last day of Aswin 1325 B. S. There was a further stipulation in the bond to the effect that in the event of default of payment of any one instalment, the creditors would be entitled to recover the entire amount of principal and interest due on the bond. The default was made in the payment of the first instalment. It has been urged on behalf of the appellant that the proviso in the bond having been inserted for the advantage of the creditor it was optional with the creditor to sue for the whole amount, i.e., she could sue for the whole, or if she chose might waive her right to sue and so the claim for the last three instalments, viz., Aswin of 1328, Aswin of 1329 and Aswin of 1330 is not barred by limitation. In the present case the plaintiff claimed the entire amount under the bond with interest from the date of its execution. This goes to show that she did not waive the benefit of the proviso. She stated in the plaint that her cause of action arose on the date the first instalment fell due, i.e., on the last day of Aswin 1325 B. S. I have already said that she wanted to save



limitation by alleging payments of interest by defendants on certain specified dates. There has been no acceptance of payment subsequent to the first default nor a mere abstinence on the part of the creditor from seeking the benefit of the proviso, but on the contrary, there has been affirmative act done by her showing that she did not waive the benefit of the proviso, but claimed the entire amount. The waiver of such condition may be effected in a variety of ways and may be inferred from various circumstances. It must, however, always depend upon some definite act or forbearance on the part of the plaintiff. Here the plaintiff distinctly pleaded payment of interest to save limitation. The fact of waiver would be inconsistent with such a plea and she could not be allowed to set it up when her plea of payment had been found to be false. I have already said that she stated in the plaint that her cause of action arose on the date of the first default, i.e., Aswin 1325. So I am of opinion that time began to run against the plaintiff from the date of the first default.

*Shib Chand Nahar v. Hyder Molla* (1) was a case of a mortgage bond executed by defendant whereby a sum of money was made payable by four instalments, and the plaintiff was given the liberty in case of any default to sue either for the amount of that instalment or for the whole amount then due; it was held that limitation ran from the date of the first default. In this case it has been observed that where there is an optional right given to enforce payment of money such right may be waived, but when it is not waived or where there is nothing to show that it has been waived, limitation would run from the date when the right accrues. This decision was followed in *Jadab Chandra v. Bhairab Chandra* (2), and in *Girindra Mohan Roy v. Kuir Narayan Das* (3), *Abinash Chandra v. Bama Bewa* (4) was a case where it was held that mere omission to sue was not such a waiver as was contemplated by Art. 75, Sch. 1, Lim. Act. Such a waiver was not limited to the case of a subsequent acceptance of an overdue instalment, but might be effected in a

variety of ways, might be inferred from various circumstances. It must, however, depend on some definite act or forbearance. In the case plaintiff brought the suit on 8th February 1909, alleging that the first two instalments had been duly paid and that the remaining fourteen instalments fell due in April 1903, on which date default was made. The defence was that the allegation of payment of the first two instalments was false, and that the suit having been brought after the expiry of 6 years from the first default, it was barred by limitation. It has been proved as a fact that the first two instalments were not paid. The learned Judges remarked:

"here they distinctly pleaded payment of the first two instalments. The fact of waiver would be absolutely inconsistent with such a plea, and they could not be allowed to set it up, when their plea of payment had been found to be false."

On the side of the appellant reference has been made to *Mohan Lal v. Tika Ram* (5). There was a proviso in the instalment bond that if there was any default in payment of any of the instalments, then the creditor would have the power to claim the entire amount in a lump sum. The bond was executed on 23rd February 1909. The first instalment would be payable at the end of February 1910. Nothing was paid on account of the first two instalments. The plaintiff brought the suit on 7th June 1917 claiming to recover only the remaining three instalments with interest. It has been held in the case that the plaintiff may, if he so chooses, waive his right and sue for such instalments as remain due and are not barred by limitation. The next case referred to is *Pancham v. Ansar Hashen* (6). Where there was a mortgage of immovable property for the advance of a sum repayable in 12 years with interest capitalizing in case of non-payment with a further proviso for the payment of Rs. 500 every year, any default which would give the mortgagee an immediate right to realize the whole debt, it was held by the Allahabad High Court that under a clause in the above form, a single default by itself operated *eo instanti* to make the money received by the mortgage "become due" and limi-

(1) [1896] 24 Cal. 281=1 O.W.N. 229.

(2) [1904] 31 Cal. 297.

(3) [1909] 86 Cal. 894=9 C. L. J. 226=1 I. C. 49=13 O. W. N. 1004.

(4) [1909] 13 C. W. N. 1010=4 I. C. 17.

(5) [1919] 41 All. 104=47 I. C. 926=16 A. L. J. 929.

(6) A. I. R. 1926 P.C. 85=48 All. 457=53 I. A. 187 (P.C.).



tation began to run therefrom : *Held* (by the Judicial Committee):

"That in the circumstances of the case, it was unnecessary to decide the point. The decision of the High Court raised a question of grave importance and it was desirable so soon as might be, the Board must finally pronounce whether the principle of those decisions was right, or, even, if it was, whether it had any application to provisos such as that in the suit."

Their Lordships of the Privy Council observed:

"there has been in different High Courts of India a sharp conflict of judicial opinion."

The suit was brought by the appellants as mortgagees to recover a sum of Rs. 34,000 alleged to be due as principal and interest on a mortgage dated 21st February 1893. The principal sum received was Rs. 4,000 with interest at 10 per cent. and provision was made in the deed for repayment of principal and interest at the rate of Rs. 500 per year. There was a further proviso that in the event of default in the payment of Rs. 500 per annum, the mortgagee should be entitled without waiting for expiry of the stipulated period to institute proceedings to realize his security. The plaint was filed on 21st February 1917 and alleged that the cause of action accrued on 21st February 1905. On presentation it was rejected as being barred by limitation and was accordingly amended by a statement that the cause of action accrued on 21st February 1894 and other dates including 10th April 1906 when interest was paid. Their Lordships observe:

"further the allegation now is that the suit which would otherwise have been out of time is exempted from limitation only by the payment of interest specified. That henceforth was the plaintiffs' case, and it would have succeeded if these payments had been proved. But the plaintiffs' attempt to prove them, as has been stated, entirely failed . . . . Having made a finding of fact in the same sense the trial Judge by his judgment of 31st May 1918, dismissed the suit with costs. That was, their Lordships think, his proper course. No other issue was, or is, on the pleadings open to the plaintiffs and their conduct in this matter is not such as to entitle them to claim any more than strict treatment. On their chosen issue they fought: to that issue they directed evidence which was not believed: on it, they therefore failed. And by that failure they must abide."

In the present case, as I have already said, the plaintiff recited in the plaint that the cause of action arose on the date of first default, i. e., Aswin 1325 and that the limitation was saved by payments of interest on subsequent dates.

Plaintiff failed to prove those payments. I don't think the plaintiff can now be allowed to set up her plea of waiver. The ruling reported in *Maung Sin v. Ma Tok* (7) does not seem to have considered the point in question. It depended upon the construction of a decree. There does not seem to have been any proviso in the decree that in default of payment of any one instalment the entire amount would be recoverable at once. The terms of a decree passed in 1916 were that certain lands were to be left in possession of the appellant who was to pay the respondent Rs. 2,000 annually and in default of payment the said property would be made over to the latter. In 1924, the respondent claimed execution of the decree of the instalments of 1923 and 1924 and as the appellant failed to pay, she prayed for the delivery of the lands to her. It was contended that the claims were time barred inasmuch as no payments had been made since the decree and the right to the possession of the land had never been asserted: *Held*, that the proper construction of the decree was that each instalment as it became due, gave rise to a fresh claim to the money or to the lands in the alternative and as such no question of limitation arose by reason of the provisions of Cl. 7, Art. 182, Lim. Act.

After consideration of all the circumstances in the case we are of opinion that the suit is barred by limitation.

So the appeal fails and is dismissed with costs

**Mukerji, J.**—I agree and desire to add a few words.

The bond in the present suit is a simple instalment bond providing for the payment of Rs. 950 in six specified instalments and stating that in default of payment of any of the instalments interest would be payable thereon at the rate of one per cent. per mensem from the date of the bond. There is another stipulation in the bond which runs in these words:

"Be it noted that in default to pay any one instalment, you will be entitled to recover from me the entire amount of principal and interest at the same time by a suit."

In the absence of a stipulation of this character the cause of action in respect of each instalment in default would arise on the date of the default. That is

(7) A. I. R. 1927 P. C. 146=5 Rang. 422=54 I. A. 272, (P.C.).



Art. 74. Lim. Act, Sch. 1. If the stipulation in question be read as meaning that if default be made in the payment of one or more instalments, the whole amount shall be due. Art. 75, Lim. Act, Sch. 1 will apply and limitation will run from the default unless there has been waiver. The stipulation in question may, favourably to the creditor, be regarded as giving him an option to treat the whole amount as due on the date of the first default. A long series of decisions of this Court have laid it down that where there is an optional right given to enforce payment of money, such right may be waived, but when it is not waived, or when there is nothing to show that it has been waived, limitation would run from the date when the right accrues. These decisions have engrafted into the Act the principle of *Hemp v. Garland* (8), in which Lord Denman, C. J. observed that:

"if the plaintiff chose to wait until all the instalments became due no doubt he might do so, but that which was optional upon plaintiff's part would not affect the right of the defendant, who might well consider the action as accruing from the time when the plaintiff had the right to maintain it."

The principle of *Hemp v. Garland* (8) was adopted in this country so far back as during the days of Act. 14 of 1859: see the Full Bench case of *Hurronath Roy v. Maheroollah Moolla* (9). While Act 14 of 1859 was in force there was no distinct statutory provision applicable to an instalment bond with a stipulation that on default of payment of any one instalment, the whole debt shall be due. The reported decisions during that period ranged themselves under two heads: viz., those which threw out the claim of the obligee altogether on the ground of limitation, and those which left him to avail himself of the benefit of the doctrine of waiver. The legislature in enacting Art. 75 in Sch. 2. Lim. Acts 9 of 1871 and 15 of 1877 effected a sort of a compromise.

My learned brother has discussed some of the cases under the Limitation Acts of 1871-1908 and I do not propose to deal with them over again. I shall point out only a few of them which may be looked upon as land marks indicating certain

definite stages in the course of the decisions.

In the case of *Hurronath Roy v. Maheroolla Moolla* (9) passed when Act 14 of 1859 was in force a Full Bench of this Court acting on the principle of *Hemp v. Garland* (8), which though it was not expressly mentioned in the judgment of this Court was cited in the order of reference, held that limitation ran from the time when default was made in the payment of the first instalment in consequence of which the whole amount became due.

In the cases of *Nilmadhab Chakravarti v. Ramsodoy Ghose* (10) and *Chunder Kamal Das v. Bisassurree Dassia* (11) the question of limitation arose in connexion with instalment decrees which gave liberty to the decreeholder to realize the whole decree in default of payment of any one of the instalments, and it was held that the option merely enlarges the power of the decreeholder to proceed, should he so desire to realise the whole amount due on the occurrence of default in payment of one of the instalments and that by his not having exercised the election he had simply waived his right to execute the whole decree then and there, but that he was entitled to realize the instalments still due and not barred by limitation.

The view propounded in the last two cases were considered in the case of *Mon Mohan Roy v. Durga Charan Gooee* (12) as being opposed to and irreconcilable with the current of decisions on the subject. In the case, which related to an instalment decree, Wilson and O'Kinealy, JJ., thus recapitulated the law on the subject:

"First, it is a general rule that where a decree or order makes a sum of money payable by instalments on certain date, and provides that on default of payment of one of the instalments, the whole of the money shall then become due and payable and be recoverable under execution then under Art. 179, Lim. Act, 15 of 1877 and under corresponding articles in earlier Acts, limitation commences to run when the first default is made. . . . There has, however, been engrafted upon that general rule an exception in certain cases. That exception I understand to be this that if the right to enforce payment of the whole sum due upon default being made in the payment of an instalment has been waived, by subsequent payment of the overdue instal-

(8) [1843] 4 Q. B. 519=3 G. & D. 402=7 Jur. 302=12 L. J. Q. B. 134.  
(9) [1867] 7 W. R. 21.

(10) [1882] 9 Cal. 857.  
(11) [1883] 13 C. L. R. 243.  
(12) [1888] 15 Cal. 502.



ment on the one hand and receipt on the other, then the penalty having been waived, the parties are remitted to the same position as they would have been if no default had occurred."

A current of decisions followed on the same line. Most of them have been discussed in detail in a comparatively recent judgment of this Court in the case of *Girindra Mohan Roy v. Khir Narayan Das* (3) and no useful purpose would be served by referring to them individually. One case, however, needs special mention, namely, the case of *Mohesh Chandra Banerji v. Prosanna Lal* (13) in which an instalment bond gave the creditor the right to sue for the whole amount due on default of payment of a single instalment and upon a consideration of the more important previous decisions of all the Courts it was held that there was no waiver of that right by acceptance of part of an overdue instalment or by receipt of interest.

The only other case that requires mention is that of *Surendra Nath v. Reshee Case Law* (14) in which it was said that most of the decisions of the point relate to cases coming under Art. 75, Lim. Act, which provides for waiver of default in payment of instalments, or to cases relating to instalment decrees to which the principle had been applied, and then, after referring to the cases of *Juggut Mohini v. Monohar Koonwar* (15) and *Sitab Chand Nahar v. Hyder Molla* (1) in which the point indirectly arose, it was said:

"Article 132, Lim. Act, does not provide for cases of waiver, and there is no case directly deciding that the principle of waiver would apply to mortgage bonds payable by instalments. . . . We think that in the absence of any provision in Art. 132 with respect to cases of waiver and of any direct authority on the point, we may apply the principle indicated in Art. 75 in determining when the money sued for becomes due within the meaning of Art. 132."

Some doubt has been cast upon the correctness of this trend of decisions by the decision of the Judicial Committee in the case of *Pancham v. Ansar Husain* (6). My learned brother has elaborately dealt with this case in his judgment and I do not propose to do so over again. All I desire to say is that their Lordships' words have to be taken in the light of the facts of the case before

them, and should be read in conjunction with the reservation they expressly made refraining to express any opinion on the question. It is, in my opinion, too early at the present moment to say that their Lordships have definitely pronounced the view of this Court as unsound. It should be noted that in the two cases that their Lordships dealt with specifically in their judgment the bonds were of a very different character. The bond in the case of *Shib Dayal v. Meherban* (16) as appears from the report of the case, provided that:

"the money with interest at the rate of eight annas per cent. per month was repayable within a period of 12 years and would carry interest from year to year, that in case of interest not being paid from year to year the creditor would have the option to add the interest due to the principal and charge interest thereon at that rate and would be able to recover the amount within the stipulated period, and that in case of non-payment the creditor shall have the power to recover the money, principal, interest and compound interest from the debtor, the mortgaged property or from his other moveable or immovable property. It further stipulated that if the debtor was not able to pay the money within the stipulated period, and with the consent of the creditor the money remained unpaid, the interest and compound interest would continue to run at the stipulated rate until the date of realization."

The bond in the case of *Gyadin v. Jhumman Lal* (17) contained a stipulation that:

"If the mortgagee, in order to get interest, does not bring a suit in default of payment of any instalment, and the debtor be unable to pay, the interest should continue up to the stipulated period of ten years and also up to the date of realization."

On the question of waiver I entirely agree with my learned brother that mere abstinence to sue on the part of the plaintiff and the mere fact that she slept over her rights would not constitute waiver, and further that it was never her case that she had waived the stipulation, but on the other hand she relied upon it and falsely tried to get over the bar of limitation.

M.N./R.K.

Appeal dismissed.

(13) [1903] 31 Cal. 83=3 C. W. N. 66.

(14) A. I. R. 1924 Cal. 139.

(15) [1876] 25 W. R. 278.

(16) A. I. R. 1923 All. 1=45 All. 27 (F.B.).

(17) [1915] 37 All. 400=28 I. C. 910=19 A. L. J. 510



## \* A. I. R. 1929 Calcutta 297

CUMING AND MALLIK, JJ.

*Gaya Prosad Karan and others*—Defendants 3 to 11—Appellants.

v.

*Bakya Mani Dasi and others*—Plaintiff and Defendants 12 to 14—Respondents.

Appeal No. 1106 of 1927, Decided on 18th December 1928, from appellate decree of Addl. Dist. Judge, Midnapur, D/- 23rd December 1926.

\* (a) Limitation Act, Art. 142—Dispossession must be physical—Resistance to possess share separately is not dispossession.

Dispossession contemplated in Art. 142 refers to actual physical dispossession, such as, when a person comes in and drives out the other from possession and not when the person in possession is resisted in his attempts to possess separately his share in the property.

[P 297 C 2]

(b) Adverse possession—Entry must be as an owner.

For claiming adverse possession the entry upon land, in order to be an assertion of hostile title, must be an entry as an owner.

[P 298 C 1]

*Sarat Chandra Basak and Gopendra Nath Das*—for Appellants.*Braja Lal Chakravarti and Saroj Kumar Maity*—for Respondents.**Mallik, J.**—The facts of the case which has given rise to this appeal are briefly these :

One Kashi Nath was the owner of some property. He died leaving three sons, defendants 1 and 2 and Trailakhya, the husband of the plaintiff. Trailakhya died when the plaintiff was a little girl of 14. And after Trailakhya's death and after defendants 1 and 2 had separated in mess, plaintiff began residing for most of her time at her father's house and would occasionally come to live in the house of her father-in-law. While in her father-in-law's house, she was well cared for by her brothers-in-law and maintained out of the usufruct of the ejmali property and while residing at her father's place, she was given at times some profits by defendants 1 and 2 for her necessary expenses, and she used to be given also according to the direction of defendants 1 and 2 some profits from the bhagchasis of some properties other than those in suit. Plaintiff continued to be in possession of the ejmali property in that manner until 1329 B. S., when defendants 1 and 2 began to ill-treat her and when she with

her father's help attempted to possess separately the 1/3 share in the property, the defendants dispossessed her in Jaistha 1330 by refusing to allow plaintiff's father to possess the same and denying the plaintiff's title. Thereafter the plaintiff gradually came to know that defendants 1 and 2 had executed kabalas in favour of defendants 3 to 14 in respect of the property in suit. On these facts, the plaintiff who is a pardanashin Hindu lady, brought the suit for a declaration of her title to a third share in the property and for joint possession of the same.

The defence inter alia was, that the plaintiff and defendants 1 and 2 were completely separate in 1313, that in 1313, plaintiff surrendered the property allotted to her to defendants 1 and 2 but taking advantage of the absence of a deed of surrender, she again claimed her share in 1315 but was driven out by defendants 1 and 2. The plea of limitation was another point raised by the defence. This defence, however, was negatived by both the Courts below and both the Courts below holding that the plaintiff's suit was in time, gave her a decree. Defendants 3 to 11 have appealed to this Court.

The only point in controversy before us has been on the question of limitation. Dr. Basak for the appellant contended that as the plaintiff had come to Court with a story of possession and subsequent dispossession Art. 142, Lim. Act, was the article applicable to the case and the lower Courts were wrong when they held that it was not applicable. I do not think this contention is sound. Plaintiff no doubt, in her plaint, used the word "dispossession (Bedakhal), but her story was not a story of dispossession of the kind as is contemplated in Art. 142. Dispossession contemplated in Art. 142 refers to actual physical dispossession and there is no dispossession under that article until some one else takes possession. Dispossession is, when a person comes in and drives out of the other from possession. In the present case, as would appear from the facts of the case set out before, the only dispossession alleged by the plaintiff was in the way that the plaintiff's father was resisted in his attempts to possess separately the 1/3rd share of the plaintiff in the property. This dispossession, if it was any dispossession at all, was not, in my judgment, such dispossession as is contemplated by Art. 142. I am, there-



fore, of opinion, that Art. 142, Lim. Act, was not the article applicable to the present case.

If Art. 142 does not apply to the present case—and I have held that it does not apply—the claim of the plaintiff who was undeniably the 1/3rd cosharer of the property to have a declaration of her title to that extent and to have joint possession of the same could be defeated only if the defendants had succeeded in establishing their adverse possession for 12 years. But here in the defendants, in my opinion, were wholly unsuccessful. There was no assertion by them of any hostile title to the plaintiff and the only thing that there is on the point in the case is, that defendants 1 and 2, plaintiff's cosharers, through whom the plaintiff had been getting her share of the property, began to ill-treat her in 1329 and the attempt of her father to possess separately the plaintiff's 13/rd share in the property was resisted by the defendants in Jaistha 1330. Dr. Basak for the appellant contended that the mere fact that defendants 3 to 14 had entered upon the property and was in possession of the same, was an assertion of hostile title. But such entry upon land, in order to be an assertion of hostile title, must be an entry as an owner. In the present case, there is in the first place, nothing to show that the plaintiff was, until a recent date, even aware of the entry of defendants 3 to 14 upon the land and even when the plaintiff came to know that defendants 3 to 14 were holding the land, it was quite possible, for all that we know, that she took them to be only bhagchasis under her cosharers defendants 1 and 2. I would therefore hold that there was no such adverse possession by the defendants in the present case as could defeat the lawful claim of the plaintiff to a declaration of her 1/3rd share in the property in the suit and to joint possession of the same.

The lower appellate Court, in my judgment, was in these circumstances, right in giving a decree to the plaintiff.

The appeal is accordingly dismissed with costs.

The cross-objection which is not pressed is also dismissed but without costs.

**Cuming, J.**—I agree.

M.N./R.K.

*Appeal dismissed.*

### \* A. I. R. 1929 Calcutta 298

RANKIN, C. J., AND C. C. GHOSE, J.

*Tota Meah Chowdhury and others—Appellants.*

v.

*Emperor—Opposite Party.*

Criminal Appeal No. 635 of 1928, Decided on 6th February 1929.

(a) Criminal P. C., S. 239 — Alternative charge against one co-accused is legal.

In the case of a joint trial of accused persons an alternative charge against one of them is legal. [P 299 C 2]

\*(b) Criminal P. C., S. 236 — Whether charges under both Ss. 147 and 304 can be legal depends on decision of jury—Criminal P. C., S. 239.

It is entirely for the jury to decide whether charges under Ss. 147 and 304 spring out of one and the same incident or out of two entirely different incidents and thus ultimately the legality of the charges under both the sections depends on the decision of the jury. [P 300 C 1]

\*(c) Criminal P. C., S. 162—Explanatory statement of police officer inferentially referring to witness's statement is admissible as against the witnesses.

The police officer in charge of an investigation is not debarred from making explanatory remarks in reference to his own conduct even though it may inferentially have reference to the statements made by witnesses; and their admissibility in evidence is not to be questioned. [P 300 C 2]

*A. K. Fazlal Huq and Debendra Narain Bhattacharjee—for Appellants.*  
*Khondkar and Sachindra Nath Bannerjee—for the Crown.*

*Sailendra Mohan Das—for Respondent.*

**Rankin, C. J.**—In this case ten persons were put upon their trial in connexion with a riot of a familiar type. The complainant Nidon Nath makes the case that on 6th November, 1927, he and certain relations went to cut paddy from plot 273 when the accused armed with lathis (except Mahatab who had a pointed mooli and accused 1 Tota Meah Chowdhury who was carrying a stick) came and objected to the cutting of the paddy. The case is that after the accused Yakub had seized the sickle from Nidon and Moizuddin had seized the sickle from another person of the complainant's party they began beating Nidon; that one Pachikul Huq or Pachu came up and reproved the accused; whereupon Tota Meah Chowdhury, accused 1, who was coming up from the rear



ordered his son Mahatab, accused 2, to kill Pachu; and that thereupon Mahatab drove the mooli he held into the stomach of Pachu near the navel, in consequence of which injury the man afterwards died.

It appears that there had been litigation between the complainant and Tota Meah about this plot and it appears also that when Pachu had been taken away to a certain house and then taken thence to a hospital, at about 6-45 on the following morning he made a dying declaration. He made another a little later on at about 8 o'clock. At the same time Nidon and one Kholu went to the thana and lodged a complaint, and a cross-complaint by one Jamiruddi was lodged against the party of the complainant.

The defence case is that there was an occurrence, that the occurrence was on a different field altogether and, in particular that the man Pachu died, not because accused 2 or accused 1 had anything to do with the matter—the defence case is that they were not there—but because another of the accused, namely, Moizuddin, accused 4, had a pointed bamboo and on this being used against him he picked it up and threw it as a missile; that Moizuddin does not know what the result of this missile was but thinks no doubt, that is the way in which Pachu met his death.

That is in the simplest terms the case of either side.

The learned Judge has devoted a good deal of labour and time to a description of the case for the prosecution and the case for the defence. He has gone through the documentary and oral evidence and has endeavoured as best as he could to put the case of either side forcibly and clearly to the jury and we have in this appeal been invited to interfere with the unanimous verdict of the jury because of some nine objections which have been very ably urged by Mr. Fazlul Huq on behalf of the appellants. I propose quite shortly to go through each of those objections and to state my view upon them.

I should have mentioned that the jury found accused 1 guilty in respect of Pachu's injury under S. 326 read with S. 109. They found Mahatab guilty under Part 1 of S. 304. These accused 1 and the remaining accused have all been found guilty under S. 147.

The first objection is to the joinder of

the charges in the present case. It is said that it was wrong in this case to charge the first accused alternatively under S. 155, I. P. C. It is not here disputed that if the man had been tried by himself the additional charge under S. 155 would have been within S. 236, Criminal P. C., but it is said that if these persons were all being tried together the section which has to be regarded is S. 239 and that under S. 239 there is no provision made by which accused 1 in addition to being charged with rioting and other charges arising out of the riot could be charged in the alternative under S. 155. I cannot see that there is any necessity to read Ss. 239 and 236, in such a way as to produce that result. In this particular case accused 1 has not been convicted under S. 155. The question, therefore, is a pure question whether the trial is vitiated by the joinder in the alternative of the charge under S. 155, and I must flatly refuse to lay it down that where accused persons are being tried together under S. 239 it is not possible to have an alternative charge against one of those accused persons. I see no necessity whatever to read this section in that manner. S. 236 deals with the question of what charges a single person may be made to meet and it says that in certain cases where it is doubtful which offence he has committed you may charge him with all and you may charge him also in the alternative. The object of S. 239, is not to say what charges a man may be called upon to meet but to say what persons may be charged and tried together. I see no difficulty at all in that matter.

Again, it is said that a charge under Ss. 147 and 304 I. P. C., against accused 1 could not be brought under S. 236 or 239, Criminal P. C. The ground of this objection is that the charge under S. 304, according to the charge of the learned Judge, might be independent altogether of the charge under S. 147, because although the prosecution case was that this injury on Pachu arose at the end of the riot and out of the riot still the learned Judge pointed out to the jury that it was possible for them to take the view that the riot had entirely finished and that this killing was after the riot was over. It seems to me that in a case of this character it is quite right that these



these charges should go to the jury in the same trial. It is entirely for the jury to say whether they were out of the riot and incidents of the riot or whether one followed upon the other, and I cannot agree that there is any difficulty in theory any more than in practice in the course which has been adopted during this trial.

As regards the second objection, that has reference to what is called a naraji petition or petition of objection to a police report to the effect that Jamiruddin's complaint was a false complaint. What is said is that this naraji petition is relied upon a good deal by the learned Judge in his charge to the jury because it is a story told on the part of the accused and in various respects the defence set up in the present trial is not exactly what was set up in that petition. The objection is that this petition was not properly proved. The witness was witness 9 who was a mukhtear. He said:

"I was the mukhtear for the accused in the lower Court in this case. Jamiruddin filed a counter case to this. After police investigation a naraji petition was filed. This naraji was written by the mohurrir of Babu Bangal Ch. Sen."

and the writing of the mohurrir was identified by the witness. The witness continued:

"The petition was written and read over to the accused."

In cross-examination he said:

"The petition was not written in my presence. One of the accused, I do not remember which, handed it to me."

and it is said that because of this it is not sufficiently proved that this naraji petition in the counter-case emanated from the parties in the dock. It seems to me that if it was going to be maintained that this naraji petition which was said to have been written and read over to the accused was not a petition of the parties in the dock that suggestion should have been carried much further in the cross-examination than it was; and I am not of opinion that there is any reason why this petition should not be used by the learned Judge in the way it was used.

The third objection has reference to the way in which certain dying declarations were spoken to by witnesses 7 and 8 for the prosecution; but this objection has not been pressed and it is not necessary to go into that matter.

Then comes what is the most difficult of the points which have not been raised

on behalf of the appellants. P. W. 20, the Sub-Inspector of Police, gave evidence in chief and he gave his evidence about the arrest of Tota Meah and how the other eight accused appeared in Court after service of certain process. He then said this:

"During investigation I met Tota Meah several times and he was looking after the case of Jamiruddin during the time that he was released on bail. Tota Meah did not say to me that Moizuddin gave the fatal blow and not Mahatab. I got no such story at all during investigation."

The objection taken to the admissibility of this evidence is that it offends against S. 162, Criminal P. C. So far as the statement about Tota Meah is concerned, it is the law of this Court that S. 162 is not intended to apply to statements made by accused persons themselves. I was a party to one decision in which that was laid down, and on that footing it does not seem to me that any objection can arise out of S. 162 so far as regards Tota Meah. There remains the simple sentence "I got no such story at all during investigation." Now, so far as any of the accused is concerned the same reasoning will apply as applies to Tota Meah's case; but it may be said that this general statement that no such story at all was obtained during investigation has inferentially reference to any statements made to the police by persons other than the accused in the course of the investigation commenced upon Jamiruddin's complaint a complaint—which really had reference to the same occurrence as the present case refers to. S. 162 is always difficult to apply, but it does seem to me that it would be going beyond the immediate intention of S. 162 to lay down that a police officer in charge of an investigation was not to be at liberty to explain his conduct by making such a statement as this that:

"at the time I did so and so I had received no information to such and such an effect."

If that were to be laid down on the ground that inferentially it has reference to the statement of a witness before the police I think not only would S. 162 in its intention be much exceeded but it would be practically impossible to do justice at all. In the present case the position was that at the Sessions trial evidence was led for the defence in rather peculiar circumstances to show that the death of Pachu was due to the act, not of



accused 2, but of accused 4; and in these circumstances naturally the investigating officer would want to explain why a charge was not brought against accused 4 as well as against accused 2. He would want it to be made clear that so far as he was concerned he was doing his ordinary duty properly and without bias against one of the accused rather than another. Again, the fact that this defence was put forward late is a fact which appears on the record itself, and it appears to me that it would be a legitimate comment upon a defence of this character to point out that the first time that it was heard of was at the last stage.

I have considered carefully the question whether assuming for the sake of argument that some of these witnesses may have stated to the police that the blow was caused by Moizuddin, the defence were prejudiced in the sense that they had no means of bringing that fact out. What is put to us is that after this statement by the Sub-Inspector the defence would not care to call any person as a witness who had stated to the police that the blow was given by Moizuddin. Let us consider that because if that can be made out no doubt it would be a matter which would require very great consideration. If it is true that the defence had witnesses who had stated this to the police why should not the defence have called such witnesses? If they called such witnesses and if the prosecution were minded to set up against them that they had not told this to the police, it would have been the duty of the defence to cross-examine this particular police officer when he was giving his evidence. Nothing can be more clear than that the police officer, having given such evidence as that, would have been subject to cross-examination by having it put to him straightaway that it was not true that he got no such information, and if anybody then had endeavoured to use S. 162 to hamper the defence it would clearly have turned out that either the position was that S. 162 prohibits the Court from letting the evidence be given in chief or else it permits the Court to allow the question to be put in cross-examination. I am not satisfied that there has been any miscarriage of justice in this matter.

The fifth objection is to certain passages in the charge where the learned Judge is endeavouring to state forcibly

and reasonably the case for the prosecution. The objection is that the learned Judge describing the prosecution case referred to Tota Meah being a person who was steeped in litigation from his youth and always getting into squabbles of a land-grabbing character. That really is the point of the remark. In this case it seems to me to be quite legitimate. Nobody is saying that because Tota Meah was given to having disputes about lands the jury are to assume that he was coming on this land armed with a lathi and that therefore he would likely be guilty of this particular offence. What the learned Judge was dealing with and what the prosecution case was dealing with was the question as to the probability whether one plot of land or the other plot of land was the subject-matter of dispute, and in the course of that question we have to consider what the parties were doing. Various section 145 cases and so on come into question. I am not at all satisfied that because the learned Judge said that the prosecution case was that this was a man who was having squabbles about land that would in any way mislead the jury for the purpose in question.

In the same way comment is made that the learned Judge says that there is nothing in the evidence that directly points to any connexion being possible between the statement made by the deceased in the dying declaration and the statement made in the first information report which was lodged by Nidon and another at the thana, but the objection there I think depends entirely on taking the learned Judge's words too much at the foot of the letter. It is said that if you look into the evidence you will find that one man if not two were with the deceased at the time he received the injury and heard his version of what had happened. It is said that Nidon had had an opportunity of meeting this man and that therefore it is not impossible that the deceased with a sharpened bamboo run into his stomach had by means of these other people done something to induce Nidon and his companions to tell the same story at the thana that he had been telling about the matter. What the learned Judge says is that there is nothing in the evidence which directly points to any connexion between those two things being possible. Of course anything is possible in the widest sense of the words.



What the learned Judge really means is—there is no substance in the evidence directly pointing to that event. It does not mean merely that there is no evidence that the two things are in some way connected; what he says is that he does not see anything in the evidence which gives a basis for suspicion of any such connexion. I do not think that any jury would be misled by those remarks by the learned Judge, particularly in a case which was thoroughly well fought out.

Then again, in the charge the learned Judge has in two places enlarged upon the fact that in the counter-information there is no story to the effect that at the end accused 4 Moizuddin picked up the bamboo and threw it and, that in that way Pachu was killed. In the course of his charge he says that not only is that not in the counter-information but Pachu's name is not there mentioned at all. As far as Pachu's name is concerned, it appears that in an altered form it was there. The substance of what the learned Judge is saying is that the story told by the defence is not to be found in the counter information at all. Very natural mistakes about these names which are frequently spelled differently seem to me to be entirely innocuous.

In the same way I cannot discover that there is any objection in the passage in the charge where the learned Judge says that his view or rather that a very possible view in his opinion is that the prosecution story is weak because it has not got a satisfactory ending and the defence story is weak because it has not got a satisfactory beginning. By this he means that it is difficult to make out from the defence version exactly how these parties were supposed to be facing each other according to the defence in filed No. 417. Our attention has been called to the evidence of the third witness for the defence and the statements made by Yakub under S. 342, Criminal P. C. and I am bound to say that having read those statements it still seems to me to be a reasonable criticism which the learned Judge left to the jury. I would point out that the learned Judge most carefully expressed himself while putting the matter before the jury. I see no objection to it.

We then come to the question whether or not the charge of abetment of culpable homicide against Tota Meah was properly left to the jury. As a matter of fact, the

jury have carefully considered this question because we know, that they brought in a verdict of guilty against Tota Meah under S. 326 read with S. 109; and objection is taken to one passage in which the learned Judge says: "The order, if you believe it, was to kill Pachu," and it is said that whereas some witnesses say that Tota Meah shouted to his son "kill the sala" other witnesses say "beat." The very expression objected to contains the caution by the learned Judge "if you believe it," and it is said that if the learned Judge had been more elaborate and had pointed out that the word "beat" was a possible translation of the vernacular word as used by some witnesses, it is possible that the jury, if they convicted at all, would have convicted under S. 324 read with S. 109. Having regard to the facts of this case and the character of the case which the jury have unanimously believed I do not think that there was any cause for the learned Judge to have been more elaborate than he was.

The jury carefully considered this question. They had the evidence before them and they have come to the conclusion that at the time the intention of Tota Meah was such as to justify a conviction under S. 326, I. P. C. In my judgment, while this case requires a good deal of anxious consideration, the charge to the jury was extremely careful, laborious and able and the jury have been unanimous, and it appears to me that this appeal must be dismissed.

The appellants who are on bail must surrender to their bail-bonds and serve out the remaining portion of the sentences imposed on them and appellant 1 will now pay the fine.

**C. C. Ghose, J.**—I agree.

P.R./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 302

C. C. GHOSE AND JACK, JJ.

*Bazlar Rahman and others*—Accused—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 835 of 1928, Decided on 10th September 1928.

Arms Act (2 of 1878), S. 19 (f)—Before entering house to be searched police seeing some men throwing something from their



persons — Police discovering cartridges under Chowki on which accused sat conversing with others—Charge against them resting on suspicion—Their possession or knowledge not proved—They cannot be convicted under S. 19 (f).

Before the police entered the house which was to be searched, certain persons inside were seen throwing down something from their person, and on a search being made certain cartridges were discovered under the Chowki on which the accused were sitting conversing with others. The cartridges were not proved to be in their possession, nor was it proved that they knew that they were there.

*Held*: that the charge against them rested on suspicion and their guilt not being proved they cannot be convicted under S. 19 (f).

[P 303 C 1, 2]

*Narendra Kumar Basu and Nasim Ali*—for Petitioners.

**Judgment.**—In this case the four petitioners have been convicted under S. 19 (f) of Act 11 of 1878 and sentenced to undergo rigorous imprisonment for six months each.

The prosecution case is that, acting on certain information, some police officers under a Sub-Inspector and an Assistant Sub-Inspector raided a house in village Sailakandi, P. S. Muradnagar and recovered, among other things, 15 cartridges from under a chowki on which the petitioners were sitting conversing together with two people who lived in the house and were also convicted in the case but whose case is not before us on revision. They were Chand Miah and Keramat Ali, the two sons of the owner of the house. Two of the petitioners are Hindus and two are Mahomedans. When the police officers knocked at the door Keramat Ali came out of the door and through the open door the Sub-Inspector saw those who were standing in the room throwing down something from their person. Subsequently, on a search of the house, these 15 cartridges were found in a parcel in a box under the chowki.

The petitioners have been convicted on the finding that they were in possession of these cartridges. The petitioners from the very first explained that they were residents of Comilla which is about 20 miles from the village in which the house of the other persons is situated and they explained that they had come there in order to attend a musical party in the village.

The only reason to suspect the petitioners if the knowledge of these cartridges is the fact that they threw down

something from their person just before the search took place, but the case against them rests merely on suspicion. There is no proof that they were in possession of these cartridges or that they knew about the existence of these cartridges. These cartridges may not have been placed there by them. There is no evidence that they even knew of their existence and there was nothing incriminating in the articles which were found on the floor.

In these circumstances, we do not think that the evidence is sufficient to bring home their guilt against the petitioners and, therefore, the conviction and the sentences passed on them must be set aside and they will be acquitted. The petitioners, if they are on bail, will be discharged from their bail-bonds.

S.N./R.K

*Conviction set aside.*

## A. I. R. 1929 Calcutta 303

PAGE AND MALLIK, JJ.

*Jitendra Nath Roy*—Plaintiff—Appellant.

v.

*Provat Chandra Kanjilal and others*—Defendants—Respondents.

Appeal No 2156 of 1926, Decided on 23rd August 1928, from appellate decree of Dist. Judge, Jessore, D/- 15th June 1926.

**Bengal Tenancy Act, Ss. 52 (b) and 179—Under contract of tenancy, tenant agreeing that rent fixed by contract shall not be more or less at any time or on any account—Land diluviating — Contract precludes tenant from claiming abatement of rent.**

Unless the terms of the contract of the tenancy are so clear that it is manifest that the parties intended to exclude the operation of S. 52, the tenant ought not to be excluded from the statutory right given him under the section.

A contract of tenancy provided that the amount of rent shall not be more or less at any time or on any account. Some of the land became diluviated and the tenant claimed proportionate abatement of rent. [P 304 C 1]

*Held*: that S. 52 could not protect the tenant. [P 304 C 2]

*H. D. Bose and Hemendra Chandra Sen*—for Appellant.

*Radha Binode Pal and Jitendra Mohan Banerji*—for Respondents.

**Page, J.**—The suit is brought by the landlord against the tenure-holder of a maurashi mokarari registered lease con-



tained in a patta and in a counter-part kabuliat. The claim is for arrears of rent from 1327 to 1320 B. S. at the annual rent fixed in the kabuliat, viz., Rs. 176-8-15. The defence was that the tenant was entitled to a diminution in the amount of rent on account of diluvion and claimed the benefit of S. 52 (B), Ben Ten. Act. The plaintiff, on the other hand, relied upon S. 179 of the Act which runs as follows :

" Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a mourashi lease on any terms agreed on between him and his tenant."

He urges that under the terms of the contract of the tenancy the tenant agreed to pay as rent for the lands demised a sum of Rs. 176-8-15 per year in any event. Now, the tenant is entitled to the benefit of S. 52 unless he has contracted to the contrary. In my opinion unless the terms of the contract in question are so clear that it is manifest that the parties intended to exclude the operation of S. 52 the tenant ought not to be excluded from the statutory right that is given him under that section. In each case the question turns upon the true construction of the terms of the contract of tenancy. In the present case a selami of Rs. 300 was paid by the tenant and in consideration of the selami and the rent, it is stated that :

"the landlords have settled with us the land described within the boundaries given in Sch. Ka below in kayemi dar mourashi right fixing the yearly jama at Rs. 176-8-15 and we of our free will do execute this kabuliat on the following conditions :—

(1) For the aforesaid lands in Sch. Ka we shall pay Rs. 176-8-15 as rent. The amount of rent shall not be more or less at any time on any account.

(4) If at the time of the measurement any land in excess of those in Sch. Ka be found to be in our possession then we shall give up the said land to you without any objection.

(5) If any portion of the lands of this jama be acquired by Government, or District Board or Union Committee or by any Company then you and we shall get compensation according to law. For this we shall not be able to get any abatement of the rent fixed.

It is upon a consideration of those provisions in the contract that the issue of this appeal depends. For the tenant it is urged that special stress is laid in the contract upon the quantum of the land demised and the area for which the fixed rent is payable. Dr. Pal has urged us to read the first clause as though the fixed

rent was in respect of the whole of the area mentioned in Sch. Ka; but if any portion of the area ceased to be rent paying there should be a proportionate abatement. I am unable to accede to that contention. To my mind the language in which Cl. (1) is couched is too strong for the tenants, and I can see no escape from the conclusion that the parties contracted that in respect of this tenure there should be paid a fixed rent of Rs. 176-8-15 and that the amount of rent fixed should not be altered at any time or on any account. It may be that the contract so construed may work (as circumstances may arise) in favour either of the landlord or of the tenant. In the present case the tenant has proved to the satisfaction of the Court of appeal below that a large proportion of the lands mentioned in Sch. Ka have become diluviated and it is pointed out that in the circumstances disaster may befall the tenant if he is called upon to fulfil the terms of Cl. (1). Sitting in this place, however, we have to administer the law as we find it, and construe a contract such as this according to the plain meaning of the terms into which the parties have entered. In my opinion, it is clear upon a true construction of this contract that the defence based upon S. 52 was not open to the tenant in the suit brought for rent by the plaintiff.

The result is that the decree of the Court of appeal below must be set aside, and a decree passed in favour of the plaintiff for arrears of rent for four years i. e., from 1327 to 1330 B. S., at the contract rate of Rs. 176-8-15 with costs in all Courts.

**Mallik, J.**—I agree.

S.N./R.K.

*Decree set aside.*

**\* A. I. R. 1929 Calcutta 304**

**MALLIK AND GARLICK, JJ.**

**Bhabani Charan Sarkar**—Defendant 2  
—Appellant.

v.

**Kadambini Dasi and others**—Plaintiffs—Respondents.

Appeal No. 415 of 1926, Decided on 21st June 1928, from appellate decree of 2nd Sub-Judge, Pabna, D/- 8th September 1925.

**\* (a) Transfer of Property Act, S. 67—Scope.**

A usufructuary mortgagee can sue for sale if the bond allows him to do so. [P 305 C 2]



**\* (b) Transfer of Property Act, S. 62—Usufructuary mortgagee—Profits in lieu of interest—Mortgagee not getting full possession—Purchaser from mortgagor obtaining possession—Deposit of principal by purchaser in ignorance of claim for interest is valid and will stop running of interest—Transfer of Property Act, S. 84.**

The condition in a usufructuary mortgage was that the mortgagee was to take the profits in lieu of interest which was fixed. Mortgagee obtained possession of part of the property for two years when a purchaser from the mortgagor obtained possession. The purchaser deposited the principal money in Court, the mortgagee having refused to accept it alleging that he was entitled to interest. In a suit for sale by the mortgagee,

*Held* : that though a deposit in Court is not valid to stop interest when it does not fully satisfy the mortgage debt, still the deposit by the purchaser who could not have known whether any interest was due was a valid deposit and interest ceased to run from the date of deposit. [P 306 C 1]

*Radha Binode Pal and Jitendra Mohan Banerji*—for Appellant.

*Bansori Lal Sircar*—for Respondents.

**Garlick, J.**—The facts found by the lower appellate Court are these :

On 1st Jaistha 1325 defendant 1 borrowed Rs. 300 from the plaintiff and executed an usufructuary mortgage bond of some 28 bighas of land, stipulating that the plaintiff should possess the land in lieu of interest and should return it on repayment of the principal. The bond also contained an agreement that if the mortgagee failed to get possession, he should be entitled to realize his dues, after deducting receipts by a suit for sale of the property, and that interest should be calculated at Rs. 112-8-0 per annum. In pursuance of the agreement the plaintiff was put in possession of 13 bighas of land, but not of the whole mortgaged property. On 15th Kartik 1326 defendant 1 sold the whole property to defendant 2. The purchaser took possession of 13 bighas of land after plaintiff had been in possession for two years. He tendered the principal money Rs. 300 to the plaintiff, but plaintiff refused it because he claimed interest in lieu of the usufruct of 15 bighas of land. So the Rs. 300 was deposited in Court. There were some negotiations with a view to compromise, but eventually the plaintiff filed this suit claiming Rs. 800 in all after deducting Rs. 100 for two years' possession of 13 bighas. And the lower Courts have decreed that sum and have

ordered it to be realized by sale of the property.

The grounds urged in the appeal by defendant 2 are: first that the deposit of the principal money was a valid deposit under S. 62, and interest ceased to run from the date of deposit, as S. 84, T. P. Act, shows ; second, that as the plaintiff was in possession of some of the land he is bound to account for his receipts from it under S. 76, T. P. Act ; third, that an usufructuary mortgagee cannot get a decree for sale. S. 67, T. P. Act, prevents it.

The last point is clearly untenable. An usufructuary mortgagee cannot as such sue for sale. But he can do so if the bond allows him to do so, as it does in this case.

As to the first point, in a usufructuary mortgage, the mortgagor has a right to recover possession under S. 62 on payment or tender or deposit of the principal money. But defendant 2 did in fact recover possession at about the time of the deposit. Under S. 84, interest ceases to run when the amount due is tendered or deposited. But the amount due in this case was not merely the principal money. The plaintiff was entitled to interest for two years at Rs. 112-8-0 per annum, minus the interest realized by his possession of 13 bighas of land. If any interest remained due, the deposit of Rs. 300 was not a valid deposit and did not prevent interest from running.

As to the second point, the lower Court has calculated that as the bond stipulated for Rs. 112-8-0 interest per annum if possession of 28 bighas 15 cattas was not delivered, therefore the value of the usufruct of 13 bighas for a year would be about Rs. 50 and that as the plaintiff has deducted Rs. 100 for his two years' possession of 13 bighas, there is no necessity to take any account. The appellant claims an account of the profits of 13 bighas for those two years. Under S. 76 a mortgagee in possession must keep and give accounts. But S. 77 lays that S. 76 shall not apply when the contract is that the mortgagee in possession shall take the receipts in lieu of interest.

In my opinion it is not right to allow the plaintiff to apportion the interest and deduct 50 per cent for possession of 13 bighas of land, for those 13 bighas may have been the most valuable portion of the mortgaged land and may have given



the plaintiff a profit of far more than 50 per cent a year. It is quite possible that the plaintiff realized the full interest of Rs. 112-8-0 from those 13 bighas alone. If the plaintiff had been put in possession of the whole mortgaged property, he would have been entitled to all the profits, even if they had far exceeded Rs. 112-8-0. But when the contract to deliver possession was broken, the plaintiffs' right by the terms of the bond was only to receive Rs. 112-8-0 a year as interest. Therefore he was bound to account for the profits he received for his possession of 13 bighas and to deduct his actual profits from the interest due for each year. Until he did this, it was impossible for defendant 2, who was not the mortgagor but a recent purchaser, to know whether any interest was due on the loan.

In my opinion therefore the deposit of Rs. 300 was a valid deposit, and interest ceased to run from the date of the deposit. The plaintiff is entitled to withdraw Rs. 300 and to be paid the balance of interest due to him for the two years preceding the deposit after accounting exactly for the profits which he received in those years.

It is not, however, worthwhile to re-mand the case for taking an account of so petty a matter. The plaintiff deducted Rs. 100 on account of his profit for two years, and there is nothing to show that that sum is inadequate. He was entitled to Rs. 225 as the interest for those two years by the terms of the bond. The amount due to him as interest is therefore Rs. 125. He is also entitled to Rs. 300 in deposit.

The result is that the decree of the lower appellate Court is modified, and the suit is decreed for Rs. 425 (including Rs. 300 in deposit) instead of Rs. 800 with proportionate costs. If the money is not paid within 15 days from the date of the arrival of the record in the lower Court, the mortgaged property or a sufficient part of it will be sold. The appellant will get one-third of his costs in the appeal as the objection to the decree for sale fails.

**Mallik, J.**—I agree.

M.N./R.K.

*Decree modified.*

### A. I. R. 1929 Calcutta 306

B. B. GHOSE AND PANTON, JJ.

*Sew Baran Saw & another—Appellants.*

v.

*Ram Charitra Dubey and others—Respondents.*

Appeal No. 186 of 1927, Decided on 30th January 1929, against original decree of Officiating Sub-Judge, Asansole, Burdwan, D/- 14th May 1927.

**Civil P. C., S. 20—Assignment of pronote saying that money should be paid where assignee resides does not entitle assignee to sue in Court where he resides—Promissory note.**

A creditor by reciting in the assignment that the money due on the promissory note assigned should be paid at a place where the assignee resides, cannot give the assignee right to sue on the promissory note in Court of that place. [P 307 C 2]

*Sarat Chandra Bose and Narendra Krishna Basu—for Appellants.*

*S. C. Basak, Banbehary Sircar, Bhupendra Kumar Ghose and Gopendra Nath Das—for Respondents.*

**Judgment.**—The plaintiff sued for a sum of money against defendant 1 and 2 or, in the alternative, against defendant 3. His allegation shortly stated was that defendants 1 and 2 advanced Rs. 4,000 to defendant 3 on a promissory note. Defendants 1 and 2 at the same time were negotiating for a usufructuary lease to be granted by defendant 3 of certain properties in favour of the plaintiff. Sometime after the money was advanced, defendants 1 and 2 along with defendant 3 came to the plaintiff's house at Asansol and defendants 1 and 2 took a loan of Rs. 4,000 from him with an agreement to pay interest at the rate of Re. 1-4 annas per cent per month and defendant 3 stood surety for the payment of the money. When the plaintiff asked for repayment of the loan from defendants 1 and 2, they made over the promissory note which defendant 3 gave to them with an endorsement that the money should be paid to the plaintiff. The plaintiff attempted to realize the money from defendant 3 but the latter did not pay and hence this suit.

The learned Subordinate Judge has disbelieved the story of the plaintiff of his advancing any loan to defendants 1 and 2 at Asansol for which defendant 3 stood surety. The story as to defendant 3 standing surety is absurd on the face of it. Defendant 3 by all accounts



was heavily involved in debts; while defendants 1 and 2 are prosperous contractors, and the Subordinate Judge has found that they are very substantial people. The plaintiff produced an account book which the Subordinate Judge has not believed and we cannot also place reliance on it for a single moment. It is a small book in which, it is said, accounts of several years are entered; no balance is struck and the plaintiff himself admits that it does not show that he had any cash in his hand on the date when he is alleged to have advanced the loan to defendants 1 and 2. On failure of the plaintiff to prove his case against defendants 1 and 2, his suit was bound to fail and as his learned advocate has not been able to satisfy us that the Subordinate Judge is wrong in disbelieving the story of the plaintiff having advanced any money to defendant 1 and 2 as loan, this appeal must fail as against those defendants.

With regard to the liability of defendant 3, the Subordinate Judge holds that the money was really advanced to defendant 3 by the plaintiff outside the jurisdiction of his Court. But at the plaintiff's request the promissory note was executed in favour of the defendants, or rather in favour of defendant 2, who is a brother of defendant 1 and is joint with him. The Subordinate Judge finds that when the negotiations about the usufructuary lease to be granted by defendant 3 to the plaintiff failed, defendant 1 as ammuhtear of defendant 2 made the endorsement on the promissory note for the money advanced by the plaintiff to defendant 3 and made it over to the plaintiff. Defendant 3, however, says that the plaintiff, has got no right to sue. On this statement the plaintiff's advocate here contends that defendants 1 and 2 were not his agents but really the agents of defendant 3 and as they received the money from the plaintiff which they paid over to defendant 3, they were personally liable for the money. It seems to be arguing in a circle. Defendants 1 and 2 never said that they advanced any loan to defendant 3 nor did they say that they had incurred any liability to the plaintiff for merely handing over the money as a conduit pipe to defendant 3, and it is impossible to see why defendants 1 and 2 should be made liable. Much stress was laid on the fact that there was

an assignment by defendants 1 and 2 of the promissory note of defendant 3 in favour of the plaintiff and it was argued that upon that assignment defendants 1 and 2 made themselves personally liable to the plaintiff. As defendants 1 and 2 never professed to have any right to the promissory note on their own account as they never claimed to have advanced any money to defendant 3, the assignment was simply a declaration that instead of defendants 1 and 2 being the owners of the promissory note, it was the plaintiff who was the real person interested in recovering the money. Therefore, it can hardly be argued that by simply doing what was the right thing to do under the circumstances found by the Subordinate Judge in this case the defendants would be personally liable to the plaintiff.

As to the alternative claim against defendant 3, the Subordinate Judge has found that defendant 3 being a resident outside his jurisdiction and no part of cause of action having arisen within his jurisdiction, he could not pass any decree against defendant 3. It is argued that defendants 1 and 2 acted as agents of defendant 3, because they wrote a letter to the plaintiff and sent a telegram asking him to bring money as defendant 3 was pressing to enter into the transaction of the lease. It is urged that if defendants 1 and 2 were the agents of defendant 3, then a part of the cause of action arose within the jurisdiction of the Court below. The matter, however, stands thus. The plaintiff asked defendants 1 and 2 to secure a lease from defendant 3 as on previous occasions defendants 1 and 2 had secured leases for other persons of lands belonging to defendant 3 and, in pursuance of that request defendants 1 and 2 were acting in the matter. It can hardly be said that defendants 1 and 2 were acting as agents of defendant 3 in the matter of the loan. No part of the cause of action, therefore, arose within the jurisdiction of the Court below. An argument was advanced that, by reason, of the assignment, the plaintiff was entitled to sue in the Court at Asansol, because the assignment says that the money should be paid to the plaintiff at Asansol. No authority has been cited in support of the proposition that a creditor by an assignment to a person living at any other place can give the assignee the right to sue in any Court



where the assignee resides and, in the absence of any such authority, it seems to us to be rather a startling proposition to accept. On all these grounds, the appeal is dismissed with costs to be recovered only by defendants 1 and 2. Defendant 3 will bear his own costs in this Court.

S.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 308

MUKERJI AND MITTER, JJ.

*Brojo Mohan Pal*—Appellant.

v.

*Darsan Pal* and others—Respondents.

Appeal No. 1750 of 1927, Decided on 1st February 1929, against appellate decree of Dist. Judge, Zillah Midnapur, D/- 24th February 1927.

(a) Bengal Tenancy Act, S. 106 — Suit under S. 106 cannot pray for possession.

A prayer for possession cannot be included in a suit under S. 106: 19 C. W. N. 911 and 15 C. W. N. 974, *Foll.* [P 308 C 2]

(b) Bengal Tenancy Act, S. 106—Question of title.

The scope of a suit under S. 106 can extend to question of title: 12 C. W. N. 8 (*Per Woodroffe, J.*), *Expl.*; 18 C. W. N. 938, *Expl.* and *Dist.*; 13 I. C. 311 and A. I. R. 1927 Cal. 216, *Ref.* 24 C. L. J. 79, *Dist.*; 64 I. C. 889, *Foll.* [P 303 C 2]

*Gopendra Nath Das*—for Appellant.

*Santosh Kumar Pal*—for Respondents.

**Judgment.**—This appeal arises out of a suit for recovery of possession on declaration of title. The plaintiff's case was that he purchased the lands in suit from defendant 3 in August 1906, that in the kobala under which he purchased there was no mention of there having been any tenants on the land, that in the Settlement Record of the Khas Mehal finally published in 1910 the plaintiff was recorded as occupancy ryot in respect of the land, that subsequently in the Record-of-Rights finally published in 1918, the lands were recorded in the names of defendants 1 and 2 under defendant 3. The plaintiff alleged that he had instituted a suit under S. 106, Ben. Ten. Act, for correction of the entry in the Record-of-Rights but withdrew from the suit with liberty to bring a fresh suit. He averred that he was dispossessed by the defendants in July 1922. The prayer for declaration of title was based on the purchase as also on adverse possession for the statutory period. There was a prayer for recovery of possession, and it was further prayed that if it be found

that defendant 3 had maliki right, the plaintiff might be given a decree for possession on declaration of his jote right to the land.

It is unnecessary to set out the defence because the only plea on which the suit has been dismissed is that S. 109, Ben. Ten. Act, operates as a bar to the maintainability of the suit.

In support of the contention that the present suit is not barred by reason of the provisions contained in S. 109, Ben. Ten. Act, a number of decisions has been drawn to our notice, many of which deal with the question whether a previous application under S. 105, Ben. Ten. Act, did or did not bar a subsequent suit. We do not propose to deal with those decisions because we are of opinion that in the present case we have really to consider only two questions: first: What, in fact, was the scope of the suit under S. 106, Ben. Ten. Act, as framed; and second: How much of that suit was triable by the Revenue Officer acting under the provisions of that section. S. 109, Ben Ten Act, would operate as a bar only to the extent that the suit as laid under S. 106 fell within the purview of the Revenue Officer's functions under that section. Having examined the plaint in the suit under S. 106 we find that it asked for correction of the entry in the Record-of-Rights by inserting the name as niskardar in respect of the lands, on a declaration that the plaintiff's title by purchase from defendant 3 had been established, and also a correction of the said entry by expunging the names of defendants 1, 2 and 3 on a declaration that they had no right to or possession in the lands. It has been urged before us on behalf of the appellant that the prayer for possession, which there is in the present suit, was not and could not be included in the suit under S. 106. This contention cannot be refuted: see, e. g., *Pran Krishna v. Trailakhyanath* (1), *Kali Sundari v. Girija Sankar* (2). But then it will not be possible to give him any relief in respect of this prayer unless he obtains a declaration of his title to the lands. It has been urged on behalf of the appellants that the Revenue Officer could not have gone into the question of his title as against defendant 3. In support of this contention reliance has

(1) [1915] 19 C. W. N. 911=27 I. C. 883.

(2) [1911] 15 C. W. N. 974=11 I. C. 184.



been placed upon several cases which will now be noticed. The first case relied upon is that of *Padmanav Ramanuja Das v. Lukmi Rani* (3). In this case there is no doubt a passage in the judgment of Woodroffe, J., which would seem to indicate that the question of possession alone should be considered in a suit under S. 106; but Coxe, J., observed that

"it is evident that in proceedings under the Bengal Tenancy Act no disputes of title between rival proprietors, considered merely as proprietors can legitimately arise. (p. 13)," and again, that suits under S. 106 are

"suits between tenant and tenant or between landlord and tenant in which questions other than that of possession may legitimately arise" (p. 15).

The observations of Woodroffe, J., therefore should be taken as limited to the peculiar facts of the case itself, namely, that the dispute concerned two rival proprietors without any question arising as between any of them and the tenants. The case of *Ram Chandra v. Nanda* (4), in which *Padmanav's* case (3) was referred to does not really help the appellant because there the question of possession had not at all been investigated and while remanding the case for an investigation of that question, it was observed that the Bengal Tenancy Act deals with relations of landlord and tenants and it is no part of its purpose to regulate disputes between rival proprietors, except in so far as such disputes affect their relations with their tenants, and the view of Cox, J., in *Padmanav's* case (3) was adopted and affirmed by the learned Judges. The view of Coxe, J., in *Padmanav's* case (3) was agreed in by Carnduff, J., in *Ensar Ali v. Ansar Ali* (5). That such dispute does not fall within the purview of S. 106 has also been held in a recent decision of this Court, namely in *Asrafunnessa v. Hem Chandra* (6). Another case upon which some reliance has been placed on behalf of the appellants is that of *Aswini Kumar v. Sardar Charan* (7). In that case there was an observation to the effect that these matters (meaning prayer for declaration of title and recovery of possession) are entirely foreign to the jurisdiction of the Revenue Officer under S. 106. The fact of that case in

so far as it appears from the report was that the suit was between two rival proprietors; but whatever that may be not much weight was attached to these observations in the latter case of *Apurba Krishna v. Atarmani* (8), in which all these cases were reviewed and it was said that in a suit under S. 106, Ben. Ten. Act, for correction of the Record-of-Rights when the Revenue Officer proceeds to decide the dispute he has to determine not merely whether certain words should or should not remain unchanged in the records but also whether the facts described by those words are correct, and the contention that the scope of the suit should not extend to questions of title was overruled. We are of opinion that the appellant's argument, that the scope of the suit under S. 106 in the present case was or should be confined to questions of possession, must fail.

At the same time we think that the present suit should not be thrown out altogether. The plaintiff's title in so far as it is based upon his allegation of adverse possession for the statutory period was not, in fact, within the scope of the plaint in the suit under S. 106, Ben. Ten. Act. He is fully competent to agitate this part of his title in the present suit and get in it such reliefs, if any, against the defendants as the law may entitle him to. We accordingly allow the appeal and setting aside the decisions of the Courts below remand the suit in the limited form indicated above to the trial Court for trial. All costs incurred up till now (including the costs in this appeal) will be costs in the cause.

S.N./R.K.

Case remanded.

(8) [1920] 64 I. O. 889.

### A. I. R. 1929 Calcutta 309

RANKIN, C. J. AND C. C. GHOSE, J.  
*Satya Ranjan Bakshi*—Appellant.

v.

*Emperor*—Opposite party.

Criminal Appeal No. 818 of 1928, Decided on 11th February 1929.

(a) Penal Code, S. 153-A—Real intention to incite one community against another is absolutely essential—Mere probability of such result is insufficient.

Although the internal evidence of the words published will generally be decisive on the question of intention they are never more than evidence of intention and it is the real intention of the accused that is the test. Ill-feel-

(3) [1908] 12 C. W. N. 8.

(4) [1914] 19 C. L. J. 197=20 I. O. 298=18 C. W. N. 938.

(5) [1912] 18 I. O. 311.

(6) A. I. R. 1927 Cal. 216=54 Cal. 114.

(7) [1916] 24 C. L. J. 79=37 I. O. 253.



ing may or may be likely to result from published matter is not in itself sufficient: *A. I. R. 1926 Cal. 1133, Foll.* [P 314 C 2]

(b) **Penal Code, S. 153-A—Intention is to be deduced by a natural interpretation of words used (Obiter.).**

If the words used naturally, clearly and indubitably have the tendency to incite one community against another then the intention to do it should be inferred: *47 Cal. 190, Foll.* [P 314 C 2]

(c) **Tort—Defamation.**

A newspaper is in exactly the same position as an individual for defaming.

[P 312 C 1]

*B. C. Chatterji, Mritunjoy Chatterjee, S. C. Taluqdar, S. N. Banerji, M. N. Banerji, Bholanath Roy, and Biraj M. Roy*—for Appellant.

*N. N. Sircar and J. C. Guha*—for the Crown.

**Rankin, C. J.**—The accused Satya Ranjan Bakshi, is the Editor of a Calcutta daily newspaper called the "Forward" and the accused Pulin Bihari Dhar is the printer and publisher thereof. They have been convicted by the Chief Presidency Magistrate under S. 153-A. I. P. C. in respect of certain matter published in the issue of the Forward newspaper dated 13th July 1928. The charge against them is that they promoted, or attempted to promote, feelings of enmity or hatred between two different classes of His Majesty's subjects, to wit the Europeans and Indians.

The statements contained in the printed matter which is now complained of have reference to a railway accident which took place at Belur soon after midnight on 8th and 9th July 1928. It would appear that a train from Howrah became derailed and that many of the carriages of the train were wrecked. It would appear further that in the course of the night a relief train, or trains, with doctors, medical staff and medical appliances came to the scene. The allegations published by the accused in the Forward newspaper are, shortly speaking, to the effect that certain Europeans belonging to the staff of the E. I. Ry., ordered injured passengers to be beaten to death and had the bodies thrown in a heap into a wagon, and that in this way the number of persons killed in the accident was increased to about 300 of whom 50 per cent were done to death with iron rods and other instruments by the staff under the direct orders and in the immediate presence of European members of the railway staff.

It is established by the evidence adduced in this case, and it has not been contested on behalf of the accused at the hearing of this appeal, that there is no truth whatever in these statements. Mr. Arthur Vincent Veneables, Divisional Superintendent of the E. I. Ry., who was one of the first to arrive at the scene of the accident and who was there during the whole of the time from 1-45 a. m. onwards, has given evidence and has explained in detail about his arrival by the patrol train and the subsequent arrival of the relief train shortly after 3 a. m. He has described how the injured were attended to by Dr. Rapper himself, how the injured were made as comfortable as possible in the rear portion of the train and how the bodies of the dead were laid on the slope of the bank and put in charge of the police. It would appear that the number of dead bodies was 19 and that these were taken in a special train to Howrah about 2 p. m. on the 9th in charge of the police. Dr. Rapper has also given evidence explaining in detail the medical work which he had to do and the manner in which it was done. Neither witness was cross-examined to show, or even to suggest, that the statements to which the accused gave publicity have any—even the smallest substratum of truth.

Criminal proceedings against these accused were begun on 17th July and on 28th September 1928, the accused filed a written statement. The evidence does not disclose that the accused, or either of them, in their newspaper or otherwise have at any time expressed regret for their conduct in giving currency to accusations so horrible and unfounded. There is no evidence, and indeed there is no pretension, that the statements complained of were, or could have been printed or published by inadvertence or by reason of mere negligence, whether excusable or inexcusable. Indeed, having regard to the astonishing character of the statements themselves and to the prominent position given to the matter now complained of in the issue of 13th July there is no room for doubt that the statements were published deliberately and with a full knowledge and appreciation of their meaning and contents.

If the sole question in this appeal was whether or not these accused have



wickedly and wantonly, without taking any trouble to verify and without any belief, reasonable or unreasonable, in the truth of what they published, spread broadcast accusations against certain European officials of the E. I. Ry., so foul as to be on the face of them incredible, there would be nothing to detain this Court on this evidence for more than a few moments.

In the written statement filed by the accused they set up as a defence the stale and ignorant contention that the allegations complained of were published by their newspaper in discharge of its duty to the public, that these allegations had been communicated to the newspaper, that the newspaper could not withhold them from the public and that the publication was with a view to letting the public and the Government look into both versions of the incident, i. e., the version contained in the allegations now complained of and the version of the railway company. This miserable plea may be brushed aside. I am not even prepared to assume, without good proof, that the accused are either so ignorant or so depraved as to imagine that there is anything in this plea. A newspaper, for the present purpose, is in exactly the same position as an individual except for the fact that it has greater facilities of giving publicity to defamatory matter. Not only has it no duty to break the law by publishing libels or seditious matter or matter objectionable under S. 153-A, it has no right to do so. The comments of the Chief Presidency Magistrate upon this plea have been expressed in somewhat pungent terms and he has rightly treated it with contempt.

The question before us, however, is not whether the conduct of the accused deserves to be reprehended, but whether it is proved that this exceptionally objectionable matter was published by them in the attempt to promote, or with the purpose of promoting, feelings of enmity or hatred between Indians and Europeans, which in this case means feelings of enmity or hatred in the minds of Indians as against Europeans. This is indeed the only point raised by learned counsel for the accused in this appeal. He says and says quite rightly that it is for the prosecution to prove that the publication was done with this intention

or purpose. The written statement of the accused deals with this question in the following words :

"That the accused never intended to promote or even to attempt to promote any feelings of enmity or hatred between any two classes of His Majesty's subjects and never imagined that the attack contained in the letter in question on the officers and employees of the E. I. Ry. who went to the scene of the disaster in the relief or special trains could be construed in the circumstances by any reasonable or right-minded man to traduce a whole class as suggested in the charge framed against the accused, namely, the European subjects of His Majesty."

It may be here observed that if rumours of horrible and brutal ill-treatment of Indians by Europeans are once started, that they will reach only the ears of reasonable and rightminded men is an impossible and indeed a paradoxical assumption ; and as the accused are clearly shown to have been well aware of what they were publishing, the statement that they never imagined that their conduct would promote class hatred stands in need of a critical examination. The Magistrate's conclusion is that:

"reading it as a whole no one can hesitate to say that it was written in hate and meant and likely to create hatred for Europeans as a class by Indians as a class."

The question is whether the Magistrate was right.

The matter complained of was published in a part of the paper in which a reader would expect to find the most important news of the day. The head-lines are in very large type:

"Railway Smash at Belur—Sufferers' Story—Killed and wounded how many."

I do not know that any importance attaches to the particular words used in the head lines, but the headings as printed are calculated to draw the immediate attention of the reader to the matter now in question. This matter begins by a statement:

"We have received for publication quite a number of letters from those who were in the ill-fated train, who have received serious injuries but have fortunately escaped with their lives. We set out below some of these letters without any alteration. The letters will be intelligible and tell their own tale."

It is the first of the letters printed under this introduction which is the subject matter of the present charge. The letter is signed "A Real Horrified Spectator" and under this nom-de-plume is the word "Howrah" intended apparently as the address of the writer. It will be seen, therefore, that this news-



paper contains a statement that the letter with which we are concerned is a letter which has been received for publication. Now, there is no proof on the part of the accused that any such letter was at any time received. It appears from the evidence of G. S. Roy, Sub-Inspector of Police, who executed a search warrant at the office of the Forward on 17th July 1928 (four days after the publication of the letter with which we are concerned) that he asked the accused Pulin Bihari Dhar for the copy of the original letter and was informed by him that he had not got it. That they did not keep copies of letters when they had printed them. No evidence has been given by the accused to show the date on which or the person from whom this letter was received and the Magistrate has pointed out very cogently in his judgment that if the letter was received at all it may or may not have been anonymous. It may also be observed that the letter as printed bears no date and that the question of the date upon which the letter was received is of some importance.

It is quite clear that the accused are not in a position to ask us to hold that the letter which was published was printed by them because it came from a source which they had reason to trust or because it amounted to evidence as to which they were honestly satisfied that an investigation was required. Speaking for myself, I am not satisfied that any such letter was in fact received. Having regard to the allegations contained in the letter it is plain enough that the purpose of the accused in publishing it was a malicious purpose to do damage to some one. The question before us was I think accurately and neatly stated by Mr. Chatterjee himself in the course of his reply—"venom against whom?"

When I scrutinize the letter itself for an answer to this question, I observe that the letter opens with a statement as to the intention of the writer. He claims to be writing:

"so that my mind and heart may be relieved of the horrors that I saw on the ill-fated night."

and he requests the Editor to publish the letter:

"so that the public may know, what was actually done by the 'Relief Train' in that night".

This profession of purpose is neces-

sarily a hollow pretence as the story prefaced by it is a series of inventions. The next paragraph contains a statement that the train was going at a speed of above 40 miles an hour and that the writer and a friend when the accident happened were discussing the speed. It states that the writer was thrown about 10 feet away from the line. Then follow certain passages:

"The dead were being thrown into the covered wagons one after the other and as quick as possible. I could plainly hear weeping and cries of pain and agony. Accompanied with them I could hear heavy thuds and blows being delivered and the cries were diminishing at quick intervals. I could hear the voice of a European, 'Jaldi Karo, Maro Osko' Somebody on my left at a distance of 15 feet cried 'Hai, Jal, Hai Marta, Babu Jal, pani'. A man came, there was a heavy blow and the dying man spoke no more. All was over with him and water had been supplied to him for ever. No more did that Indian voice cry. He had been hushed for ever and carried away, away and thrown over the heap in the wagon."

Another passage:

"Oh, Brothers, Oh, Indians, what a horrible sight it was. My eyes fail to describe it. Search lights were flashing in every direction. The wounded were being searched and 'killed', mind you, 'killed' not saved. Where a cry arose, a Sahib came with a light, somebody delivered a heavy blow and the Royal Indian spoke no more. Oh, Brothers, Indian blood has been lavishly spilt, all the wounded and dying were killed and heaped into the wagons."

The letter then goes on to suggest that a large number of dead having been heaped into wagons, the wagons were not taken to Howrah but were taken somewhere else where the bodies were hidden or thrown into the river or the sea:

"I call upon the noble Indian public to bravely come forward and ask the Government what has become of the wagon loads of dead bodies silently carried away before dawn".

Another passage:

"I am ready to prove to the public that 'more' than 300 are 'dead' and 50 per cent could have been saved if the 'relief train' had not arrived and killed the dying with iron rods etc. . . . As regards proof, I dare say that I can identify 10 men of the relief party, however cleverly too they may be disguised, and even if you shut my eyes, I can recognize the European's voice (his gruff voice is still ringing in my ears)".

The concluding sentences of the letter are chiefly of importance owing to the constant reiteration of the word "Indian"

"Indians, 300 innocent dead bodies (half of whom were alive and cried for aid) have brutally been taken to God knows where and it is up to the Indian public to trace the clue and I shall give the evidence and tell to



which side the wagons went. I earnestly call upon all Indians, Barristers, Leaders, public men to whatever political party, religion, or caste they may belong to come forward and demand a public answer to where those over 300 dead bodies of those innocent, those poor, those Royal Indians, been despatched? Why were the wounded killed? If the authorities deny all these, I shall go out to tell the world for the cause of the departed souls. Oh Indian, if you have any Indian blood in you, if you have any self-respect, sympathy, arise then now and come forward now, for your brothers have been treated worse than dogs. I hope all the national papers over and outside the country "will" copy this report."

It is said for the prosecution that the intention of the accused to promote hatred against Europeans is evidenced by the fact that the main point in this tissue of miserable lies is to represent that the injured who were killed were all killed at the order and in the immediate presence of a European. That the constant ejaculation "Oh? Indians" and the use of phrases like "The Royal Indian spoke no more," "Indian blood has been lavishly spilt," "those poor, those Royal Indians, been despatched", "Indians, if you have any Indian blood in you," all disclose and emphasize the attempt to give as the prominent feature of the narrative the brutal European butchering the helpless Indian.

Mr. Chatterjee has pointed out that if one examines the narrative such as it is, one will see that according to the writer Indian coolies or Indians of some sort were carrying out the orders of the European members killing their fellow countrymen, it would appear, as and when required, in fact promptly and industriously using iron rods upon the dying whenever asked to do so. This, it is contended, throws some doubt upon the inference that the motive of the writer (if there was a writer outside the Forward office), and the motive of the accused in giving publicity to the story was to excite hatred against Europeans as Europeans. The point is certainly worth attention and the effect of the letter as a whole cannot be assessed by taking separate points and separate passages. If, however, it is indisputable that the European staff of the relief train were intended by the accused to be exhibited as monsters killing Indians right and left, not doing so with their own hands but making Indian subordinates do the foul work in their immediate presence, it is clear enough that

one part of the intention of this lying article is in the first instance to create the bitterest ill-feeling against those particular Europeans. Beyond the fact that the objects of this elaborate malevolence are Europeans, the only other circumstance which is conveyed to the reader with reference to those Europeans is the fact that they belonged to the relief train. Had there been some evidence showing, for example, that the accused had been discharged employees of E. I. Ry. or had, or supposed themselves to have, some special grievance against the railway or its medical staff, the purpose of the accused in publishing this letter might perhaps be taken to be confined to damaging the railway company or some of its employees. I observe that the accused in their written statement speak of :

"the attack contained in the letter in question on the officers and employees of the East Indian Railway who went to the scene of the disaster in the relief or special trains."

The learned counsel for the accused did not succeed in conveying to me any clear idea of the defence contention as to the purpose of his clients in publishing this article, but it seems desirable to consider whether the accused under S. 153-A can escape conviction upon the footing that their purpose was to create ill-feeling against some Europeans as a means of damaging the E. I. Ry. If this line of reasoning affords no defence to the accused, I see no other defence which has any relation to the facts of this case. The circumstance that according to the imaginative narrative complained of, Indian coolies are represented as giving unresisting obedience to the savagery of the Europeans is clearly a weak spot in the invention and it is also clear that the inventor perceived this, touched upon this particular part of the story very lightly and made as little of it as possible :

"A man came, there was a heavy blow and the dying man spoke no "more," "somebody delivered a heavy blow and the Royal Indian spoke no more."

If it cannot be disputed that the intention of the writer was in the first instance to create ill-feeling against the European principals in this imagined brutality, the part assigned to the Indian coolies is of no great importance.

The defence has pointed out that after the letter complained of, several other



letters were published and at the end of these is an account of the proceedings of the official enquiry held by the Senior Government Inspector of Railways on Thursday the 12th July. This includes the evidence of Dr. Rapper who was in charge of the relief operations and who stated that the number of dead was 20. It contains also the evidence of the Permanent Way Inspector in which he stated that when he inspected the road with his Divisional Superintendent shortly after the accident, he found that a pair of fish-plates had been removed from the joints on the outside of the curve. Now it is said by the defence that in this issue there was no suppression of the story told by the railway officials and that this is a circumstance tending to show that the publication of the letter complained of was not done with the intention of creating enmity against Europeans. It is said also that in addition to the letter complained of, other letters were being published and that in these other letters there is nothing tending to show the purpose of creating enmity. Some of these letters if inaccurate in important particulars have nothing in common with the story of wholesale murder contained in the first letter. One of these other letters does, however, contain a statement that about 3 a. m. coolies were overheard proclaiming with shovels in their hands an intention to finish the injured. The same letter displays also an anxiety to make out that the number of dead is far in excess of the number given by the authorities and that the accident was due to the negligence of the railway authorities and not to any tampering with the line on the part of train-wreckers. I have not discovered any reasonable ground for thinking that the defence takes any advantage from the contents of these letters upon the question of the purpose of the accused in printing the letter complained of. It is, however, a note-worthy circumstance that the letter complained of was printed in front of the report of the official enquiry by the Government Inspector of Railways. The Magistrate has pointed out that if the letter was really received from an outside source, the date of its receipt would on this question be very interesting :

"If it was received on the 9th, then is it pure coincidence that it was published on the

same date as the report of the enquiry, that is on the 13th ?"

As it appears to me to be clear that the accused were knowingly and deliberately publishing a farrago of injurious lies, I am of opinion that whether this letter was received at all or not, and on whatever date it was received, the purpose of its publication as disclosed by the date and manner thereof was really to swamp whatever effect the publication of the official version might be calculated to produce. The pride of place to which the Magistrate has referred is intentional and has an immediate and no mere general purpose. The written statement of the accused represents that

"it was thought incumbent on the Forward to publish along with such communications, the version of the railway authorities themselves referring to the identical matter."

In my opinion this is a plain inversion of the truth. The letter was published in a manner deliberately intended to distract from, and to nullify the effect of, the official enquiry, the report of which was little likely to sink into the minds of the ignorant or credulous reader when his mind has been prepared by the excited rhetoric, the horrors and the appeal to national sentiment of the letter complained of.

In *P. K. Chakravarty v. Emperor* (1), I had occasion to point out that although the internal evidence of the words published will generally be decisive on the question of intention, they are never more than evidence of intention and it is the real intention of the accused that is the test. I pointed out also that the mere fact that ill-feeling may result or may be likely to result from the publication is not in itself sufficient and that there may be circumstances in any such case which would rightly prevent a Judge of fact from holding that the publication was an attempt to promote ill-feeling. I drew attention on that occasion to the statement of an important principle given in *In re : Amrita Bazaar Patrika Press* (2) at p. 225 by Woodroffe, J.:

"If the words used naturally, clearly and indubitably have such tendency, then it must be presumed that the publisher intended to create the natural result of the words used."

The learned Judge went on to say: "and no other evidence is to say the least likely to rebut the existence of such intention ;"

(1) A. I. R. 1926 Cal. 1133=54 Cal. 59.

(2) [1920] 47 Cal. 190=54 I. C. 578=21 Cr. L. J. 98.



but each case must be dealt with on its own facts. The present case is one in which the primary intention of the accused to create ill-feeling and enmity is beyond the range of reasonable dispute. For this purpose the means employed were the dissemination of accusations so wild and horrible that their effect would obviously reach far beyond the limited range afforded by the number of persons who could read a newspaper printed in English. No one can suppose that the strongest denunciation of Europeans would if couched in general language have the same effect in the bazaars as a definite story of brutality told with reference to particular European officials. Nor can the accused be supposed to have been ignorant that when the story which they were publishing gained currency in the bazars, it would be far more likely that the object of resentment and ill-feeling would be Europeans as a class than that it would be directed against the railway administration. That it would not stop with the individuals directly libelled is clear enough. In the letter complained of the writer does all that a foolish and vulgar person can to give to his untruths the appearance of a story of outrage and to set them forth in a provocative manner with excited and exciting comment. Much pains are taken to appeal to sentiments characteristically national. It seems to me in the circumstances that the individual Europeans who are the primary victims of the criminal purpose of the accused are used in the same manner as a certain Mr. R. D. Spencer was used in the case of *Jaswant Rai v. Emperor* (3). As was observed in that case :

"you may tell people that they are being oppressed and that their fellows are being murdered with impunity but you will not carry conviction unless you can give them specific instances of oppression and murder. A concrete fact appeals more to the imagination and creates a more vivid impression on the mind than any number of general statements."

In my judgment neither the fact that the statements complained of amount to a gross libel upon the particular individuals concerned, nor the fact that they are intended to reflect upon and do damage to the administration of the E. I. Ry. militates against or in any way detracts from the further fact that this letter was clearly calculated to promote

class hatred between Indians and Europeans and that it was published by the accused with the intention to subserve this wicked purpose. The appeal should in my judgment be dismissed.

**C. C. Ghose, J.**—I agree.

P.R./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 315

SUHWARDY AND GARLICK, JJ.

*Bejoy Kumar Sen and another*—Defendants—Appellants.

v.

*Kusum Kumari Debi and others*—Plaintiffs—Respondents.

Appeals Nos. 1224 and 1398 of 1926, Decided on 25th July 1928, from appellate decree of Addl. Sub-Judge., Khulna, D/- 26th January 1926.

(a) **Contribution**—Suit is based on equity—Equitable adjustment of all rights and liabilities between parties should be made.

The claim for contribution is based on principles of equity and the Court must adjust the rights of the parties in accordance with rules consistent with justice, equity and good conscience. In adjusting the rights the attention of the Court is not to be limited by the liabilities arising from the claim in the suit but it may go beyond the scope of the suit and enquire into other mutual liabilities: 12 C. L. R. 539; 12 C. W. N. 60, *Foll.*; 31 Cal. 95; A. I. R. 1926 Cal. 657 and 20 C. L. J. 205, *Rel. on.*

[P 316 C 2]

(b) **Civil P. C., O. 41, R. 33**—Decree against party to suit can be passed in his absence—Discretion should be used to allow him to be present.

A decree in a suit for contribution was passed against two defendants. One defendant successfully appealed but the other defendant was not made a respondent. Appellate Court passed an additional decree against the absent defendant :

*Held*: under O. 41, R. 33 the Court could pass an order against a party to the suit in his absence although it would have been sound exercise of discretion to give an opportunity to that party of appearing before him and of being heard: A. I. R. 1926 P. C. 34 *Dist.*

[P 317 C 1]

(c) **Limitation Act, S. 4**—Application of S. 4 after extending time under S. 14 is allowed—Limitation Act, S. 14.

Section 4 can be applied to a case in which extension of time has been claimed under S. 14 and a plaintiff is entitled to the benefit of S. 14 and S. 4 tacked together: 24 W. R. 26; A. I. R. 1921 Mad. 654 *Dist.* [P 317 C 2; P 318 C 1]

*Brojendra K. Chatterjee and Prafulla Kamal Das*—for Appellants.

*G. C. Sen and Manmatha Nath Roy*—for Respondents.

(3) [1907] 10 P. R. 1907 Or.=14 P. W. R. 1907 Or.



**Suhrawardy, J.**—These two appeals arise out of a contribution suit. Jagabandhu the predecessor of the plaintiff, Mathura Nath the predecessor of defendants 1—3, Umesh Chandra the predecessor of defendants 5 and 6 and defendant 4 held a Nim Osat Taluk. The landlord in execution of a decree for arrears of rent in respect of it brought the taluk to sale when one Somoraddi who had a subordinate interest in it deposited the decretal amount under S. 171, Ben. Ten. Act. Subsequently he brought a suit against the Nim Osat Talukdars to recover the amount he had paid on their behalf to satisfy the landlord's decree. He obtained a decree and in execution of it some property belonging exclusively to the plaintiff was sold for Rs. 1,033. The plaintiff, therefore, sued defendants 1—3, defendants 5-6 and defendant 4 to recover from each set of defendants 1/4th share of the sum of Rs. 1,033 with interest thereon. It appears that the decree-holder Somoraddi's debts were not fully satisfied by the sale of the plaintiff's property. Some time after, defendant 4 paid the outstanding amount in another execution case to the decree-holder and thus squared up the liabilities of the defendants under the decree. The different sets of defendants raised various objections in the plaintiff's suit for contribution, some of which will be noticed later. During the pendency of the suit the plaintiff and defendants 1—3 entered into a compromise and thus they (defendants 1—3) went out of the suit. The Munsif in the trial Court gave a decree for Rs. 350-14-8 against defendants 5 and 6 and for the same amount against defendant 4. This amount was arrived at by calculating the 1/4th share of each set of defendants in the sum of Rs. 1,033 realized from the plaintiff alone with interest at the rate of 12 per cent per annum. Defendant 4 appealed and the learned Subordinate Judge dismissed the plaintiff's suit against defendant 4 but passed a further decree against defendants 5 and 6 for Rs. 116-15-6. It should be noted that in the appeal by defendant 4 defendants 5 and 6 were not made respondents.

These two appeals are by the plaintiff and defendants 5 and 6. We will first deal with the plaintiff's appeal which is No. 1398 of 1926. It is argued on his behalf that as he paid the amount which

was payable by all the defendants, he is entitled to a decree against defendant 4 also. It is submitted on behalf of defendant 4 that as he has paid his dues in full to the decree-holder, he is not liable to contribute towards the amount realized from the plaintiff. Now the claim for contribution is based on principles of equity and the Court must take an equitable view in the circumstances of each case and decide according to principles of equity and adjust the rights of the parties in accordance with rules consistent with justice, equity and good conscience: *Magniram v. Mehdi Hossain Khan* (1). The right to contribution though an equitable right arises out of an implied contract of indemnity between the parties liable for the same debt. This contractual obligation attaches to each of the persons liable to satisfy the common debt. But this right is not confined to Ss. 69 and 70, Contract Act, but may be based upon other equitable considerations and these considerations are available as much to the plaintiff as to the defendants. *Registered Jessor Loan Co. Ltd. v. Gopal Hari* (2) which is authority further for the view that all difference between the parties should be settled and adjusted in one suit.

In *Matungini Debi v. Brojeswari Banerji* (3) it was held among other things that no contribution can be levied against a person who has paid more than his share of the debt. In adjusting the rights of the parties in a suit for contribution the attention of the Court is not to be limited by the liabilities arising from the claim in the suit but in adjusting the equitable rights of the parties to the suit it may go beyond the scope of the suit and enquire into other mutual liabilities. In *Gogun Chand Dutt v. Huri Mohan Dutt* (4) the suit was brought by the plaintiff for contribution against the defendant on the ground that he had paid rent in excess of his share under a claim which he and the defendant were jointly liable to satisfy. In that case the defendant proved that he had paid the whole rent similarly on previous occasions and such payments were taken into consideration in adjusting the rights of the parties without the defendants

(1) [1904] 31 Cal. 95=8 C. W. N. 30.

(2) A. I. R. 1926 Cal. 657.

(3) [1914] 20 C. L. J. 205=27 I. C. 22.

(4) [1883] 12 C. L. R. 539.



pleading a set off. In *Gajadhar Mahto v. Raghubar Gope* (5), in a suit for contribution by a cosharer for a certain sum of money paid on behalf of his other cosharer to discharge a decree for rent obtained against them jointly, the defendant claimed a set off on account of previous payments by him under similar decrees for joint debts. The Court upheld the plea and the defendant was allowed to prove payments on behalf of the plaintiff on other occasions and further it held that in such cases no question of limitation arose. That being the law we have to consider how the rights of the different parties in this suit can be adjusted in justice, equity and good conscience.

Before dealing further with this matter it will be convenient to dispose of the appeal by defendants 5 and 6. Their first ground is that as they were no parties in the appeal the Court was wrong in passing a decree against them in their absence. The order passed by the lower Court allowing a decree against them for a further sum was apparently passed under O. 41, R. 33, Civil P. C. I do not see why it cannot in a case like the present pass an order against a party to the suit in his absence although it would have been sound exercise of discretion to give an opportunity to that party of appearing before him and of being heard. The limitation to the application of this rule has been pointed out by their Lordships of the Judicial Committee in the case of *Mahomed Khaleel Shirazi v. Les Tanneries Lyonnaises* (6). The present case does not come within the rule of the decision of the Judicial Committee. Here the plaintiff not having appealed, his right to claim a decree for the excess amount against defendants 5 and 6 was barred and in his appeal against the other defendants the Court could not under R. 33 grant a decree against persons not parties to the appeal. But defendant 4 who was one of the co-defendants could very well appeal to the appellate Court and say that he was not liable for the plaintiff's claim; and if in determining the point raised in the appeal the Court finds that the plaintiff is entitled to recover the amount charged upon the

appellant from other defendants the Court may pass a decree against them though not parties to the appeal. It would have been much better if the Court had acted under R. 20, O. 41, instead of R. 33 and added defendants 5 and 6 as respondents to the appeal and heard the matter in their presence. But it is not necessary to discuss the matter any further as all the parties are now before us and we are in a position to adjust their respective rights without giving effect to the decree of the lower Court.

It is next argued on behalf of defendants 5 and 6 who are the appellants in Appeal No. 1224 of 1926 that it should have been held that the plaintiff's suit was barred by limitation. The argument is based on certain facts which may be shortly stated. The money was realized from the plaintiff under process of law on 19th July 1920; the plaint was presented in the Munsif's Court at Barisal on 18th July 1923; it was returned by that Court for want of jurisdiction for presentation in the proper Court on 20th March 1924. The 21st, 22nd and 23rd days of March being holidays the plaint was presented in the Munsif's Court at Khulna on the 24th March. On these facts the learned Subordinate Judge has held that the plaintiff's suit is not barred by the application of S. 14, Lim. Act, which gives an extension of time to the plaintiff up till the 20th March and S. 4, Lim. Act, which gives him a further period till the 24th March. The learned advocate appearing for the appellants argues that S. 4, Lim. Act, cannot be applied to a case in which extension of time has been claimed under S. 14 and reference in this connexion is made to *Abhoy Charan v. Gour Mohan Dutt* (7). That case has no application because there the parties did not claim the return of the plaint immediately after it was decided that the suit was filed in a wrong Court and further that the suit was not instituted in the proper Court on the day on which it re-opened but it was instituted on the following day. Then it is argued that the plaintiff is not entitled to the benefit of S. 14 and S. 4 tacked together. In support of this contention reliance has been placed on the case of *Ummathu v. Pathumma* (8).

(5) 11908, 12 C. W. N. 60.

(6) A. I. R. 1923 P. O. 34=49 Mad. 435=53 I. A. 84 (P.O.).

(7) 24 W. R. 26.

(8) A. I. R. 1921 Mad. 654=44 Mad. 817.



The question raised in that case requires a good deal of consideration; but I do not wish to discuss the view taken by the learned Judges because on the facts that case is distinguishable from the present. There the plaintiff took advantage of S. 4 before instituting the suit and she instituted the suit in the wrong Court, after the period of limitation had expired during the holidays, on the re-opening day of that Court. It is not clear but probably the proper Court was open when the time expired. The plaint was returned to the plaintiff and the suit was instituted in the proper Court. On the objection on the ground of limitation the Court held that as the suit had already become barred before it was presented in a wrong Court, S. 4 has no application to the case inasmuch as it contemplates the filing of a suit in the proper Court. One of the learned Judges, Ramesam, J., clearly puts the point before him for consideration :

“ Can the appellant get the benefit of S. 4 if the holiday precedes such periods.”

The answer of the learned Judge was in the negative. The fact here is that the plaint was presented and was returned to the plaintiff on 20th March and he should have presented it to the proper Court on the next day. It was impossible for him to do so for the Court was closed. In the *Madras* case the learned Judges have referred to some other cases of that Court and adopted the view that under S. 4, Lim. Act, the fact whether the proper Court was closed, and not the wrong Court is the matter to be taken into consideration. It may be said on the facts of the case before us that it was not a question really under S. 4. The plaint was returned to the plaintiff and the plaintiff was bound to present it in the proper Court with as little delay as possible and it is evident that he could not do so before 24th March. This objection must accordingly be overruled.

The appellants in Appeal No. 1224 have also argued in the same strain as the plaintiff in the other appeal with reference to the liability of defendant 4. The decision of the question, therefore, will be held to apply to both these appeals. According to the principles that we have enunciated above we have to adjust the rights of the parties in this suit on grounds of justice. It is in evidence that

the total amount recoverable under Samiraddin's decree was Rs. 1,380 ; each of the four cosharers was liable to pay Rs. 345 as his share of the debt. Defendant 4 paid Rs. 346 to the decree-holder for the amount which remained unrealized after the sale of the plaintiff's property. He thus paid whatever was due from him and must be held to have discharged himself from the debt ; but it is argued on behalf of the plaintiff that on the authority of the case *Matungini Debi v. Brojeswari Banerji* (3) if the defendant had paid more than his share he could have claimed discharge. It so happened that in that case the defendant had paid more than his share but we see no reason for holding that if he does not pay more than his share he cannot claim exemption from liability to contribute towards the amount payable in liquidation of the debt of the cosharers. If that be the principle as suggested by the plaintiff, defendant 4 in this case has paid one rupee more than his proper share.

Next we have to look to the plaintiff's claim. He has paid Rs. 1,033 in partial discharge of the common debt. From this amount should be deducted the amount which he was liable to pay under the decree, namely, Rs. 345. This leaves a balance of Rs. 688, half of which is payable by defendants 1 to 3 and the other half by defendants 5 and 6 ; and this amount he is entitled to recover from those defendants. He has compromised the suit with defendants 1 to 3, against whom there can be no further claim. He is accordingly entitled to recover Rs. 344 with interest from defendants 5 and 6. The lower Courts have allowed the plaintiff interest at 12 per cent per annum. In most of the reported cases the rate of interest allowed in such cases is 6 per cent per annum. We should accordingly allow the plaintiff interest at the rate of six per cent per annum from 19th July 1920, the date on which money was realized from the plaintiff, to 18th July 1923, the date on which the plaint was presented in the Barisal Court. This gives us the amount Rs. 62 which the plaintiff is entitled to recover from defendants 5 and 6. Under the decree of the lower Courts the plaintiff has already recovered from these defendants rupees 350-14-6. There will be a decree against them for the balance with interest at



six per cent per annum till the date of realization.

As regards defendant 4 he paid a sum of Rs. 346 to the decree-holder on 2nd June 1922. This amount was paid on behalf of the four cosharers including the plaintiff. The plaintiff is entitled to recover interest from defendant 4 from 19th July 1920 to 2nd June 1922 and defendant 4 in his turn is entitled to recover interest from the plaintiff for one-fourth of the amount of Rs. 346 which he paid on 2nd June 1922 on behalf of the plaintiff up to the present date. On making a rough calculation we think no party should have any claim against the other.

The result is that appeal No. 1398 is dismissed with costs; Appeal No. 1224 is partly allowed and the decrees of the of the lower Courts are varied in the way suggested above. We allow no costs in this appeal. Costs of the Courts below in proportion.

M.N/R.K.

*Order accordingly.*

**\* A. I. R. 1929 Calcutta 319**

SUHRWARDY AND MITTER, JJ.

G. V. Raman—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 3 of 1929, Decided on 23rd January 1929, against order of Chief Presidency Magistrate.

\* (a) Criminal P. C., S. 494 (Mitter, J.) — Order under — Reasons must be given (Suhrawardy, J., contra).

Mitter, J.—Order under S. 494 is a judicial order and the Court should record reasons in order to enable the High Court to judge whether the order of the withdrawal has been rightly made: A. I. R. 1924 Cal. 382; and 26 C. L. J. 203, Foll.; A. I. R. 1924 Pat. 283, Not Foll. [P 320 C 1]

Suhrawardy, J. — It is a matter between the Public Prosecutor and the Magistrate and neither of them need assign any reason to record. [P 322 C 1]

(b) Criminal P. C., S. 494—Accused discharged under, is competent witness against co-accused—Evidence Act, S. 30.

Section 494 of the Code stands by itself. The effect of the section is that as soon as an accused is discharged under that section he is taken away from the category of an accused person and becomes under the general principles of law a competent witness against his co-accused. [P 320 C 2]

(c) Criminal P. C., S. 494—Order under —Propriety of—Test is whether extraneous circumstances are considered.

Where the Court is considering whether the Magistrate has rightly made the order of dis-

charge under S. 494 or not, one test and a very important test is whether in coming to a decision it has taken into consideration extraneous circumstances which ought not properly to have been taken into account. [P 321 C 2]

\* (d) Criminal P. C., S. 337—S. 337 is not exclusive of method of obtaining co-accused's evidence.

Section 337 of the Code does not suggest the idea that the only method of obtaining the evidence of a co-accused against another is by tendering him a pardon with all the safeguards mentioned in the said section. [P 321 C 2]

(e) Criminal P. C., S. 494 — Allowing withdrawal is discretionary.

The language of S. 494 is very wide and gives a discretion to the Magistrate as to whether he would consent to the withdrawal of a prosecution by the Public Prosecutor—Such discretion to be exercised not arbitrarily but must be based on correct legal principles. [P 321 C 2]

\* (f) Criminal P. C., S. 436 — Setting aside discharge—Third party can apply.

An order of discharge of an accused person may be interfered with at the instance of a third party when such an order has the effect of operating to the detriment of such third person. He has in such cases a right to apply in revision against such an order. [P 321 C 2]

B. C. Chatterji, Mrityunjoy Chatterji and Gopal Chandra Mukerji—for Petitioner.

Khondkar—for the Crown.

Mitter, J. — This rule is directed against an order of the Chief Presidency Magistrate by which he allowed the Public Prosecutor to withdraw a criminal prosecution pending against Bijoy Bhusan Bose and further allowed him to be examined as a witness. The order discharging Bijoy was made under S. 494, Criminal P. C. It appears that the said Bijoy Bhusan Bose along with several others including Raman who is the petitioner before this Court was sent up to take his trial on a charge of conspiracy to cheat under S. 120-B read with S. 420, I. P. C. On 20th December 1928 before any evidence was gone into the Public Prosecutor wanted to withdraw the case against Bijoy and to examine him as a witness against the petitioner Raman. This prayer of the Public Prosecutor was allowed, Bijoy was discharged and he was subsequently examined for the prosecution.

It is contended in this rule: (i) that the order of withdrawal is bad in law as no reasons have been given by the Chief Presidency Magistrate and (ii) it was not open to the trying Magistrate to permit the withdrawal of the prosecution against



Bijoy in order to examine him as a witness against his co-accused viz., the petitioner.

In support of ground 1 taken, two decisions of this Court have been referred to: they are the cases of *Umesh Chandra Roy v. Satish Chandra Roy* (1), and *Jagat Chandra Roy v. Kalimuddin* (2). These cases undoubtedly lay down that the order on an application for withdrawal made by the Public Prosecutor under S. 494, Criminal P. C., is passed by the Court in its judicial capacity and the Court must give and record its reason so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. The learned Deputy Legal Remembrancer appearing for the Crown has contended that these decisions are wrong as S. 494 nowhere says that reasons should be recorded and he relies on the decision of the Patna High Court in the case of *Gulli v. Narain* (3). We are bound, however, by the decisions of our own Court and we think that as the order under S. 494 is a judicial order the Court should record reasons in order to enable the High Court to judge whether the order of the withdrawal has been rightly made. In this case, however, the Magistrate has given his reasons for allowing the withdrawal and he states in effect that the withdrawal is allowed in order that Bijoy who was indicated jointly with the petitioner might give his evidence against the latter. This leads me to consider ground 2 raised as to whether this is a sufficient and good reason for allowing an withdrawal. The argument of the petitioner is put in this way:—It is said that S. 337, Criminal P. C., is the only section which lays down the procedure which is to be followed in the case of certain offences with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to the said offences and this provision seems to import the idea that it is only in particular cases that evidence of a co-accused is available against the other and is so available under certain conditions and safeguards and that it could not have been the intention of the legislature to allow a co-

accused to depose against another except under the safeguards mentioned in S. 337. We are unable to agree with this contention. S. 494 of the Code stands by itself. The effect of the section is that as soon as an accused is discharged under that section he is taken away from the category of an accused person and becomes under the general principles of law a competent witness against his co-accused. The question is:—Is there anything wrong in law in allowing the Public Prosecutor to withdraw the prosecution against Bijoy in order that he may call him as a witness for the prosecution.

It appears that so far back as 1840 Erskine, J., cited a passage from Hale P. C. 118 that:

"when the accomplice has been joined in the indictment, and before the case comes on it appears that his evidence will be required, the usual practice is, before opening the case, to apply to have the accomplice acquitted: see *Regina v. Lyons* (4)."

In the same case Erskine, J., cited another passage from Lord Hale which runs as follows:

"Where a party had been joined in the indictment and it was intended to call him as a witness for the prosecution it was formerly the practice to enter nolle prosequi as to him."

The learned Deputy Legal Remembrancer has drawn our attention to the case of *Queen v. Owen* (5) where three persons were indicted for a rape and were also indicted for the murder of the party alleged to have been ravished and where before the trial on the indictment for rape the counsel for the prosecution asked to have one of the prisoners acquitted in order that he might call him as a witness against the others, Williams, J., held notwithstanding opposition by counsel for the other prisoners, that in cases of this kind the Court will, if it sees no cause to the contrary entrust it to the discretion of the counsel for the prosecution to determine whether he will have a prisoner acquitted before the trial commences to call such prisoner as a witness against the other prisoners. Williams, J., having conferred with Alderson B. said:

"I had little doubt as to the course I ought to take, and my learned brother entirely agrees with me that this is a matter very much of ordinary occurrence. In cases of this kind, the Court if it sees no cause to the contrary, is in the habit of relying on the discretion of the learned counsel who conduct the prosecution."

(1) [1917] 26 C.L.J. 208=41 I.C. 998=22 C. W.N. 69.

(2) A.I.R. 1924 Cal. 382.

(3) A.I.R. 1924 Pat. 283=2 Pat. 708.

(4) 9 Carr. & P. 555.

(5) 9 C. & P. 83.



I shall, therefore, in this case entrust it to the discretion of the learned Sergeant to determine whether he will have the prisoner Owen acquitted before the case is gone into or not. I think it almost of course."

In *Winson v. Queen* (6), Cockburn, C. J., said :

"In all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose of insuring the greatest possible amount of truthfulness in the person coming to give evidence to take a verdict of not guilty as to him, or if the plea of not guilty be withdrawn by him, and a plea of guilty taken, to pass sentence ; so that the witness may give his evidence with mind free of all the corrupt influence, which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce."

In this case which was carried to the Exchequer Chamber on a writ of error from the Queen's Bench it was held that where two prisoners are indicated jointly for a felony and plead not guilty, but one only is given in charge to the jury the other is an admissible witness although his plea of not guilty remains on the record undisposed of: See *Winsor v. Queen* (7).

In Russell on Crimes, p. 2114 (8th Edition) it is stated that it is a common practice after the indictment has been founded on the accused arraigned to offer no evidence against the accomplice and on his acquittal to call him for the Crown. In *R. v. Rowland* (8) upon an indictment for conspiracy the Court allowed an acquittal to be taken against some of the defendants in order that they might be called as witnesses for the prosecution. In *Queen v. Payne* (9) Cockburn, C. J., stated that this was a convenient rule and practice: see 354-55. In Phipson on Evidence the learned author states that to render co-defendant competent to be called by the prosecution, each co-defendants must have been acquitted, or have obtained a nolle prosequi or have pleaded guilty: see p. 453, 5th edition. It is the right of the Crown at any stage of a trial but before judgment is pronounced, to enter a nolle prosequi. S. 333 gives the power to the Advocate General in cases tried before

the High Court. In other cases the Public Prosecutor performs a similar function (S. 494.)

In the case of withdrawal by the Public Prosecutor the consent of the Court is necessary under the Criminal Procedure Code. The result of the authorities is that where the Court is considering whether the Chief Presidency Magistrate has rightly made the order of discharge under S. 494 or not, one test and a very important test is whether in coming to a decision it has taken into consideration extraneous circumstances which ought not properly to have been taken into account. The present question may usefully be approached with decisions cited in mind.

My conclusions, therefore, are (1) that S. 337 of the Code does not suggest the idea that the only method of obtaining the evidence of a co-accused against another is by tendering him a pardon with all the safeguards mentioned in the said section; (2) that the language of S. 494 is very wide and gives a discretion to the Magistrate as to whether he would consent to the withdrawal of a prosecution by the Public Prosecutor, such discretion to be exercised not arbitrarily but must be based on correct legal principles; (3) that the Chief Presidency Magistrate has not in the present case exercised the discretion wrongly in relying on the discretion of the Public Prosecutor on withdrawing the prosecution against Bijoy in order that his evidence might be available after his discharge against the petitioner Raman who was being jointly tried with him, on charges of conspiracy and cheating. For the reasons given above I think this Rule should be discharged.

It remains to notice an argument of the learned Deputy Legal Remembrancer that the High Court ought not to interfere against an order of discharge of an accused person at the instance of a third party. It seems to me, however, that when such an order has the effect of operating to the detriment of such third person he has right to apply in revision against such an order.

**Suhrawardy, J.**—I agree with my learned brother in discharging this rule. In my judgment, however, decision of this Court referred to by my learned brother laying down that in giving consent under S. 494 the Magistrate is bound to record his reasons in writing have to be, on a proper occasion, reconsidered.

(6) [1866] 1 Q.B. 289.

(7) [1866] 1 Q.B. 390=7 B. & S. 490=10 Cox. C. O. 327=14 W.R. 695=14 L.T. 567=12 Jur. (n. s.) 561.

(8) Ry. & M. 401.

(9) [1872] 1 Cr. C. R. 349.



To hold so would be to improve upon the legislature and to introduce into the section some words not used by the legislature, which seem to have been intentionally omitted as in some other cases expressly used Ss. 204, 249, 250, 253, 344 and other sections. It seems to me that it is a matter between the Public Prosecutor and the Magistrate and neither of them need assign any reason to record. But in this case the reason is given.

On the main question I do not think that Ss. 337 and 494, Criminal P. C., should be read together and held that the former governs the latter and abridges in any way the wide words of S. 494. S. 337 appears in another connexion and deals only with granting pardon to an under-trial prisoner in some serious cases. If he satisfies the condition of the pardon he gets acquitted; if not, he may be tried for the offence. But if a case is withdrawn under S. 494 the accused, if he is discharged, may be tried for the offence which he admits in his examination as a witness to have committed; and if he is acquitted he cannot be retried even though he refuses to give his evidence for the prosecution. The learned counsel for the petitioner concedes that it would be a correct procedure first to withdraw the case against Bijoy and then to put him in the witness-box. The objection, therefore, is to the form and not to the substance of the matter. The Rule is discharged.

D.D.

*Rule discharged.*

### \* A. I. R. 1929 Calcutta 322

SUHRAWARDY AND GRAHAM, JJ.

*Bama Charan Das*—Appellant.

v.

*Gadadhar Das*—Respondent.

Second Appeal No. 1936 of 1927, Decided on 28th February 1928, against decree of Sub-Judge, Murshidabad, D/- 23rd May 1927.

\* (a) Civil P. C., S. 105 (1)—In appeal from the final decree the propriety of order setting aside the award can be enquired.

The decision by the trial Court setting aside an award is a decision which affects the merits of the case inasmuch as the rights of the parties relating to the subject-matter of the suit will be differently settled if the award is allowed to stand. The Court of appeal can therefore on appeal from the final decree enquire into the propriety of the order setting

aside the award: 14 W. R. 327; and 31 *Mad.* 345, *Foll.*; A. I. R. 1925 *Cal.* 766; A. I. R. 1927 *Bom.* 455; A. I. R. 1925 *Lah.* 466 and A. I. R. 1925 *All.* 426, *Dist.*; 11 *Cal.* 172; 26 *Bom.* 551; and 8 C. W. N. 390, *Expl.* and *Appr.*; 37 *All.* 456; A. I. R. 1925 *All.* 458 and A. I. R. 1925 *All.* 566, *Appl.* [P 323 C 2, P 324 C 1]

(b) Legal Practitioner—Reference to arbitration.

The words used with reference to the power to be exercised by the pleader appointed by the vakalatnama were shalishan or solenama karibain.

*Held:* that the pleader was vested with sufficient authority to refer the matter to arbitration: *Cal. Civil Rule No. 21 of 1926, Rel. on.*

[P 324 C 2]

(c) Civil P. C., O. 41, R. 33—Appeal from ex parte decree.

There is nothing in the Code which confines the power of the appellate Court in appeal from ex parte decree only to the investigation of the cause of non-appearance. [P 325 C 1]

*Rupendra Kumar Mitter* and *Durga Charan Mitter*—for Appellant.

*Nalin Chandra Pal*—for Respondent.

**Suhrawardy, J.**—The facts upon which this appeal is founded are that the plaintiff-appellant brought a suit for recovery of possession on establishment of title to two cottas of land. During the progress of the suit it was referred to the arbitration of three gentlemen on an application signed by the pleaders of the parties. The arbitrators filed their award on 25th July 1925, the effect of which was to allow the plaintiff's claim in a modified form. On 4th August, the plaintiff objected to the award on the ground that his pleader had no authority under the vakalatnama to apply for arbitration and he also made charges of misconduct against the arbitrators. The Munsif by his order, dated 15th September 1926, held that the pleader had no authority under the vakalatnama filed in the suit to appoint arbitrators and refer the matter in dispute to them. In this view he set aside the award and fixed 10th November 1925, for the hearing of the suit. On that date the defendant did not appear and the suit was decreed ex parte according to the plaintiff's claim. Against that decree the defendant appealed and the learned Subordinate Judge of Murshidabad set aside the decree passed by the Munsif on 10th November 1925, on the ground that the view taken by the Munsif that the pleader was not vested with sufficient authority to refer the matter to arbitration was erroneous and remanded the case to



the first Court for an investigation into the charges of misconduct made by the plaintiff against the arbitrators. This appeal is against this order of remand and it has been argued in the first place on behalf of the appellant that the Court of appeal below had no jurisdiction to set aside the interlocutory order of the Munsif of 15th September 1925, inasmuch as it is not an order which "affects the decision of the case" within the meaning of S. 105, Civil P. C. On the authorities and after a careful consideration of the questions raised I am of opinion that this contention ought not to prevail. Great stress has been laid on the decision of this Court in *Sayma Bibi v. Madhusudan Mohanta* (1). There an abatement was set aside by the trial Court. On appeal from the final decree in the suit objection was taken to the order setting aside the abatement. The lower appellate Court held that there was no appeal from an order setting aside an abatement and such an order could not be challenged in appeal from the final decree. The defendant appealed to this Court and it was argued on his behalf that the order setting aside the abatement is an order "affecting the decision of the case" and hence could be challenged in appeal from the final decree.

It was held that an order setting aside an abatement is not an order "affecting the decision of the case" and hence could not be challenged in the appeal from the decree. Upon the same consideration are decided the cases which have held that an order setting aside an ex parte decree cannot be challenged in appeal against the final decree as it is not an order affecting the decision of the case: *Dhondu Narayan v. Waman Govind* (2), *Sundar Singh v. Nighaiya* (3) and *Babu Ram v. Banke Behari Lal* (4). It is not necessary for me to accept the correctness of these decisions in so far as they relate to decrees passed ex parte, but the considerations which apply to cases relating to the setting aside of abatement or ex parte decree are not pertinent in the present case. An order setting aside an abatement or an ex parte decree is an order which far

from affecting the merits of the case invites the parties to enter into the merits of the case to enable the Court to come to a decision upon its merits. It may be that if an order of abatement or an order passed ex parte is allowed to stand the parties will stand in a different position and their rights will be differently adjusted; but such an order cannot be said to be an order affecting the decision of the case which have been interpreted as meaning affecting the merits or affecting questions bearing upon the merits of the case. There is ample authority in support of the view that the decision by the trial Court setting aside an award is a decision which affects the merits of the case inasmuch as the rights of the parties relating to the subject-matter of the suit will be differently settled if the award which was a decision on the merits by the arbitrators was allowed to stand. It is not necessary to cite all the cases on the point which are numerous but it is enough to point out that this view was taken so long ago as 1870 in *Mothooranath Tewaree v. Brindabun Tewaree* (5). I cannot express myself on this point any better than what has been said by Sir Richard Couch in that case. The learned Chief Justice after referring to the setting aside of the award by the trial Court and the appeal from the final decree in the suit to the Judge where the objection was taken that the Judge had no authority to reverse the decision of the Munsif setting aside the award observed thus:

"It is true that no appeal is allowable against an interlocutory order, and that the order of the Munsif setting aside the award being an interlocutory order was not open to appeal immediately, but when the Munsif had made his decree in the suit in favour of the plaintiff, it was competent for the defendant to appeal against that decree. He did so, and then he was at liberty to question the propriety of any interlocutory order which had been made, provided that the error in that order was such as to affect the merits of the case. We do not see how it can be said in this case that the error in the interlocutory order of the Munsif was one which did not affect the merits of the case, for if the award was a proper award and one that ought not to have been set aside by the Munsif, the setting it aside would be an act which would necessarily affect the merits of the case, as the award was upon the very subject-matter of the suit and determined it."

It may be noted that in the corresponding section in Act 8 of 1859 under

(5) [1870] 14 W. R. 327.

(1) A. I. R. 1925 Cal. 766=52 Cal. 472.

(2) A. I. R. 1927 Bom. 455=51 Bom. 495.

(3) A. I. R. 1925 Lah. 466=6 Lah. 94.

(4) A. I. R. 1925 All. 426=47 All. 555.



which this case was decided, the words were "affecting the merits of the case." I do not think that the words in S. 105, Civil P. C., 1908, "affecting the decision of the case" have in any way changed the scope of those words, if they have not actually widened it. In this Court there is no case bearing directly on the point except the case in the *Weekly Reporter* but opinion in support of the view has been expressed in *Ambica Dasia v. Nadyar Chand Pal* (6), in which an appeal was preferred against an order setting aside the award and it was held that no appeal lay from the interlocutory order which was only liable to revision when the final decree was passed. In *Shyama Charan Pramanik v. Prohad Durwan* (7), this point was not raised, but the judgment of Banerjee, J., indicates that the learned Judge was of opinion that such an order could be challenged in appeal from the decree. In *Damodar Trimbak v. Raghunath Hari* (8), the same observation was made in a case in which the appeal was taken against an order setting aside an award, namely, that no appeal lay but that it could be challenged in appeal from the decree. In *Achuthayya v. Thimmayya* (9), this point was directly raised and it was held that where a Court sets aside an award under S. 521, Civil P. C., 1882, and decides the case on the merits, the Court of appeal can on appeal from the final decree enquire into the propriety of the order setting aside the award.

In *Ram Autar v. Deoki Tewari* (10), it was held in revision that an order of a Court setting aside an award of the arbitrator and deciding that the case should be tried by the Court is an order affecting the decision of the case within the meaning of S. 105, Civil P. C., and is therefore liable to be challenged in appeal against the decree. To the same effect are the observations in *Shah Muhammad Fakhruddin v. Rahimulla Shah* (11) and *Rudra Prosad Pandey v. Mathura Prosad Pande* (12). The ob-

servations are no doubt made in cases which came in revision and in which opinion is expressed that the question can be enquired into in an appeal from the decree; but the observations made by the learned Judges in those cases in order to support their order refusing to interfere in revision on this ground are certainly entitled to great weight and cannot be said to be obiter dicta. But the cases that are directly in point are those reported in *Mothooranath Tewaree v. Brindabun Tewaree* (5) and *Achuthaya v. Thimayya* (9) which I have no hesitation in following. This objection of the appellant must, accordingly, be overruled. It is next argued by Mr. Mitter on behalf of the appellant that the order of the Munsif setting aside the award on the ground that the pleader who referred the matter to arbitration was not properly authorized is an order which decides a matter which happened previous to the arbitration and challenges the propriety or validity of the reference. The defendant, therefore, not having appealed against that order, could not be allowed to agitate the matter in appeal from the final decree. There is no substance in this contention either, as the order of the Munsif was apparently passed under para. 15, Sch. 2, Civil P. C., and it is an order against which no appeal is provided by the Code.

The third contention raised by the learned vakil is that the interpretation put by the learned Subordinate Judge in the Court below on the vakalatnama is wrong and that put by the Munsif was right and should be upheld. I am unable to agree with the construction of the vakalatnama by the Munsif. In one clause in the document, the words used with reference to the power to be exercised by the pleader appointed by the vakalatnama are *shalishan or solenama kariben* and in another clause the words are *shalishani adi kariben*. The learned Munsif is of opinion that these words mean that the pleaders were authorized to act as arbitrators and they do not mean that they are vested with the right of appointing arbitrators. This interpretation of the words cannot be supported. *Shalishani* is a Persianised Arabic word loosely used in the Bengali language and must be construed with reference to the context. The first clause begins with the words:

(6) [1885] 11 Cal. 172.

(7) [1904] 8 C. W. N. 390.

(8) [1902] 26 Bom. 551=4 Bom. L. R. 267.

(9) [1908] 31 Mad. 945=18 M. L. J. 228=3 M. L. T. 315.

(10) [1915] 37 All. 456=29 I. C. 411=13 A. L. J. 653.

(11) A. I. R. 1925 All. 458=47 All. 121.

(12) A. I. R. 1925 All. 566=47 All. 916.



"I appoint the pleaders named herein and any one of them who happens to be present may amongst other things *shalishani kari-ben*."

As the Subordinate Judge observes *shalishani* is plural of *shalish* and means arbitrators. It will be unintelligible if one person is authorized to act as "arbitrators." I have no doubt in my mind that the construction put upon this document by the Subordinate Judge is correct and I am fortified in this view by the decision of my learned brother in Civil Rule No. 21 of 1926, decided on 9th March 1926. This objection must also be overruled.

The last ground urged is that as the appeal by the defendant was against the *ex parte* decree the only point to which enquiry should be directed by the appellate Court was whether the decree passed *ex parte* in the circumstances of the case was right or wrong. In other words the authority of the appellate Court was limited to the enquiry whether the *ex parte* decree was passed under the circumstances which might make it binding upon the defendant or otherwise. I cannot agree to this proposition also. It is true that against an *ex parte* decree the party aggrieved has three courses open to him; he may either make an application under O. 9, R. 9 or R. 13; he may appeal from the decree or apply for a review of the judgment or order passed *ex parte*. But it seems to me that where the only objection is with regard to the non-appearance of a party at the hearing on account of sufficient cause the matter can chiefly be agitated in an application under O. 9. But where the decree is against the record or against law, it can be successfully challenged in an appeal from it and if there be any error which comes within the ambit of O. 47, R. 1, the *ex parte* decree may be questioned by an application for review. There is nothing in the Code which confines the power of the appellate Court in appeal from *ex parte* decree only to the investigation of the cause of non-appearance for which on the record as it stands there is hardly any material. This objection also fails.

All the points taken on behalf of the appellants having been overruled this appeal is dismissed with costs.

Graham, J.—I agree.

R.K.

*Appeal dismissed.*

## A. I. R. 1929 Calcutta 325

CUMING AND MALLIK, JJ.

*Sati Prosad Garga and others* — Defendants—Appellants.

v.

*Gobinda Chandra Shee* — Plaintiff — Respondent.

Appeal No. 693 of 1926, Decided on 28th November 1928, from appellate decree of Addl. Dist. Judge, Midnapore, D/- 4th December, 1925.

(a) Bengal Tenancy Act (8 of 1885), S. 184—Section prescribes period of limitation but does not exclude application of S. 14, Limitation Act.

Section 184 provides the period of limitation, and S. 14, Lim. Act, provides, not the period of limitation but means to compute that period which is an entirely different thing. Therefore S. 184 does not exclude the application of S. 14, Lim. Act. [P 326 C 2]

(b) Evidence Act, Ss. 101 to 103—Suit for possession of land — Plaintiff must prove that land lies within the holding.

In a suit for possession of land the plaintiff has to prove that the land lay within his holding and not for the defendants to prove that it lay outside: 3 C. W. N. 763, Ref. [P 327 C 2]

(c) Evidence Act, Ss. 102 & 103—Onus is immaterial when evidence is given by both sides.

The question on whom the burden of proof should fall is of very little importance when evidence has been gone into by both sides.

[P 327 C 2]

*Amarendra Nath Bose, Arun Chandra Bose for Probodh Ch. Chatterjee* — for Appellants.

*Prafulla Kamal Das*—for Respondent.

Cuming, J.—In the suit out of which this appeal arises the plaintiff sued for possession of some eight bighas of land which was specified as settlement dags 823, 918, 919 and 700 and further for a perpetual injunction restraining the defendants from interfering with the plaintiff's possession after a declaration that the entry in the Record-of-Rights is erroneous, ultra vires and not binding on the plaintiff.

The plaintiff's case is briefly this: That the lands in dispute so far as dags 823, 918 and 919 are concerned were taken settlement of by some, five persons so long ago as July 1830. One of these five persons was one Gaya Narayan Shee, the grandfather of the plaintiff; that the plaintiff inherited the land in suit which formed part of the demised land as heir of his grandfather, and that he and his predecessors-in-interest had been in possession all along. With regard to the dag 700 he states that he purchased it from Madhab Kandar in 1316 and had



been in possession of the same since that date, and that he had executed a kabuliati in favour of the Government Khas Mehal Department as this dag 700 was found to be included in the Government Khas Mehal being described as bund surplus land of the Government. The defendants resisted his claim and contended that the lands in suits so far as dags 823, 918 and 919 were concerned were recorded in their names in the Settlement Record-of-Rights. They contended that the amalnama was not genuine and further that the dag 823 918 and 919 had not been included in the amalnama. With regard to dags 700 the defendants seemed to contend that the Government had no title to any portion of dag 700. They further argued that the suit was barred by limitation the period of limitation applicable to the case being the special law of limitation provided by Art. 3, Sch. 3, Ben. Ten. Act. The trial Court and also the lower appellate Court found all the issues in favour of the plaintiff and decreed the suit. The defendants have appealed to this Court.

The first point which has been urged by Mr. Bose who appears on behalf of the appellants is that the suit is barred by limitation. He would maintain that the period of limitation provided for the suit is that provided by the Bengal Tenancy Act and that S. 184, Ben. Ten. Act, would exclude this suit from the operation of S. 14, Lim. Act. In order to understand Mr. Bose's point clearly it would be necessary to state a few more facts. The suit was instituted on 8th December 1922 in a Munsif's Court. The period of limitation would normally expire on 22nd November 1923. Therefore apparently at the time when the suit was instituted in the Munsif's Court at Tam-luk it was within time. A question, however, was raised by the defendants as to the valuation of the suit. After an enquiry made by the Munsif it was found by him that the value of the suit was beyond his pecuniary jurisdiction and on 22nd December 1923 he returned the plaint to the plaintiff to be presented before the proper Court. On 2nd January next it was presented in the Court of the Subordinate Judge at Midnapore. I may here note that the civil Courts were closed on 23rd December and remained closed up to 2nd January. 2nd January was the reopening day of the civil Courts.

It will be seen therefore that on the day when it was presented in the Court of the Subordinate Judge at Midnapore that suit was out of time—time having expired on 22nd November 1923. The plaintiff, however, called to his aid S. 14, Lim. Act, and contended that he was entitled to exclude the period during which he had been prosecuting in good faith his suit in the Court of the Munsif at Tam-luk. Both the lower Courts have found that he was entitled to exclude this period and hence his suit was within time. Mr. Bose admits that if the plaintiff is entitled to exclude this period the suit is within time. But Mr. Bose contends that S. 14, Lim. Act, does not apply and he is not entitled to exclude the period. Mr. Bose relied on S. 184, Ben. Ten. Act. S. 184 states :

"that the suits, appeals and applications specified in Sch. 3 annexed to this Act shall be instituted and made within the time prescribed in that schedule for them respectively ; and every such suit or appeal instituted and application made after the period of limitation so prescribed, shall be dismissed, although limitation has not been pleaded."

Mr. Bose would argue from this that S. 14, Lim. Act, has no application. S. 184, Ben. Ten. Act, however, to my mind provides the period of limitation. S. 14, Lim. Act, provides not the period of limitation but means to compute that period which to my mind is an entirely different thing. A reference to S. 185, Tenancy Act, will I think made it quite clear that S. 14, Lim. Act, does apply. S. 185 states that (1) :

"Sections 7, 8 and 9, Lim. Act, 1877 shall not apply to the suits and applications mentioned in the last foregoing S. (2) subject to the provisions of this chapter, the provisions of the Indian Limitation Act 1877 shall apply to all suits, appeals and applications mentioned in the last foregoing section."

Now, it seems to me that if it were the intention of the legislature that S. 14 would not apply to suits &c., mentioned in S. 184, Ben. Ten. Act, the legislature would have stated so because it specifically excludes S. 7, 8 and 9 and if it desired to exclude S. 14 nothing would have been easier than to add this section to the list of sections which were excluded and I cannot see how S. 184, Ben. Ten. Act, excludes the application of S. 14, Lim. Act. The point is made still clearer by a reference to S. 29, Lim. Act. This section has been amended recently in 1922. It provides that

"where any special or local law prescribes for any suit, appeal or application a period of limi-



tation different from the period prescribed therefor by Sch. 1, the provisions of S. 3 shall apply as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law (a) the provisions contained in S. 4, Ss. 9 to 18 and S. 22 shall apply only in so far as and to the extent to which, they are not expressly excluded by such special or local law."

As I read this section, S. 4, Ss. 9 to 18 and S. 22 would apply unless they are expressly excluded by any special or local law. By the expression "expressly" I think it is meant that express reference is made to the specific section in the Act; and that unless such reference is made to the section and by that reference they are expressly excluded then they would apply. I have no hesitation in coming to the conclusion that S. 14, Lim. Act does apply to the present suit and in view of the facts the plaintiff is clearly within time. Mr. Bose has further contended with regard to the question of limitation that it has not been found that the plaintiff was in good faith prosecuting the suit in the Munsiff's Court. Whether a person is acting in good faith or bad faith is clearly a question of fact and there is on this point a specific finding by the learned Judge: see p. 14 of the paper book lines, 5 and 6 where the learned Judge states:

"In such circumstances it cannot be said that the plaintiff in bad faith gave a lower price."

Reading this portion of the judgment I think it is quite clear that the learned Judge means to say that the plaintiff gave the price that he did in good faith. Mr. Bose then proceeds to contend further that the learned Judge in deciding this point had not got in his mind the meaning of the expression "good faith." "Good faith" is specifically defined in the Limitation Act as follows:

"Nothing shall be deemed to be done in good faith which is not done with due care and attention."

Now the learned Judge was dealing with a section of the Limitation Act and there is no doubt that the expression "good faith" is used with a particular meaning in this Act. But we must presume that the learned Judge in dealing with the expression "good faith" as used in the Limitation Act was perfectly well aware of the particular definition of the expression "good faith" which will be found in the Limitation Act and, therefore, when he found that the plaintiff pro-

secuted his suit in good faith he found that he prosecuted it with due care and attention.

Mr. Bose has then argued that the learned Judge has wrongly placed the burden of proof on the defendant. At p. 14, line 45, of the paper book the following statement of the learned District Judge appears:

"The lands in suit are claimed by plaintiff as part of his holding defendants must prove according to the ruling in *Shama Sundari Dassee v. Raj Behary Dhur* (1), that it is outside the plaintiff's jote."

Mr. Bose contends that in so doing the learned Judge has placed the burden of proof on the wrong party. He contends, I think rightly, that it was for the plaintiff to prove that the land lay within his jote and not for the defendant to prove that it lay outside. I do not, however, think that this is really material. No doubt the learned Judge was wrong in stating that the burden of proof lay on the defendants. But as has been pointed out by their Lordships of the Judicial Committee of the Privy Council the question on whom the burden of proof should fall is of very little importance when evidence have been gone into by both sides. When one reads the judgment it will be seen that the learned Judge really put the burden of proof on the plaintiff. He was aware as would be quite clear from line 36 at p. 15 of the paper book that the Record-of-Rights was in favour of the defendants and it was for the plaintiff to rebut the presumption arising from the entry in the Record-of-Rights. He deals with the evidence on that footing and finally finds that the presumption of the Record-of-Rights has been rebutted.

Mr. Bose next argues that the learned Judge has not considered whether the lands in question are covered by the amalnama. As far as I can see reading the judgment of the learned District Judge it was not disputed in the lower appellate Court that the lands in dispute were covered by the terms of the amalnama. So far as the amalnama was concerned the only question raised before the learned District Judge was whether the amalnama itself was or was not genuine and it was not disputed before him whether the lands in dispute were or were not covered by it. I do not think therefore that the finding of the learned Judge that the three plots 823, 918 and 919 belong to the plaintiff



has been vitiated by any erroneous proposition of law that he put before himself and apparently adopted with regard to the burden of proof.

Mr. Bose lastly argued that dag 700 has not been properly dealt with and that the learned Judge disposed of dag 700 in two lines. No doubt the learned Judge has not dealt with dag 700 at any length as he has done with regard to the other three dags. The explanation is I think that dag 700 is about a cottah in area while the area of the remaining three dags amounts to some eight bighas; it is quite possible that the parties did not attach very much importance to what amounts to 1/16th of the whole and very few arguments were addressed to the learned Judge. However, he has held that the plaintiff has proved his possession and his purchase from Madhab Kandar. This purchase was in 1316 more than 12 years before the institution of the suit. I do not think that it is necessary to find any thing further.

The result is this appeal must fail and is dismissed with costs.

**Mallik, J.**—I agree.

M.N./R.K. *Appeal dismissed.*

### A. I. R. 1929 Calcutta 328

SUHRWARDY AND GRAHAM, JJ.

*Abdur Rahman Bhuia and others*—Petitioners.

v.

*Dinesh Haldar and others*—Opposite Party.

Criminal Revn. No. 933 of 1928, Decided on 24th January 1929, against order of Sess. Judge, Pabna, D/- 26th July 1928.

(a) Criminal P. C., S. 145 — No dispute likely to cause breach of peace—Proceedings can be struck off at any stage.

A Magistrate shall cancel the order initiating the proceeding under S. 145, if he is satisfied at any stage of the case that no dispute likely to cause a breach of the peace exists. This the Magistrate is entitled to do at any stage of the case though these words are not expressly used in the section but the sense is conveyed by the use of the word "exist" in it : 30 Cal. 112 ; A. I. R. 1925 Mad. 1252 ; A. I. R. 1924 Mad. 795, Rel. on ; 30 Cal. 155, Ref. [P 329 C 2]

(b) Criminal P. C., S. 145 (5)—Magistrate staying proceedings on information as to absence of likelihood of breach of peace—Magistrate's action is justified and he is

not bound to record evidence of parties before ordering stay.

When the Magistrate is able to act upon the police report or other information in starting proceeding under S. 145, he is competent to stay further proceedings on similar information regarding absence of likelihood of breach of peace without being obliged to record such evidence as the parties may adduce : A. I. R. 1924 Mad. 795, Rel. on.

[P 329 C 2]

*S. K. Sen, Probodh Chandra Chatterji and Profulla Chandra Nag*—for Petitioners.

*B. C. Mitter, Romoni Mohan Chatterji and Tarapada Banerjee* — for Opposite Party.

**Suhrawardy, J.**—In this case a rule has been issued on two grounds :

"(1) that Cl. 5 S. 145, Criminal P. C., has no application at this stage of the proceeding when both parties had filed their written statements and the learned Magistrate was enquiring into the question of possession ; (2) that the order complained of was illegal and without jurisdiction having been made behind the back of the petitioners and without giving them any opportunity of being heard and adducing their evidence."

The Magistrate after starting proceedings under S. 145, dropped them subsequently as it appeared to him from police report that likelihood of the breach of the peace no longer existed.

As regards the first ground it is argued that Cl. (5) to S. 145, applies only to the stage of the proceeding before written statements are filed by parties and that after they have been put in the Magistrate has no jurisdiction to stay his hand but that he is bound in law to decide the case on the question of possession. This ground is apparently suggested by the decision of this Court in *Manindra Chandra Nandi v. Baroda Kanto Chowdhury* (1) where after a statement of the facts in the case it was casually remarked that when the Magistrate passed his final order dropping the proceedings no written statement had been filed by either party. That fact, however, did not influence the decision in that case. One would have thought that after the point raised in the case was settled by *Manindra Nandi's* case (1) there was hardly anything left to be argued. But the learned counsel for the petitioner says that the wording of sub-S. (5) lends support to the idea that a party is entitled to show that no dispute likely to cause breach of the peace exists only before he had filed

(1) [1903] 30 Cal. 112=6 C. W. N. 417.



his written statement. It is difficult to read that meaning into the sub-section which comes as a separate clause after all the other clauses dealing with the procedure to be followed by a Magistrate after starting proceedings are inserted. By this clause a right is given to any party interested in the dispute to show that a likelihood of the breach of the peace does not exist at any particular time and that if it is so, the Magistrate should cancel the order issued by him under sub-S. (1).

The argument which has been placed before us was raised in this shape in *Manindra Nandy's* case (1). There one of the grounds taken was that the Magistrate had no jurisdiction to strike out the proceeding after having once instituted it and that it was incumbent upon him to use the statements if any put in by the parties, to hear parties, to receive evidence produced by them, to consider the effect of such evidence and then to decide whether if any one of the parties at the date of the institution of the proceedings was in possession of the subject-matter of the dispute. This ground was overruled. The same view has been taken in Madras on the line of the decision of this Court in *Manindra Chandra Nandy's* case (1) in *Narasayya v. Venkiah* (2). *Manindra Nandy's* case (1) was also followed in the case of *Suryanarayana v. Ankinud Prosad* (3) which lays down an important proposition namely, that when a Magistrate strikes off a proceeding under S. 145, on the ground that a likelihood of breach of the peace did not exist no party to the proceeding can challenge the propriety of such an order. On this ground also the petitioner is not entitled to question the order which has been passed by the Magistrate in this case. As was observed by Hill, J., in the Full Bench case of *Krishna Kamini v. Abdul Jabbar* (4) at page 195 the object of the enactment of S. 145 is to prevent breach of the peace. The Magistrate is not primarily concerned with civil rights of the parties but he is advised to maintain them only for the purpose of averting a breach of the peace. The learned Judge said :

"The maintenance of the public peace was the object before the mind of the legislature

and where that supreme object is in view there can be no question but that the convenience and even the rights of individuals must at times be sacrificed for its attainment."

It is also suggested that in the present case though the opposite party brought the matter to the notice of the Magistrate that there was on a certain date no likelihood of the breach of the peace, the Magistrate did not rely upon the evidence of that party but upon the report and evidence of the Sub-Inspector of Police. This ground was also suggested in *Manindra Chandra Nandy's* case (1) where it was observed :

"We are unable to understand why there should be any such limitation of the power of the Magistrate to stay his hand if he has become satisfied, whatever his source of information may have been, that the state of things does not exist which alone would give him jurisdiction to proceed with the enquiry."

Referring to the wording of Cl. (5) it is clear that the Magistrate shall cancel the order initiating the proceeding if he is satisfied at any stage of the case that no such dispute exists. This the Magistrate is entitled to do at any stage of the case though these words are not expressly used in the section but the sense is conveyed by the use of the word "exist" in it. In my opinion this ground must fail. As regards the second ground, the answer has been partially given in considering the first ground. What happened was that the Magistrate examined the Police Inspector and on examining him he found that there was no likelihood of the breach of the peace at that time. He thereupon passed an order in the presence of both parties dropping the proceeding. As has been observed in the cases referred to above the petitioner had no absolute right to challenge order by means of evidence relating to the breach of the peace. It has been held in *Suryanarayana v. Ankinud Prosad* (3) that it is not obligatory for a Magistrate to take evidence before dropping the proceeding under S. 145, Criminal P. C. It is pertinent to observe that when the Magistrate is able to act upon the Police Report or other information in starting proceeding under S. 145 there is no reason why he should not be competent to stay further proceedings on similar information without being obliged to record such evidence as the parties may adduce. This ground also fails. The rule is discharged.

(2) A. I. R. 1925 Mad. 1252=49 Mad. 232.

(3) A. I. R. 1924 Mad. 795=47 Mad. 713.

(4) [1903] 30 Cal. 155=6 C. W. N. 737 (F.B.).



**Graham, J.**—I agree that the Rule should be discharged. It seems to me that the application of the petitioner is based upon a misconception of the nature of a proceeding under S. 145, Criminal P. C., and of the position and status of the parties to such a proceeding. There is nothing in sub-S. 5, S. 145, Criminal P. C., which has the effect of limiting or restricting its operation to the earlier stages of the proceeding. The subsection appears to empower the Magistrate at any stage to cancel the proceeding if he is satisfied that no likelihood of a breach of the peace exists. I am further of opinion that no private party, whether he be a party before the Court or not has any locus standi to contest the propriety of the Magistrate's order.

M.N./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 330

RANKIN, C. J., AND MUKERJI, J.

*Hemangini Dassi*—Plaintiff — Appellant.

v.

*Asutosh Das*—Defendant—Respondent.

Appeal No. 1546 of 1926, Decided on 24th July 1928, against appellate decree of Sub-Judge, Third Court, 24-Parganas, D/- 25th February 1926.

(a) Landlord and Tenant—Tenancy 80 or 85 years ago.

To a tenancy having its origin 80 or 85 years ago provisions of Transfer of Property Act or Bengal Tenancy Act are not applicable.

[P 331 C 1]

(b) Landlord and Tenant—Tenancy created 80 years ago—Tenancy heritable and for agricultural purposes — Tenant is raiyat holding at fixed rate of rent and such tenant has right to cut trees, and has permanent and transferable right in his holding.

Where the rent of a tenancy created 80 or 85 years ago has been the same, and the tenancy is heritable and one for agricultural purposes, the tenant is a raiyat holding at a fixed rate of rent, and such tenant has the right to cut and appropriate trees from his land and has a permanent and transferable right in his holding : 21 C. W. N. 636, *Foll.* [P 331 C 1, 2]

*Satindra Nath Roy Chaudhury*—for Appellant.

*Mon Mohan Banerjee*—for Respondent.

**Mukerji, J.**—This appeal has arisen out of a suit which was instituted by the plaintiff for the recovery of a sum of Rs 25 as damages for certain trees that has been cut from a plot of land which

defendant 1 held under under the plaintiff as tenant and also for an injunction restraining the said defendant from cutting the trees standing on the land, in future. The suit has been dismissed by both the lower Courts and the plaintiff has thereupon preferred this second appeal.

The plaintiff's case was that defendant 1 had been holding the land under a kabuliyat dated 1309 B. S. and that, in contravention of the terms of the said kabuliyat, the said defendant in collusion with other persons had cut down and removed five trees standing thereon. The defence of defendant 1 was that the tenancy was not created by the kabuliyat of 1309 B. S. but that it had been in existence for over 80 years and from the time of the father of the said defendant, that the tenancy consisted of an area of 2 bighas out of which defendant 1 had sold a quantity of land measuring  $1\frac{3}{4}$  bighas to one Kedar Nath Mukherji and had retained for himself the remaining land, namely, 5 cottas in area and further that defendant 1 had not cut any trees from the said land. On this defence being taken, the plaintiff impleaded as one of the defendants in the suit defendant 2 who was the person in whose name the purchase had been made by the said Kedar Nath Mukherjee. She also added as parties defendants to the suit two other persons, namely, defendants 3 and 4 on the allegation that they were servants of the said Kedar Nath Mukherjee.

The Munsif held that the tenancy was a very old one and had existed from the time of the father of defendant 1 who himself was about 80 years of age. He held further that the origin of the tenancy was not known, that rent had been uniformly paid for the tenancy at the rate of Rs. 3 ; that the kabuliyat of 1309 B. S. was a document which was not acted upon, that defendant 1 was a tenant holding at a fixed rate of rent and, under the law, therefore, he had the right to cut and appropriate the trees on the land and further that he had a permanent and transferable right and that, therefore, the plaintiff was not entitled to a decree at all. The plaintiff, thereupon, as I have already stated, preferred an appeal. The Subordinate Judge who dealt with the appeal held that, in the absence of Kedar Nath Mukherjee as a defendant in the suit, the suit was not maintainable. The



reasons that he gave for this decision were that Kedar Nath Mukherjee was the real purchaser and defendant 2 was his benamidar, that the holding was the ancestral holding of defendant 1, that defendant 1 himself had not cut any of the trees which were the subject of the suit, that if any tree had been cut, it had been cut by Kedar Nath Mukerjee and that therefore the suit was not maintainable in the absence of the said Kedar Nath Mukherji as a defendant therein.

Treating the case as one governed by the provisions of the Transfer of Property Act, as it has been contended on behalf of the appellant that it should be, I am of opinion that the findings of the learned Subordinate Judge and the reasons that he has given for his decision are not sufficient. Questions might arise under S. 108, T. P. Act, as to whether by the mere fact that defendant 1 had made a transfer of a part of the land in favour of Kedar Nath Mukherjee, the said defendant was absolved from the statutory liabilities which arise under Cls. (m) and (o) of that section. I think, however, we are relieved of the necessity of considering this matter because the view that should be taken of this tenancy is that it is one to which neither the provisions of the Bengal Tenancy Act nor those of the Transfer of Property Act are applicable. The learned Subordinate Judge has said in his judgment that the holding is the ancestral holding of defendant 1. It does not appear that he has properly considered all the circumstances which should be taken into consideration in arriving at this finding and, therefore, it may well be contended, as it has been, that this finding of the learned Judge is not really a finding which is conclusive on the question. We have, therefore, looked into the evidence in this case and also the findings which have been recorded by the learned Munsif. The view that should be taken with regard to this matter, in my opinion, is that the tenancy is the ancestral holding of defendant 1 having had its origin more than 80 or 85 years ago, that the rent that has been paid for it has been a uniform rental of Rs. 3 only, that it has been used for agricultural purposes and that it has descended from the father of defendant 1 to defendant 1 himself.

As regards the kabuliyat of 1309 B. S. I am entirely in agreement with what the learned Munsif has said in his judg-

ment. The kabuliyat came from the custody of defendant 1 himself and the explanation that was offered on behalf of the plaintiff, namely, that it had been taken away from her by defendant 3 has not been accepted as true by the learned Munsif. There are very good reasons why this explanation should not be accepted specially, as it appears that, in a subsequent suit which was instituted by the plaintiff for rent, this kabuliyat was not mentioned and the rent was claimed at the rate of Rs. 10 though the kabuliyat provides for a rent of Rs. 3 only. That suit terminated in a solenama and, although the defendant had to pay at the rate of Rs. 3 no reference whatsoever was made to the kabuliyat in the solenama the defendant's case being that Rs. 3 was the rent which had been paid all along for the holding. There are also other indications in the contents of the kabuliyat which would point to the conclusion that it was a document which was attempted to be created for the purpose of curtailing the right of defendant 1, but that it does not represent a genuine contract between the parties. On the whole I am in agreement with the view which the learned Munsif has taken as regards the validity of this document.

Once it is taken that the tenancy had its origin more than 80 or 85 years ago, the provisions of the Transfer of Property Act or of the Bengal Tenancy Act evidently would not be applicable to this tenancy and upon the facts to which I have referred, namely, that the rent has been the same, that the tenancy was heritable and that it was a tenancy for agricultural purposes, it is evident that defendant 1 should be regarded as a raiyat holding at a fixed rate of rent. It has been held in the case of *Radhika Nath Ray v. Fakir* (1) that such a tenant has the right to cut and appropriate trees from the land and has a permanent and transferable right in his holding. On these findings, it is not possible for the plaintiff to obtain a decree in the present suit. In that view of the matter, I would dismiss the appeal with costs.

**Rankin, C. J.**—I agree.

S.N./R.K.

*Appeal dismissed.*

(1) [1917] 21 C. W. N. 636=38 I. C. 49.



**\* A. I. R 1929 Calcutta 332**

MUKERJI, J.

*Wahed Ali Akon*—Complainant—Petitioner.

v.

*Sarajuddin Ukih* — Accused — Opposite Party.

Criminal Revn. No. 1382 of 1928, Decided on 5th February 1929, against order of 2nd class Magistrate, Munshiganj.

**\*Criminal P. C., S. 250 (1) and (2)—Without first writing out order of discharge Magistrate calling upon complainant to show cause why he should not pay compensation and then combining order of discharge and order to pay compensation—Magistrate does not substantially contravene law.**

Although under sub-Ss. (1) and (2) the law contemplates two different orders, still, in practice, if a Magistrate, without first writing out his order of discharge under sub-S. (1), calls upon the complainant to show cause why he should not pay compensation, and then combines in one order the order of discharge and the order to pay compensation, he does not contravene substantially the provisions of the law: 11 C.W.N. 62 S.N.; A. I. R. 1925 Mad. 1139 and A. I. R. 1922 Pat. 157, Dist. [P 332 C 2, P 333 C 1]

*Jatis Chandra Guha*—for Petitioner.

**Judgment.** — This rule has been issued to show cause why an order passed by Mr. S. C. Guha, Magistrate, 2nd Class, of Munshiganj, on the petitioner to pay Rs. 50 as compensation to the accused in a case in which the petitioner was the complainant should not be set aside upon ground 1 stated in the petition. Ground 1 in the petition is in these words: For that in the absence of any finding to the effect that the case was a false and frivolous or vexatious one recorded by the trying Magistrate after reviewing the cause shown, the order under S. 250, Criminal P. C., is not warranted in law and it is liable to be set aside.

The facts are these: The Magistrate in the last paragraph of his judgment by which he discharged the accused persons and made the order complained of in this rule observed as follows:

"Considering the whole facts and circumstances of the case and the evidence adduced I find that the case is false and it is vexatious at the same time. I accordingly find that there are no materials for a charge and I accordingly discharge the accused under S. 253, Criminal P. C. and call upon the complainant to show cause why he should not pay compensation to the accused under S. 250, Criminal P. C. The complainant has shown cause and he has traversed the points in his explanation which have been discussed in

detail above. I have nothing more to add to show that his case is not a true one as alleged by him. I accordingly direct that the complainant should pay Rs. 50 as compensation to the accused under S. 250, Criminal P. C. in default to suffer simple imprisonment for two weeks."

The order complained of, it may be conceded at once, is quite in form being a combination of two orders by which the accused was ordered to be discharged and the petitioner was ordered to pay compensation. From the order, however, it appears that what the learned Magistrate did was that when he made up his mind to discharge the accused being of opinion that the case against him was false and vexatious, he called upon the petitioner to show cause why compensation should not be ordered. On that the complainant showed cause and the Magistrate took the cause that was shown into consideration and then wrote out his entire judgment in the last paragraph of which, quoted above, he discharged the accused and ordered the complainant to pay compensation. That is quite clear from the words in the passage quoted above, namely:

"The complainant has shown cause and he has traversed the points in his explanation which have been discussed in detail above. I have nothing more to add to show that his case is not a true one as alleged by him."

What the law contemplates under sub-S. (1), S. 250, is that when the Magistrate makes an order of discharge and is of opinion that the accusation against the accused is false and either frivolous or vexatious, he by his order of discharge, may call upon the complainant forthwith to show cause why he should not pay compensation to the accused. The law, therefore, under sub-S. (1) contemplates an order of discharge simultaneously with which may be passed an order calling upon the complainant forthwith to show cause. Sub-S. (2), S. 250, Criminal P. C. then says:

"The Magistrate shall record and consider any cause which the complainant may show and if he is satisfied that the accusation was false and either frivolous or vexatious may direct that compensation should be paid and should he make such an order he has to record his reasons for passing it."

Under these two sub-sections therefore the law contemplates two different orders, but in practice what often happens is that the order of discharge is not written out until after the Magistrate has given the complainant an opportunity



to show cause. This is exactly what has taken place in the present case.

It has been argued on behalf of the petitioner that the provisions of this section are mandatory and these provisions have got to be strictly complied with. This proposition cannot be disputed. But what is to be seen is whether all that the law enjoins the Magistrate to do as a matter of substance has been done in the present case. The law evidently contemplates firstly that the Magistrate at the time when he makes up his mind to discharge the accused, should also be of opinion that the case is a false one and is also either frivolous or vexatious and that it is a case in which he should proceed further for the purpose of awarding compensation; and secondly that when cause is shown by the complainant he has got to take that cause into consideration and then on consideration of the cause that is shown he has to ask himself again as to whether the case is really a false one and at the same time either frivolous or vexatious, and if he still sticks to that opinion then he can under the law make an order directing compensation. In the present case the passage from the judgment quoted above shows that the Magistrate was clearly of opinion that the case was false and vexatious. He says in the order that he has taken the explanation which the complainant offered that the case was a true one into consideration. He has then said that he has nothing more to add to show that the case was not a true one as was alleged in the explanation. He then proceeded to direct the complainant to pay compensation to the accused. Under these circumstances although, strictly speaking, two orders ought to have been recorded, one under sub-S. (1) and the other under sub-S. (2), I am unable to find that any of the requisites was wanting on the part of the learned Magistrate.

My attention has been drawn to three reported decisions to which I shall presently refer. One of them is the case of *Sekh Jonab Ali v Hira Lal Pasban* (1). What happened in that case was that the provisions of Cl. (a), S. 250, as it stood in the Code before the amendment of 1923 were overlooked by the Magistrate. The Magistrate after calling upon the complainant to show cause why he should not be ordered to pay compensation and

on receiving the cause thus shown, merely stated that in his opinion the cause shown by the complainant was unsatisfactory and he did not place on the record what was the cause shown as he was bound to do under the law. In the present case the Magistrate has recorded in the order the substance of the cause that was shown, namely that the case was a true one. He has taken that fact into consideration and notwithstanding the cause thus shown he has adhered to the opinion which he previously formed, namely, that the case was a false and vexatious one.

The next case referred to, on behalf of the petitioner is the case of *Thadiappun v. Veeraperumal Thevan A. I. R. 1925 Mad. 1139*. In that case as far as can be made out from the order of the Magistrate that is quoted in the judgment of the High Court, the Magistrate did not, when discharging the accused state that the case was a false and frivolous or vexatious one. He stated that as no case was made out against any of the accused he discharged them. He next added that two of the accused had been falsely added as accused persons without making any reference to the other element that is absolutely necessary to justify an order under S. 250, Criminal P. C., namely that the case was a frivolous or vexatious one; and when cause was shown he merely stated that the complainant had no sufficient cause to show. Upon these materials the Magistrate made an order under S. 250. In that case the High Court observed that the recording of the reasons for ordering compensation is almost a condition precedent to the proper exercise of the power under the section. That case bears no analogy to the case now before me.

Lastly, reliance has been placed upon a decision of the Patna High Court in the case of *Deo Narain Mahata v. Chhatoo Raut* a report of which will be found in *A. I. R. 1922 Pat. 157* in which it is said that the direction contained in proviso (a), S. 250 of the Code (as it stood before this amendment of 1923, which was to the effect that the Magistrate shall record any objection which the complainant or informant may urge against the making of the direction is mandatory and the non-compliance of which vitiates the order. To

(1) [1907] 11 O. W. N. 62 S. N.



the proposition of law as laid down in that case no exception can possibly be taken. But the facts of that case were that the Magistrate did not state in his order what the objection of the complainant was, nor was there anything in his order to show that he had considered such objection. He simply said in his judgment that the complainant filed a petition showing cause and that the cause shown was not reasonable at all. The case therefore stands on a widely different footing from the case which I have now to deal with.

I am of opinion upon the materials which the order of the Magistrate discloses and the reasons which he has given and recorded in that order, it cannot be said that the formal defect that there exists in the recording of the order has substantially contravened the provisions of the law. The Rule therefore, in my opinion, should be discharged and I order accordingly.

S.N./R.K.

*Rule discharged.*

### **A. I. R. 1929 Calcutta 334**

JACK AND MITTER, JJ.

*Port Canning and Land Improvement Co. Ltd.*—Plaintiff—Appellant.

v.

*Asiruddyy Molla and others*—Defendants—Respondents.

Appeal No. 239 of 1927, Decided on 5th February 1929, against appellate decree of Dist. Judge, 24-Perganas, D/- 19th August 1926.

**Bengal Tenancy Act, S. 46, Cl. 7 — Non-occupancy tenant's liability for enhanced payment begins from the time of his agreement so to pay.**

The liability of the non-occupancy tenant to pay enhanced rent is not dependent on the decree which merely stops short after determining what the fair and equitable rent is. The liability attaches from the time when the tenant agrees to pay the rent so determined : *A. I. R. 1926 Pat. 42. Rel. on.*

[P 335 C 2]

*Sarat Chunder Basak, Khetra Mohun Ghose, Birendra Coomar De, Roma Prosad Mukherji, and Durgadas Roy*—for Appellant.

*Sisir Coomar Ghosal and Gurudas Mukherji*—for Respondents.

**Mitter, J.**—This is an appeal by the plaintiffs the Port Canning and Land Improvement Company Ltd. in a suit

instituted by them against the defendants for arrears of rent for the years 1319 to 1330 B. S. It appears that the plaintiff company served upon the defendants who were non-occupancy raiyats an agreement demanding a certain enhanced rent. The defendants did not agree to the enhancement. The plaintiffs consequently had to institute against the defendants proceedings under S. 46, Ben. Ten. Act, so far back as 28th March 1913. The Court of first instance which tried the suit dismissed the plaintiff's claim. On appeal, the lower appellate Court affirmed the decision of the Court of first instance. The matter was then carried in second appeal to the High Court and the High Court remanded the suit on 24th July 1919 for determining what the fair and equitable rent in respect of the holding would be. On 28th September 1921, the Munsiff determined the fair and equitable rent in respect of the lands in question. Against this decision, the tenants preferred an appeal to the District Judge. During the pendency of the appeal, on 5th November 1921, the tenants agreed to pay the enhanced rent as settled by the Munsiff subject to the result of the appeal. On 6th July 1923, the appeal of the tenants was dismissed. The present suit was instituted on 14th April 1924. The Court of first instance has allowed to the plaintiffs a decree for arrears of rent at the rate of Rs. 104-3-6 for the years 1327 and 1328 and at an enhanced rate of Rs. 159-6-3, for the years 1329 and 1330 B. S. with cesses at six pies in the rupee and interest at 12½ per cent per annum. Against this decision, an appeal was carried to the District Judge and the learned District Judge has affirmed the decision of the Court of first instance. Against this decree of affirmance by the lower appellate Court, a second appeal has been taken to this Court, as already stated, by the plaintiffs.

The main contention of the appellants before us has been that the Courts below have clearly erred in dismissing the suit of the plaintiff company for the years 1323 to 1326 and in allowing them arrears of rent for the years 1327 and 1328 at the old rate. It is said that the lower Courts should have granted a decree to the plaintiffs at the enhanced rate for the years 1323 up to 1328. The agreement of the appellants is based on the



contention that, as the proceedings under S. 46, Ben. Ten. Act, ascertaining the fair and equitable rent were proceedings in the nature of a suit for enhancement of rent, the provisions of S. 154 of the said Act were attracted to the case and that consequently the plaintiff company were entitled to get rent at the enhanced rate from, at any rate, the year 1323 B. S. This argument assumes that the enhancement agreed to by the tenants respondents in this case was really an enhancement made by the Court. It becomes necessary, therefore, to examine some of the provisions of the Act for the purpose of determining whether the enhancement in the present case which was agreed to on 5th November 1921 was an enhancement made by a decree of the Court so as to attract the provisions of S. 154. S. 43 says :

"The rent of a non-occupancy raiyat shall not be enhanced except by registered agreement or by agreement under S. 46."

It appears in this case that, after the Munsiff had determined the fair rent on 28th September 1921, the tenants agreed to pay the rent so determined within the meaning of S. 46 Cl. (7). S. 46 Cl. (7) states :

"If the raiyat agrees to pay the rent so determined, he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement."

It is not necessary to quote the remaining part of this clause. The contention of the appellants that this enhancement was really made by the decree determining the fair and equitable rent under S. 46 loses its force when the scheme of the whole section is considered. S. 46 provides that the Court is to determine the fair and equitable rent of a non-occupancy raiyat and then, after the determination of such rent, if the raiyat does not execute the agreement and file it under sub-S. (3) he shall be deemed for the purposes of section to have refused to execute it. Sub-S. (7) says that if the raiyat agrees to pay the rent so determined, he shall be entitled to remain in occupation of the holding for five years from the date of the agreement. This shows that the agreement is to take effect from the date when it is entered into. It has been strenuously argued before us by the learned advocate for the appellants that this is not to be treated as a case of an agreement between the

parties, that is, between the landlords and the tenants but it is to be treated as an election of an alternative order made by the Court which determined the fair and equitable rent. This is a contention to which I cannot agree. S. 43 in express terms states that the rent of a non-occupancy raiyat can be enhanced by agreement under S. 46 ; and that is the agreement which is referred to in S. 46 (7). The liability of the tenant to pay enhanced rent is not dependent on the decree which merely stops short after determining what the fair and equitable rent is. The liability really attaches from the time when the tenant agrees to pay the rent so determined. This view receives support from the decision of the Patna High Court in the case of *Wajihunnessa Begum v. Babu Lal* (1) and I shall refer to some of the observations made by Sir Dawson-Miller, C. J., in that case which are pertinent to the present controversy. It is conceded that the case referred to is directly in point. The learned Chief Justice at p. 53 of the report expresses himself thus on the point with which we are now dealing :

"But it seems clear that the enhanced rent is payable at the latest from the date when the raiyat agrees to pay the rent determined by the Court. Sub-S. (7) does not in terms say from what date the enhanced rent should be payable. It merely states that the raiyat shall be entitled to remain in occupation of his holding at the enhanced rent for a term of five years from the date of the agreement. But, as his liability to pay the enhanced rent, only arises by reason of his agreement, it seems to me impossible to hold that he was under any liability to pay rent at the enhanced rate before that date. The fact that the defendants did not, in fact agree to pay the enhanced rent until a much later date than, that on which they might have been put to their election appears to have been due to the failure of the plaintiff to insist upon her rights. She could have compelled the defendants to pay the new rent or submit to ejectment as soon as the Munsiff's decision was given unless the Court ordered a stay which would only be granted on terms protecting the plaintiff's rights."

It seems to me clear on a consideration of the provisions of Ss. 43 and 46, Ben. Ten. Act, that the contention of the appellants must fail.

There is another consideration which inclines me to take the view that the appellant's contention is without force because the term of five years referred to in S. 46 (7) cannot possibly refer to five

(1) A. I. R. 1926 Pat. 42=5 Pat. 46.



years subsequent to the time when proceedings under S. 46 were started in the year 1913, for, that period, according to this view, expired long before the date of the agreement. If the right is founded on agreement, as I think it is, it seems impossible to contend that the agreement would take effect, as in the present case, for about 8 or 9 years, prior to the date of the agreement. The appellants, however, will be entitled, in the view which I have expressed as to the date from which the tenants became liable to pay enhanced rent, to get such rent for nearly six months more from 19th Kartik to the end of Chaitra 1328.

The result is that the decrees of the Courts below are varied by directing that the plaintiffs shall get a decree for the sum which has been awarded to them by those Courts and also for an excess sum of Rs. 25-5-0. Subject to this variation, the appeal will stand dismissed. In the circumstances of the case, there will be no order as to the costs of this appeal.

**Jack, J.**—I agree.

P.R./R.K.

*Decree varied.*

### A. I. R. 1929 Calcutta 336

MUKERJI AND GRAHAM, JJ.

*Sitram Kalwar*—Petitioner.

v.

*Sukia Kalwarin*—Opposite Party.

Criminal Revn. No. 983 of 1928, Decided on 18th December 1928, against order of Honorary Magistrate, Sealdah, D/- 9th November 1927.

**Criminal P. C., S. 488 — Proceeding in wrong district — Magistrate otherwise competent—Final order is not vitiated.**

Where a Magistrate who dealing with the proceedings under S. 488 is empowered by law to deal with the application for maintenance under S. 488, passed a final order it is not vitiated merely by reason of the fact that the proceedings were held in a wrong district.

[P 336 C 2]

*Bir Bhusan Dutt*—for Petitioner.

*Dwijendra Krishna Dutta*—for Opposite Party.

**Judgment.**—The foundation of this Rule is the allegation that the petitioner had no notice of the proceedings under S. 488, Criminal P. C. that were held in the Court of the Magistrate who made the final order in 1927. As regards this

matter it appears to us that the allegations which the petitioner has made in his application for revision to this Court are not correct. We are satisfied upon a perusal of the two reports of the serving peon as well as on his evidence that was given in those proceedings that the notices in connexion therewith were personally served upon the petitioner. If this fact has been established as in our opinion it has been, then the only question is whether the Magistrate had jurisdiction to deal with those proceedings under the provisions of Sub-S. 8 of S. 488, Criminal P. C. That subsection says that,

“proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife”

etc. The proceedings undoubtedly were taken in the District of 24 Parganas. The petitioner at that time admittedly was residing in Calcutta. But it is alleged on behalf of the opposite party that it was within the 24 Parganas that the petitioner had last resided with his wife. The allegation, however, is denied on behalf of the petitioner. It is not necessary for us to come to a definite finding on this question, because even if it be assumed that it has not been established that the petitioner had last resided prior to those proceedings with his wife within the jurisdiction of 24-Parganas, the final order which the Magistrate has made under S. 488, Criminal P. C., would not be vitiated simply for that reason. In our opinion S. 531, Criminal P. C., should apply to the case and the order which the learned Magistrate passed under S. 488, Criminal P. C., would not be vitiated merely because the proceedings were held in a wrong District. It has been urged on behalf of the petitioner that S. 530 (n), Criminal P. C., would apply to the case and, therefore, the proceedings should be held to be void. We are unable to agree in this contention, because the Magistrate who dealt with these proceedings undoubtedly was empowered by law to deal with the application for maintenance under S. 488, Criminal P. C.

In this view of the matter we are of opinion that there is no substance in this Rule and that it should be discharged.

R.K.

*Rule discharged.*



## \* A. I. R. 1929 Calcutta 337

JACK AND MITTER, JJ.

*Shyama Charan Chattopadhyaya*—  
Plaintiff—Appellant.

v.

*Sricharan Chattopadhyaya*—Defendant  
—Respondent.Appeal No. 234 of 1927, Decided on 6th  
February 1929, against appellate decree  
of Sub-Judge, First Court, Bakargunge,  
D/- 10th August 1926.\* (a) Hindu Law — Adoption — Bengal  
School — According to Bengal School an  
estate once vested in the son, cannot be di-  
vested by subsequent adoption except in  
case of extreme degradation.Under the Bengal School of Hindu law a  
person who has inherited the property of his  
father on the latter's death is not divested of  
that inheritance by his being subsequently ad-  
opted by his paternal uncle except in case of  
extreme degradation: 29 *Mad.* 437 at 449; 5  
*Cal.* 776 (P.C.), *Foll.*; A.I. R. 1928 P. C. 87; 40  
*Bom.* 429, *Dist.* [P 333 C 2, P 340 C 1]

(b) Precedents—Scope of.

A case is authority for what it actually de-  
cides and not for what would seem to flow  
logically from it for the law is not always logi-  
cal at all: (1901) A. C. 465, *Foll.* [P 338 C 2]*Brojendra Nath Chatterji, & Satindra  
Nath Banerji*—for Appellant.*Brojolal Chuckerbutty, Suresh Chun-  
der Taluqdar, Prokash Chunder  
Pakrashi, and Mohendra Coomar Ghose*  
—for Respondent.**Mitter, J.**—The substantial question  
of law raised by this appeal is whether  
under the Bengal School of Hindu Law a  
person who has inherited the property of  
his father on the latter's death is divested  
of that inheritance by his being subse-  
quently adopted by his paternal uncle.  
The appellant contends that he is so  
divested, on the other hand the respondent  
contends that he is not. Both the Courts  
below have given effect to the contention  
of the respondent. The question in this  
appeal is whether those decisions are right.The relevant facts on which the ques-  
tion of law depends are not now in dis-  
pute. They may briefly be stated thus :  
Govinda Chatterjee and Prosanna Chat-  
terjee were two brothers governed by the  
Bengal School of Hindu law. Govinda  
granted a lease to his brother of certain  
lands which constituted a tenure. These  
lands belonged exclusively in proprietary  
right to Govinda who died in the year  
1883. Govinda left behind him two sons  
Shyamacharan (plaintiff, now appellant)  
and Sricharan (defendant, now respondent)  
as his heirs and legal representatives.

1929 C/43 &amp; 44

The plaintiff and the defendant conse-  
quently became entitled to the proprie-  
tary right in equal moieties in the lands  
under which Prosanna, their uncle, held  
the tenure and each became entitled to  
get half of the rental from Prosanna. A  
year after the death of Govinda his widow  
gave the defendant Sricharan in adop-  
tion to her husband's brother Prosanna.  
The name of the plaintiff, however, ap-  
pears in the land revenue register as  
possessing two annas share in Taluq Nos.  
3322 and 3382 under which the tenure in  
question is held. The plaintiff brought  
the suit in which this appeal arises for  
the rent of the tenure as the sole heir of  
his father. The defence of the defendant  
is that plaintiff is only entitled to a half  
share of the rent as he was given in ad-  
option after the property in respect of  
which the rent suit has been instituted  
vested in him by inheritance, and that  
his subsequent adoption by his uncle  
could not divest him of this inheritance.  
The defendant has also raised other defen-  
ces which will be mentioned when I shall  
deal with the other points raised by this ap-  
peal. As I have said already the Courts  
below have given effect to the defence and  
have dismissed the plaintiff's suit on the  
ground that the rent for the four years  
1327 to 1330 B. S. in plaintiff's half share  
had been satisfied. Hence the plaintiff  
has appealed.It has been contended on behalf of the  
appellant that the effect of the adoption  
of the defendant by his uncle was to sever  
his connexion with his natural family so  
completely that he was to give up every-  
thing connected with the family, that he  
was civilly dead so far as his natural  
family was concerned which means as if  
he has never been born in the family of  
his natural father Govinda. It is argued  
that the logical result is that Govinda's  
estate devolved on the plaintiff who must  
be regarded as the only son of Govinda in  
view of the fiction of Hindu law that the  
defendant must be taken to have never  
been born in the family of his natural  
father. It is said that the decision of  
Mr. Ameer Ali, J., as he then was, in  
the case of *Behari Lal v. Kailash  
Chunder* (1) which takes a contrary view  
is wrong. Reliance is placed on the de-  
cision of the Bombay High Court in the  
case of *Dattatraya v. Gobinda* (2), which

(1) [1897] 1 O. W. N. 121.

(2) [1916] 40 Bom. 429=18 Bom. L. R. 258.



was a case governed by the Mitakshara School of Hindu law as modified by the Mayukha School. In that case it was held that when a boy is given in adoption he loses all the rights he may have acquired to the property of his natural father including the right to property which has become exclusively vested in him before the date of his adoption. It is based upon a text of Manu which I shall refer to later and which has been read as giving effect to the fundamental idea underlying the adoption viz., that the boy given in adoption gives up the natural family and everything connected with the family and takes his place in the adoptive family as if he has been born there, as far as possible. Stress is laid on the circumstances that the Judicial Committee of the Privy Council has in a recent case see: *Raghuraj v. Subhadra* (3), applied the principle of the Bombay decision and has quoted the same with approval. It becomes necessary, therefore, to examine to what state of circumstances their Lordships of the Judicial Committee applied the fundamental principle laid down in the Bombay case and whether it was the intention of their Lordships to go back upon another well established principle laid down by their Lordships in the case of *Maniram v. Kollitani* (4), namely that an estate once vested under the Hindu Law cannot be divested. In the case in *Raghuraj v. Subhadra* (3) the question arose with regard to the succession to an Oudh Taluqa. The question was whether on the death intestate of a Hindu holder, the ceremonially adopted son of the preceding holder, his natural brother could be regarded as a "brother" within the meaning of the Oudh Estates Act (1 of 1869 as subsequently amended) in view of the fact that according to the Hindu Law the adoption operated as a re-birth. The Judicial Committee held: "that if the natural brother of the ceremonially adopted son of the previous holder were to be made the heir to the taluk, how could he still a member of his family of birth and bound to make the necessary offerings for his own ancestors, be qualified to be the same thing for his brother and his adoptive father and that father's immediate predecessors? If he cannot, how is the legal theory squared with the termination of the ceremonies in the family into which the son was adopted."

(3) A. I. R. 1928 P. C. 87=3 Luck. 76=55 I. A. 139. (P.C.)

(4) [1880] 5 Cal. 776=7 I. A. 115=6 C. L. R. 322 (P.C.).

It is in connexion with this state of circumstances that the Judicial Committee quoted with approval the remarks of the learned Judges of the Bombay High Court in the case already referred to, viz.,

"the fundamental idea is that the boy given in adoption gives up the natural family and everything connected with the family."

At the same time their Lordships pointed out that the expressions

"Civilly dead or as if he had never been born in his family,"

are not for all purposes correct or logically applicable, but they are complimentary to the term "new birth." Their Lordships' decision must be read by keeping in view what has been said in the case of *Quinn v. Leatham* (5) that a case is authority for what it actually decides and not for what would seem to flow logically from it for the law is not always logical at all. There is nothing in the judgment of the Judicial Committee which would go to show that their Lordships approved of the actual decision in the Bombay case which lays down the broad proposition contended for by the appellant. Under the Dayabhaga system of Hindu law the son on the death of his father obtains an absolute right to his share in the property of his father. His father's right to such property is extinguished by his death and the son's right in the property is created on the father's death. It is difficult to imagine how a person by reason of his being adopted subsequent to his father's death can be deprived of property which at the time of his adoption was his own. It is to be noticed that the Bombay High Court in the year 1922 held that a person governed by the Mitakshara law does not on his adoption lose the share which he has already obtained on partition from his natural father and brothers in his family of birth: see *Mahableswar v. Subramanya* (6) and the same Court in the case of *Manik Bai v. Gokul Das Ramdas* (7) held that the adoption of a married Hindu, the sole owner of ancestral property acquired by survivorship on the death of his father, does not deprive his daughter of her right of inheritance to that property. It was

(5) [1901] A. C. 495=70 L. J. P. C. 76=17 T. L. R. 749=65 J. P. 708=50 W. R. 139=85 L. T. 289.

(6) A. I. R. 1923 Bom. 297=47 Bom. 542.

(7) A. I. R. 1925 Bom. 363=49 Bom. 520.



pointed out in that case by Sir Norman Macleod, C. J., that by his adoption Ram Das lost all rights of inheritance in his natural family as if he had died but it was quite unnecessary to add a further fiction viz., as if he had never been born in the family. It is difficult to reconcile the case in *Mahableswar v. Subramanya* (6) with the broad view taken in the case in *Dattatraya v. Gobinda* (2). In the case of *Venkata Narasimha v. Rangayya* (8) the learned Judges followed the decision of the Calcutta High Court in *Behari Lal v. Kailash Chunder* (1) and after examining the texts of Hindu law held that the adoption into another family of the only surviving member of a joint family in whom the family estate vested solely and absolutely does not in law operate to divest him of his rights in such estate. Reliance has been placed on a text of Manu in regard to which there is a difference in the translation as given by Sir William Jones and that given by Mr. Golap Chandra Sarkar Sastri. I will give the two translations side by side Mr. Sarkar's translation is as follows :

"The adopted son is not to take away (with him when he is passing from the family of his birth to that of adoption), the Gotra and Riktha of the progenitor; the pinda is follower of the Gotra and the Riktha; the Swadha (or spiritual food) goes away absolutely from the giver."

Sir William Jones's version is as follows:

"A given son must never claim the family and estate of his natural father; the funeral cake follows the family and estate; but of him, who has given away the son the funeral oblation is extinct".

Mr. Sarkar on the basis of his translation was of opinion that the adopted son's existing proprietary right in a natural father's property becomes extinguished otherwise, says the learned author :

"Why should he not take away with him such property or his share in the same when he is leaving the progenitor's family for joining the adopter's family?" see Hindu law p. 243 (6th Edn.).

But it is to be noticed that this view is directly opposed to Mr. Sarkar's earlier view as stated in Tagore's lecture on adoption 1888 published in 1899, pp. 389 and 390. It is conceded that the adopted son would take away with him his own self-acquired property and it is difficult to see why he should not take away with him property to which he is absolutely entitled although he has acquired such

property by inheritance from his natural father. The authors of *Dattaka Mimansa* and *Dattaka Chandrika* cite the text of Manu and explain the same by stating that from the very act of giving (in adoption), the extinction of the giver's son's proprietary right in the giver's property and the extinction of the giver's gotra—take place. With regard to these texts we agree with the observations of the learned Judges of the Madras High Court in *Venkata Narasimha v. Rangayya* (8). The learned Judges said :

"We do not think that there is anything in these passages which necessarily carries with it the idea that the adopted son is divested of property which is his own absolutely at the time of adoption. The more correct view seems to be that by the adoption the filial relationship as the author of the *Chandrika* says, is extinguished in one family and is created in the other family, and that thereafter the person adopted cannot claim or take any property in his natural family by virtue of the extinguished filial relationship therein. The fact that under the Dayabhaga law in force in Bengal a son has no vested coparcenary interest with his father in ancestral property and that his interest in ancestral property of the father only accrues on the father's death rather favours the view that *Mimangsha* when adopting the interpretation of the *Chandrika* had in mind the loss of rights that might accrue after the date of adoption rather than rights to property which had already vested".

In the case of *Maniram Kolita* (4) referred to above their Lordships of the Judicial Committee observed as follows with regard to the proprietary right of a son by inheritance from his father under the Dayabhaga school of Hindu law :

"The proprietary right of a son by inheritance from his father is expressly ordained, because the wealth devolving upon sons benefits the deceased (*Dayabhaga* Chap. 11, S. 1 Vol. 38) and the right of succession of other heirs to the property is also founded on competence for offering oblations at obsequies (18th verse); see also verse 32. "But a son, even if by the mere fact of his birth he delivers his father from the hell called *put*, is according to the *Dayabhaga*, excluded from certain causes from inheritance in the same manner as other heirs (see the *Dayabhaga*, Chap. 5, paras. 4 5 and 6), but, if he once succeeds, the estate is not divested for anything less than degradation, though causes which would have excluded him if they had existed before succession arise after the estate has descended."

It will thus appear that nothing short of degradation can deprive a Dayabhaga son of property inherited from his father. Even if the case in 40 *Bom.* be regarded as good law this does not assist the appellant as the decision was based on the peculiar constitution of the *Mitakshara*

(8) [1906] 29 Mad. 437=16 M. L. J. 178.



joint family by which right to property of the father arises from the birth of the son and is liable to be divested if the son is transferred from the joint family to some other family by adoption which causes the extinction of the filial relationship if the adoption takes place during the lifetime of the father. The 40 Bom. case has gone a step further and has held that the same rule applies where the adoption takes place after the death of the father. Under the Dayabhaga law after the son succeeds absolutely there is no divestment except in the extreme case of degradation which is provided for by the Dayabhaga Chap. 1, paras. 31, 32 and 33 which provides that the son's degradation of his being deprived of caste causes an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. The text of Dattaka Mimansa and Dattaka Chandrika are equivocal even if the view most favourable to the appellant is taken. There is nothing in the decision of the Judicial Committee of the Privy Council in *Raghuraj v. Subhadra* (3) which compels us to hold that their Lordships expressed their approval of the actual decision in the *Dattatraya v. Gobinda* (2).

For the reasons given above we think that the view taken by the Courts below is right and this ground of appeal must fail.

It remains to notice the minor points raised on this appeal. It is said that even if the defendant has got the right to moiety share of the rent that right has become extinguished by the adverse possession by the plaintiff for more than the statutory period as defendant has not taken any share of the rent since his natural father's death. The findings of the lower appellate Court on this part of the case are conclusive against the appellant. His findings are: (1) The same Tahsildar used to collect rents both for plaintiff and defendant and their mutual dues to be adjusted by him by set-off, (2) collection papers of the plaintiff were not produced and there is nothing to show plaintiff realized more than his half share of rent. No interception of rent and profits for more than 12 years has been established on the side of the plaintiff. The ground of adverse possession consequently fails.

The next ground urged for the appellant is that as the plaintiff is the sole

registered proprietor in respect of the two annas share of the Taluqs within which the tenure in question is situate defendant is bound to pay the entire rent to the plaintiff appellant having regard to the provisions of S. 78, Land Registration Act (7 of 1876) B. C. read with S. 60, Ben. Ten. Act. S. 60 in terms does not apply as the defendant is not setting up the title of a third person to receive the half share of the rent but setting up title to recover such moiety share in himself. All the grounds urged in appeal fail which must be dismissed with costs.

P.R./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 340

C. C. GHOSE, J.

*Pramatha Nath Basu*—Complainant.  
—Petitioner.

v.

*Ganga Charan Chakravarty*—Accused  
—Opposite Party.

Criminal Revn. No. 986 of 1928, Decided on 11th January 1929.

Criminal P. C., S. 439 (1)—Enhancement of sentence.

It is a safe working rule for the High Court not to interfere, although it has power to interfere, on petitions for enhancement of sentences passed on accused persons, made on behalf of private complainants.

[P 340 C 2, P 341 C 1]

*Narendra Kumar Basu and Manindra Kumar Basu*—for Petitioner.

*S. R. Das Gupta, and Khitish Chunder Ghatak*—for Opposite Party.

**Judgment.**—I have examined the record in this case and have perused with attention the opinions of the differing Judges. As far as I know, the practice of this Court has been not to interfere on petitions of private complainants praying for enhancement of the sentence passed on the accused. It will not be understood from what I have just said that the High Court has not the power to interfere on the application of a private complainant. The powers of the High Court are extremely wide. But it is an elementary proposition that wider the power, the more cautious must be the exercise of that power and, in the cautious exercise of that power, it has been laid down by eminent Judges from time to time that it is a safe working rule not to interfere on petitions for enhancement of sentences.



passed on accused persons made on behalf of private complainants. But the position in this case is this: the present application is not for the issue of a Rule calling upon the accused to show cause why the sentence should not be enhanced. A Rule has been issued by the High Court. It is not for me to say whether the Rule should have been issued or not. It is sufficient for me to take note of the fact that a Rule has been issued and it is, therefore, my obvious duty to go into the facts and ascertain for myself whether, in the circumstances of this case, the sentence should be enhanced. That is the sole duty which is before me at the present moment. Now, on that point, I cannot help saying that, in the circumstances of this particular case, the sentence of fine imposed by the trial Court should not have been reduced by the Sessions Judge. Mr. Das Gupta who appears on behalf of the accused states that, inasmuch as the High Court does not ordinarily interfere on the application of a private complainant, I should not interfere on this occasion with the order passed by the Sessions Judge. As indicated above, much of the importance which would otherwise have attached to Mr. Das Gupta's contention has been lessened by reason of the issue of the Rule by my learned brothers Costello and Lort-Williams, JJ.

As I said a few moments ago, the High Court can interfere on the application of a private complainant but it does not ordinarily so interfere. The High Court for the matter of that can interfere of its own motion. But having regard to the fact that the Rule was issued by the High Court, while I am not unmindful of what has been contended before me, it is my obvious duty to look into the record for myself and come to the conclusion as to whether or not the sentence should be enhanced. I am of opinion that the sentence imposed by the trial Court should not have been reduced and, in that view of the matter, I enhance the sentence of fine passed on the accused from Rs. 200 to 500 and, in default of payment, direct the accused to suffer rigorous imprisonment for a period of three months.

S.N./R.K.

*Sentence enhanced.*

## \* A. I. R. 1929 Calcutta 341

SUHRAWARDY AND GRAHAM, JJ.

*W. Stewart and others—Petitioners.*

v.

*Hubert Hughes—Opposite Party.*

Criminal Revn. No. 1059 of 1928, Decided on 31st January 1929.

\* Criminal P. C., S. 145—Magistrate has no jurisdiction to initiate proceedings under S. 145 where the dispute between the parties is likely to cause breach of peace not at the time but only at some future date (e. g. 2 months hence).

The words "dispute likely to cause a breach of the peace exists" mean that the dispute must exist and it should be of such a character as is likely to cause a breach of the peace unless proceedings are now taken under S. 145. And so where the breach of the peace is not likely to be caused at the time but only at some future date (e. g., 2 months hence) the Magistrate has no jurisdiction to initiate proceedings under the section: 33 Cal. 33; 33 Cal. 352 (F.B.) Ref.; 7 C. L. R. 352; 7 Cal. 385; 4 W. R. 26; 8 C. W. N. 590; 11 C. W. N. 198 and 11 C. W. N. 835, Rel. on. [P 343 C 1, 2]

*N. K. Basu and Rajendra Bhusan Bakshi—for Petitioners.*

*Probodh Chandra Chatterjee—for Opposite Party.*

**Suhrawardy, J.**—This rule has been issued upon several grounds one of which in my opinion is enough to dispose of this matter. That is:

"That the police report not having disclosed any apprehension of a breach of the peace at the time the proceedings were drawn up the said proceedings were without jurisdiction."

It appears on a reference to the proceedings drawn up by the Magistrate that he relied upon a report of the Sub-Inspector of Police of the Murari Police Station dated 24th June 1928, for holding that a dispute likely to induce a breach of the peace existed between the parties. The police report upon which the learned Magistrate relies says:

"The work on the disputed lands by the first party has been stopped on account of monsoon since about a month ago and so no breach of the peace is apprehended at present but there is an apprehension of a breach of the peace for the disputed lands after the present monsoon."

The question is whether this report upon which alone the learned Magistrate relies for drawing up proceedings under S. 145, Criminal P. C., discloses the existence of a dispute likely to cause a breach of the peace so as to give jurisdiction to the Magistrate to act under that section. The dispute between the parties



is with regard to quarrying boulders for ballast purposes and this obviously could not be done during the monsoon when the police report was submitted.

It is now settled that in order to give jurisdiction to a Magistrate to exercise the quasi civil powers conferred upon him by S. 145, Criminal P. C., he must rely for the initiation of the proceedings upon such materials as would disclose the existence of a dispute likely to cause breach of the peace. Now the words used in the section are "a dispute likely to cause a breach of the peace exists." We have to give a reasonable and natural meaning to those words. It is to be seen whether the section requires that there should be a dispute in existence which is likely to cause a breach of the peace at any time or whether the dispute should be such that it is likely to cause a breach of the peace at the time when the proceedings are drawn up. From very early times since this provision of the law came under judicial interpretation it has been held that the dispute must be such as is likely to cause a breach of the peace at the time. In some cases it is said that this likelihood should be "imminent" or "immediate." It has been observed in *Kulada Kinkar Roy v. Danesh Mir* (1), that the introduction of the word "imminent" into the section, giving it a stronger significance than the words used there bear, is not justifiable. That may be correct though the word "imminent" was used in the Full Bench case of *Khos Mahomed v. Nazir Mahomed* (2) in the judgment of Ghose, J. It has been used in various other cases but what the learned Judges always meant by it was the presence of a likelihood of the breach of the peace at the time when the proceedings were drawn up. It does not seem to be reasonable that the word "dispute" should be read apart from the qualifying words "likely to cause a breach of the peace." A dispute may exist which is likely to cause a breach of the peace at any future time (may be years thence). But what the criminal law is concerned with, to make a breach of the peace a ground for its interference is such likelihood as is present at the time. We have got the high authority of Garth, C. J., in

*Uma Charan Santra v. Beni Madhab Roy* (3), the facts of which case are very similar to those of the present case. There the Magistrate acted upon the report of a cannungoe which said that the first party was in actual possession of the disputed land; that no present apprehension of a breach of the peace existed; but that in the absence of an order under S. 530 a breach of the peace was likely to occur at a time when the cultivation of the disputed lands would be proceeded with. The learned Chief Justice observed that the report upon which the learned Magistrate had relied disclosed no present danger of a breach of the peace although it suggested that probably at the time of the cultivation which would be some 3 or 4 months afterwards there might be a danger of that kind. He then said:

"It is clear that if there was no likelihood of breach of the peace at the time when the order was made the probability of a breach of the peace some 3 or 4 months later did not justify the Deputy Magistrate in making the order."

The same view has been expressed by another eminent Judge Mitter, J., in *Damodur Biddyadur v. Syamanund Dey* (4) where the learned Judge said:

"A Magistrate would have no jurisdiction under S. 530 (S. 145 of the present code) unless he was satisfied that there exists a dispute concerning lands and which dispute is likely to induce a breach of the peace that is, there must be a reasonable apprehension that a disturbance of the peace is likely to occur, rendering it necessary for the Magistrate to take immediate action under S. 530, Criminal P. C., to prevent the apprehended breach of the peace."

For this view the learned Judge has relied upon a number of decisions beginning with *Hervey v. Brice* (5). The same view was adopted in *Janu Manjhi v. Maniruddin* (6) where the word "immediate" is used in place of "imminent." In *Surja Kanta v. Jagadindra Nath* (7) and in *Maharaj Bahadur Singh v. Raja Ranjit Singh* (8), where the police report said that though there was nothing to show that there was a likelihood of a breach of the peace, it was not impossible that there might be a breach of the peace. It is better to avoid the use of words like "imminent" or "immediate" which have

(3) [1880] 7 C.L.R. 352.

(4) [1881] 7 Cal. 385=8 C.L.R. 514.

(5) [1865] 4 W.R. 26.

(6) [1904] 8 C.W.N. 590.

(7) [1906] 11 C.W.N. 193.

(8) [1906] 11 C.W.N. 835.

(1) [1906] 33 Cal. 33=2 C.L.J. 271=10 C. W. N. 257 (F.B.).

(2) [1906] 33 Cal. 352=2 C.L.J. 259=9 C. W. N. 1065 (F.B.).



been objected to but what I understand by the use of the words "dispute likely to cause a breach of the peace exists," is that the dispute must exist and it should be of such a character as likely to cause a breach of the peace unless proceedings are now taken under S. 145, Criminal P. C. In other words, proceedings are to be taken under that section in order to avert a breach of the peace which would otherwise take place due to the existence of a dispute between the parties. As I have pointed out, the police report on which the Magistrate relies does not show that there was any likelihood of a breach of the peace at the time when the proceedings were drawn up by it but it shows that there was a possibility of a collision between the parties at a future time namely, about two months from that date. The learned Magistrate has in his explanation referred to several circumstances which had happened before drawing up the proceedings showing that there was a likelihood of a breach of the peace. The proceedings would have been in order if reference were made to those circumstances. But the learned Magistrate who is not the Magistrate who has submitted the explanation relies solely upon a report which does not show that there was any likelihood of a breach of the peace existing at the time.

On this ground alone this rule, in my judgment, must be made absolute and the proceedings under S. 145, Criminal P. C., drawn up by the learned Magistrate on 26th June 1928, must be set aside. It will be of course open to the Magistrate to draw up fresh proceedings upon sufficient materials if the likelihood of a breach of the peace still exists.

**Graham, J.**—The rule in this case was issued on three grounds. I agree that it should be made absolute on the first of those grounds which briefly stated is that the proceedings were without jurisdiction. It is well settled that it is the existence of a dispute likely to cause a breach of the peace which confers jurisdiction on the Magistrate to initiate the proceedings. The word used in the section is "exists" and there can be no doubt that the dispute existed. It is clear, however, from the police report that there was at the time no likelihood of any breach of the peace, and indeed that no such likelihood had existed for about a month previous to the submission of

the police report. All that was disclosed in that report was that there was a likelihood at some future date of a breach of the peace. That according to the current of decisions in this Court was not sufficient to give jurisdiction. For these reasons I agree with my learned brother that this rule must be made absolute.

S.N./R.K.

*Rule made absolute.*

### \* A. I. R. 1929 Calcutta 343

SUHRAWARDY AND GRAHAM, JJ.

*Abdur Rashid and others*—Accused—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1378 of 1928, Decided on 24th January 1929.

\* (a) Criminal P. C., S. 439—High Court can enquire into validity of reasons for discharging jury.

In view of the wide provisions of S. 439 of the Code it is difficult to say that the High Court is debarred from enquiring into the validity of the reasons for discharging a jury. [P 344 C 2]

\* (b) Criminal P. C. S. 282—Jury—Judge has inherent power to discharge jury on suspicion when satisfied that reasonable grounds exist for exercise of his discretion.

Though the Code of Criminal Procedure has not specifically conferred any right on the Judge to discharge a jury on the ground of misconduct yet every Judge has an inherent power to discharge a jury when he is satisfied by such enquiry as in the circumstances he can adopt that reasonable grounds exist for exercising the discretion vested in him to discharge a jury on suspicion: *A. I. R. 1923 Cal. 724, Foll.*; *A. I. R. 1929 Cal. 57, Rel. on.*

[P 345 C 1]

(c) Criminal P. C. S. 276—Jury—Discharged jurors should not be recalled in same case to act as jurors.

A jury having once been discharged should not be recalled to do duty as jurors in the same case as it is reasonable to suppose that after their discharge the jurors might have mixed freely with the people and talked about the case with others and formed decided opinions about the case: *A. I. R. 1927 Cal. 199, Foll.*

[P 345 C 1]

(d) Criminal P. C. S. 282—Jury—Grounds for discharging jury.

Suspicion in the mind of a Public Prosecutor is not and could never be recognized as a good or valid ground for discharging a jury. Something much more definite and tangible than this is necessary. [P 345 C 2]

*Sures Chandra Taluqdar and Mahendra Kumar Ghose*—for Petitioners.

*Sachindra Nath Banerjee*—for the Crown.



**Suhrawardy, J.**—This rule has been issued on two grounds: (1) that the order of the Additional Sessions Judge discharging the jury and directing a fresh trial of the petitioners is wrong and should be set aside; and (2) why the case should not be transferred from Noakhali to Comilla.

As regards the first ground the facts are that the trial went on for a long time and the argument on behalf of the defence was finished and while the Public Prosecutor was arguing on behalf of the Crown an application was filed by the Public Prosecutor for discharging the jury. The facts mentioned in the application were that one of the jurors had called at the house of the Public Prosecutor and that two others were seen talking to a person belonging to the accused party. The application was supported by affidavits and the learned Additional Sessions Judge thereupon examined the pleader Babu Ashutosh Mukherjee and a juror M. Abdul Khaleque. He did not institute a searching enquiry but after examining these witnesses he was of opinion that it was a case of (at least) suspicion and, therefore, he thought it necessary in the interest of justice to discharge the jury. The learned advocate on behalf of the accused argues that the learned Judge should have instituted a regular enquiry into the matter and then if he was satisfied that there was reason to believe that the jurors would not be impartial and would be influenced or if there had been good grounds for suspecting their integrity he could then and then only have discharged the jury. It is regrettable that the trial went on for over 32 days and the case was on the point of being finished when this untoward incident occurred. On behalf of the Crown it is argued that a Judge presiding over the Sessions has absolute right to determine the propriety of discharging a jury and his discretion cannot be questioned either in appeal or in revision. The English law on the point certainly favours this view. It was at one time held that the reasons which led a Judge to discharge a jury may be scrutinized by a Court of appeal or in revision: see *Edmond Conway and Patrick Lynch v. The Queen* (1) Subsequently this view was disapproved in

*Windsor v. Regina* (2) by the Original Court and also on appeal from that case reported in the same volume at p. 390. The law as it stands in England is that a Judge may at his discretion discharge a jury even though there may not exist "absolute" necessity for doing it but a high degree of necessity for such a discharge is evident. In the *King v. Ketheridge* (3), one of the jurors separated himself from his colleagues by mistake. It was held that it was a sufficient reason to justify the order of the Judge for discharging the jury and that it was not necessary or relevant to consider whether the irregularity has in fact, prejudiced the prisoner. It is not necessary for us to go so far as to hold that this Court has no jurisdiction to enquire into the reasons which led the Judge to discharge the jury. In view of the wide provisions S. 439, Criminal P. C., it is difficult to say that this Court is debarred from enquiring into the validity of the reasons for discharging a jury. In some cases in England a Court of appeal had occasion to question the propriety of the reasons for discharging a jury: see *Regina v. John Barff Charlesworth* (4).

Mr. Taluqdar for the accused says that the learned Judge has nowhere expressed his opinion that the jury had acted in such a way as to justify a conclusion that they were not impartial. But it appears from the order of the learned Judge that to his mind it was apparent that some attempts had been made to influence three of the jurors, and that the materials placed before the Court were sufficient to show that the Public Prosecutor had reasonable grounds for suspicion against three of the jurors. Though the learned Judge would have been well advised to push the enquiry a little further but when he discovered that there were good grounds for suspecting the impartiality of some of the jurors, it was not only discretionary on his part but it was incumbent on him to discharge the jury in order to give the trial a look of fairness. That the Judge has the right to discharge the jury under circumstances which in his opinion justifies the course has been approved of or tacitly admitted in this Court in the case of *Rahim Sheikh v. Emperor* (5).

(2) [1866] 1 Q. B. 239.

(3) [1915] 1 K. B. 467.

(4) [1831] 2 F. & F. 326.

(5) A. I. R. 1923 Cal. 724=50 Cal. 872.

(1) [1845] 1 Cox. 210.



where it has been held that though the Code of Criminal Procedure has not specifically conferred any right on the Judge to discharge a jury on the ground of misconduct but every Judge has an inherent power to discharge a jury when he is satisfied by such enquiry as in the circumstances he can adopt that reasonable grounds exist for exercising the discretion vested in him to discharge a jury on suspicion. A similar view was expressed in *Rebati Mohan Chakravarty v. Emperor* (6). There is another fatal objection to Mr. Taluqdar's request to recall the same jury and continue the trial by them. A jury having once been discharged should not be recalled to do duty as jurors in the same case for apparent reasons. It is reasonable to suppose that after their discharge the jurors might have mixed freely with the people and talked about the case with others. In *Emperor v. Monmotha Nath* (7), it was held that a jury once discharged should not with propriety be recalled in the same case on these grounds I dispose of Mr. Taluqdar's first objection and disallow it.

With regard to the second objection relating to transfer the application is opposed by the Crown and the reason given to me is that Noakhali is an easier access from the residence of the accused and the witnesses than Comilla. There is another strong reason for not allowing the case to be transferred from Noakhali and that is that the occurrence took place in the district of Noakhali and the investigation was held by the local police who are apparently in charge of the case. No ground has been made out for the transfer of the case and this prayer is also disallowed.

The result is that the rule is discharged. Let the papers be sent down at once with the request that the trial may be commenced as early as possible. I regret very much that after such a protracted trial the case had to be tried anew; but in the circumstance of this case there is no other alternative.

**Graham, J.**—I agree. In my opinion the only course open to us in the circumstances which have happened in this case is to direct a fresh trial before another Jury. It is a most unfortunate case. The charges were under Ss. 302/149, 326 and

324, I. P. C., and the trial lasted nearly three months from 21st June 1928 till 13th September 1928. 23 witnesses were examined for the prosecution, and 12 for the defence. Arguments were then heard on eight days, and on 7th September after the Public Prosecutor had addressed the Court on four of these dates without apparently concluding his remarks he filed an application, at the 11th hour so to speak, asking that the jury should be discharged upon certain grounds and having reference to incidents alleged to have happened on 4th and 5th September.

The learned Judge thereupon after some sort of enquiry recorded an order discharging the jury. There is no provision in Criminal Procedure Code for discharging a jury for misconduct the only sections of the Code relating to the discharge of a jury before verdict being Ss. 282 and 283. It has been held, however, by this Court in *Rahim Sheik v. Emperor* (5) that a Sessions Judge has inherent power to make such an order.

It is a serious matter, however, to discharge a jury, and it seems to me that the learned Judge before taking so important a step should have made a full and careful enquiry. I regret to say that he does not appear to have done so. For example the Public Prosecutor was not examined, though he was obviously a material witness, and indeed it was upon the alleged suspicions of that officer that the learned Judge based his order. It seems to be clear too that the Judge cannot have properly appreciated what is necessary in order to justify such a serious step as the discharge of the jury. For he observes as follows:

"The materials placed before the Court are sufficient to show that the Public Prosecutor has reasonable grounds for suspicion against three of the jurors."

Suspicion in the mind of a Public Prosecutor is not and could never be recognized as a good or valid ground for discharging a jury. Something much more definite and tangible than this is necessary.

But though I think the order cannot be supported, it seems to me to be quite out of the question to set it aside and direct the trial to be resumed before the same jury. There are two reasons why that course cannot be adopted, firstly because an interval of over four months has elapsed since the trial came to its abrupt end and because the jury have by

(6) A.I.R. 1929 Cal. 57=56 Cal. 150.

(7) A. I. R. 1927 Cal. 199.



this time presumably forgotten all about the evidence. Even if that evidence were read over to them in order to refresh their memory it could never be the same thing. Matters connected with the demeanour of witnesses should be fresh in the minds of a jury when they are called upon to give their verdict.

The second reason is that in the interval the case may have been the theme of discussion in the neighbourhood, and the members of the jury may have formed decided views on the case one way or the other. In this connexion I may refer to the case of *Emperor v. Monmotha Nath Mitter* (7) and in particular to the remarks made by the learned Chief Justice at p. 147 thereof. The present case is a good deal stronger than that case. For the reasons which I have stated the case cannot, despite the time which has already been spent over it, be allowed to be tried before the same jury. There may be some doubt too whether we can set aside such an order when once it has been made. But we can, and I think ought, to direct a de novo trial before a fresh jury, and if possible before another Judge.

Before parting with the case I should like to say that it seems to me to be nothing short of a scandal that the trial of this case, a case of no particular importance and with no special features, should have taken up nearly three months of the time of the Sessions Court. The advocate for the defence addressed the Court on five days occupying about four whole days in so doing, and the prosecution took another four days. To my mind this exceeds the limits of reasonable advocacy. It is only right and proper that both sides should have time to place their arguments fairly before the Court and indeed they have a right to do so, but that right is abused when no less than eight days of the Court's time are taken up. Some restraint should be exercised in these matters. Ordinarily a day, or at the utmost two days should be sufficient for both sides to say what there is to be said in a case of this description.

There was also a prayer for transfer but no sufficient ground has in my opinion been made out for such an order. I may observe in conclusion that a perusal of the order sheet appears to show that the defence in this case was conducted in what I can only describe as a contumacious and objectionable spirit frequent peti-

tions being filed before the Judge some of them questioning his rulings, and many of them being of a frivolous nature. If it had not been for this attitude on the part of the defence it is possible that the trial would have concluded before the events which from the subject-matter of this Rule happened, if indeed they took place as alleged. For the reasons given I agree with my learned brother that the Rule should be discharged.

M.N./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 346

MUKERJI, J.

*Muhammad Gul*—Petitioner.

v.

*Hazi Fazley Karim*—Opposite Party.

Criminal Revn. No 1222 of 1928, Decided on 22nd January 1929, against decision of 3rd Presidency Magistrate, Northern Division, Calcutta.

(a) Criminal P. C., S. 4 (b)—Complaint alleging commission of offence and praying for police investigation in non-cognizable case, is a valid complaint.

In a complaint of a non-cognizable case to a Magistrate after the allegations that the accused had committed an offence the prayer was worded thus: "Under the circumstances complainant prays that your Honour would be pleased to order the D. D. Police to cause an enquiry to be made into the matter and the allegations made against the complainant and to submit the report of the same to your Honor. And, for the time being, your petitioner reserves the right of bringing a case of defamation against the accused in future."

*Held*: that the petition satisfies the definition of complaint as given in S. 4 (b), Criminal P. C. [P 347 C 2]

(b) Criminal P. C., S. 68—Prayer for issue of summons can be orally made.

Under the law a verbal prayer for issue of summons to an accused is sufficient.

[P 348 C 1]

(c) Criminal trial—Duty of Court—Before convicting the Court must see if facts proved do not bring the case within the exception which take it out of the offence.

Unlike a civil suit in which the Court is confined more or less to the pleadings, in a criminal case, before a conviction is recorded, it always has to be seen whether the proved or admitted facts bring the case within an exception, which takes it out of the offence defined even though the accused has not specifically relied on getting the benefit of the exception. [P 348 C 2]

(d) Penal Code, S. 499, Exceps. 8 and 9—Determination of good faith—Desire of accused to protect himself rather than to



**injure other — Accused is protected by Exceps. 8 and 9.**

The Court in determining the question of good faith should have to take into account the intellectual capacity of the person, his predilections and the surrounding facts: 4 Cal. 124 and 31 Bom. 293, *Rel. on.* [P 349 C 2]

Where it was found that an accused acted with a desire to protect himself by an appeal to the Magistrate, rather than to injure others, the accused is protected by Exceps. 8 and 9 of S. 499: 4 Cal. 124, *Foll.*

[P 350 C 1]

*B. C. Mitter and Satindra Nath Mukherji*—for Petitioner.

*Langford James and Probodh Chandra Chatterjee*—for Opposite Party.

**Judgment.**—The petitioner Mohamad Gul has been convicted by the third Presidency Magistrate, Northern Division, Calcutta, under S. 500, I. P. C., and sentenced to pay a fine of Rs. 100 in default to undergo rigorous imprisonment for one month, the fine to be paid to the complainant as compensation. The subject matter of the defamation was contained in a petition which the petitioner filed in the Court of the Additional Chief Presidency Magistrate, Calcutta, on 22nd March 1928. It was a petition against four persons namely the opposite party Haji Fazle Karim, one Golam Nabi, one Shamsuddin and one Abdur Rashid. It ran in these words:

"The petitioner is a merchant in a leather goods and is on inimical terms with the defendants above named over a landed property in their native District in Punjab. In order to bring your petitioner's party to terms the accused persons caused the petitioner to be implicated in several false cases:

(1) A cocaine case in Burdwan in which the petitioner was discharged:

(2) A pistol planting case in which also on enquiry it was found that the petitioner has been falsely implicated.

After all these onslaughts the petitioner moved the learned D. C. Detective Department and he directed them to be warned in the first instance. This has enraged them further more. Accused 1 is the brother of the famous goonda Mukhia who was shot dead and accused 2 is his relation. They have started again threatening the complainant and his men with bodily injury this time. The petitioner has got to go to their side of Machua-bazar as he has got business connexions there. They are thus in constant danger of bodily injury or threat by their men. In fact twice they were assaulted by some people whom they can identify and police has been informed.

Under the circumstances it is prayed for that they may be warned not to molest the petitioner or his men in the first instance.

The whole of this petition was incorporated in the charge that was framed

against the petitioner under S. 500, I. P. C. It contains a multitude of statements and it was not quite right to leave it to the accused to find out which exactly are the imputations that were intended or believed to cause harm to the reputation of the opposite party. No complaint, however, has been made before me on this ground and perhaps it was the case that all the statements were so intended or believed.

The rule has been issued upon three grounds: 1st, that the elements necessary to constitute the offence has not been made out; 2nd, that the petition of the opposite party upon which the case against the petitioner was started was not a complaint within the meaning of the law and S. 198, Criminal P. C., was a bar to the trial of the case; and 3rd, that the petitioner was protected by Exceps. 8 and 9 to S. 499, I. P. C. The first and the third grounds go together, while the second ground is really a combination of two grounds as will be presently seen.

It will be convenient to deal with the second ground first. Under the ground it is contended in the first place that the petition of the opposite party was not a complaint within the meaning of the law. This petition was filed on 5th April 1928. In it it was alleged that the petitioner and others had combined together and as a result of the conspiracy the petitioner had filed the petition of 22nd March 1928, falsely implicating the opposite party in the cases and acts mentioned therein in order to disgrace the opposite party. The prayer in it was worded thus:

"Under the circumstances complainant prays that your Honour would be pleased to order the D. D. Police to cause an enquiry to be made into the matter and the allegations made against the complainant and to submit the report of the same to your Honor. And, for the time being, your petitioner reserves the right of bringing a case of defamation against the accused in future".

I am clearly of opinion that the petition satisfies the definition of complaint as given in S. 4 (h), Criminal P. C. It contained allegation that the petitioner had committed an offence and it was made to a Magistrate with a view to his ordering a police enquiry an action under S. 155 of the Code without which action the police would not be able to take up the investigation the case being a non-



cognizable one. It is said under this ground, in the next place, that in the face of the prayer in the aforesaid petition in which it was expressly stated that the opposite party reserved his right to bring a case of defamation in future the trial could not take place as S. 198, Criminal P. C., would operate as a bar. On behalf of the opposite party it is pointed out that S. 198 does not bar a trial but only the cognizance of the offence specified therein and that if the petition of the opposite party dated 5th April 1928 fulfils the requirements of the definition of complaint as given in S. 4 (h) the Magistrate was competent to summon the accused and go on with the trial notwithstanding the express reservation contained in the prayer in that petition. To accede to the contention of the opposite party would perhaps be to put a rather narrow meaning upon S. 198, but I do not desire to express any decided opinion on the point. It is sufficient for me to refer to the order of the Additional Chief Presidency Magistrate, dated 2nd May 1928 by which he summoned the petitioner to stand his trial under S. 500, I. P. C. This order appears to me to indicate beyond doubt that on the report of the police having been submitted the opposite party was further examined on his complaint and gave good reasons as to why there should be a trial of the case. It is, in my judgment, a perfectly fair inference to draw from the contents of the order that the opposite party at this stage orally prayed for summons on the petitioner. Under the law a verbal prayer for this purpose is sufficient. The second ground, therefore, in both its branches must be overruled.

As regards the first and the third grounds which I have said go together, what has to be seen is whether the petitioner is protected by the 8th or the 9th exception to S. 499, I. P. C. The question whether defamatory statements, contained in a petition before a criminal Court, on the basis of which the Court is asked to take action, should on the ground of expediency, form the subject-matter of other charges than that of defamation is one on which neither side has addressed any arguments and is therefore not one into which I need enter. As regards the exceptions the learned Magistrate in his judgment does not appear to have dealt with them. He has simply dealt with

the plea of veritas and has overruled it, observing that

"accused has adduced no evidence to show that the allegations are true."

The 8th or the 9th exception does not appear to have been considered by him at all, as they should have, even if the petitioner did not specifically rely on them provided of course that the facts gave rise to a consideration of these exceptions. Unlike a civil suit in which the Court is confined more or less to the pleadings, in a criminal case, before a conviction is recorded, it always has to be seen whether the proved or admitted facts bring the case within an exception, which takes it out of the offence, defined. The burden of proving such facts, of course, is on the accused. The question of these exceptions, therefore, requires investigation.

Now, what are the facts proved in the case? The petitioner 'Mahamed Gul has a business in shoes under the name of Gulzari and Co. and Kamruddin the son-in-law of one Fatehdin who is a brother of the petitioner had a separate business in cardboard vide: P. W. 4 Mohamed Amin cross-examination. The opposite party Hazi Fazlay Karim also has a cardboard business and there is trade rivalry between him and Kamruddin. In an application made by the opposite party to Mr. Bird for a police warning he mentioned the fact of this trade rivalry vide: P. W. 7 Fazlay Karim cross-examination. One Mahamed Khan and one Abdul Khan sold land with building to one Mohamed Amin (not P. W. 4), one Golam Nabi and one Abdul Rashid. The opposite party was a witness to the kobala in respect of this transaction, and in consequence of this transaction there is litigation pending between one Fazal-din, a nephew of the petitioner and some others on the one hand, vide P. W. 7 Fazlay Karim cross-examination and Abdul Rashid and Mohamed Amin (not P. W. 4) and possibly other persons on the other. (vide P. W. 4 Mohamed Amin cross-examination) Abdul Rashid is the son of the said Mohamed Amin (not P. W. 4), and Kamruddin was formerly a partner of Golam Nabi but left the partnership about three years ago vide: P. W. 4 Mohamed Amin cross-examination. That there has been some quarrel between the opposite party and the



petitioner for some reason or other is abundantly clear because the opposite party has stated in his evidence :

"Mr. Amir Ali went and saw Mr. Bird on my behalf but I did not instruct him. I told Mr. Amir Ali about the quarrel between myself and the accused. I made an application before Mr. Bird in which I mentioned about the business rivalry with Kamruddin ; after the warning I made two complaints against the accused at the Jorasanko Thana."

It may be that the quarrel that the opposite party was referring to was the quarrel in consequence of the allegations that had been made against him by the petitioner before Mr. Bird and which were founded upon a number of entries which the petitioner had got made at the thana against him and upon the basis of which allegations the petitioner had obtained a warning order against the opposite party : vide P. W. 7 Fazley Karim, examination-in-chief. Be that as it may, it is abundantly clear that while on the one hand there is a large body of evidence establishing the fact that the opposite party is quite a respectable man, there is on the other hand the undeniable fact that the petitioner was persistently charging him with conspiracy with his enemies and also threatening him in various ways.

The defence of veritas has been negatived by the learned Magistrate and I think he has taken the correct view so far as that matter is concerned, but the question remains whether upon the facts established upon the evidence to which I have referred exceptions 8 and 9 or either of them protects the petitioner.

In dealing with these exceptions the question of good faith has to be considered. The definition of good faith in S. 52, I. P. C., it is true, does away with the presumption that the accused acted bona fide until the contrary is proved and under the Indian law the accused has to show that he has made the imputation not without due care and circumspection. But the question to what extent should he have pushed his care and circumspection is a different matter altogether. Markby, J., in the case of *In the matter of the petition of Shibo Prosad Pandah* (1), in dealing with the question of good faith within the meaning of the exceptions to S. 499 and in view of S. 105, Evidence Act, observed :

"The law in the mofussil is apparently that which common sense seems to me to teach, namely, that in a case of this kind the Court had a right to call upon the party making the imputation to show that he has some reasonable ground for making it."

In the case of *Emperor v. Abdool Waddood* (2) it has been said :

"Good faith requires not, indeed, logical infallibility but due care and attention. How far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning."

The Court in determining the question of good faith should, in my judgment, should have to take into account the intellectual capacity of the person, his predilections and the surrounding facts.

Now the following facts cannot be disputed. The two cases referred to in the petitioner's complaint of 22nd March 1928 were false cases, instituted with the object of injuring the petitioner. Then there is the fact, spoken to by the pleader P. W. 6 M. Yakub who has not been disbelieved by the learned Magistrate that in connexion with a case at Sealdah under S. 420, I. P. C. against Fazaldin, nephew of the petitioner and which case the petitioner was looking after on behalf of the said nephew, the opposite party was seen interesting himself in one Emamon, the complainant in that case. Fazaldin was acquitted in that case, the learned Magistrate observing :

"The whole incident has the appearance of a faked up case intended to harass the accused by bringing him down from Rawalpindi on the off-chance of securing a conviction by false evidence. It suggests a deep-rooted hostility which has inspired this prosecution."

P. W. 6 M. Yakub also says that Golam Nabi who is one of the other persons named as accused in the complaint of 22nd March 1928, and whose address is given in the said complaint as the same as of the opposite party, was seen at Burdwan in connexion with the cocaine case against the petitioner. Judging the case by the standard I have indicated above, these as well as the other facts which have already been stated as established on the evidence, in my judgment, may not unreasonably

(1) [1879] 4 Cal. 124=3 C. L. R. 122.

(2) [1907] 31 Bom. 293=9 Bom. L. R. 230.



have created an honest belief in the mind of the petitioner about the complicity of the opposite party in a conspiracy against him, however much that belief may be unfounded in fact. I think I cannot put my conclusions in this case in better words than those used by Prinsep, J., in the case of *In the matter of the Petition of Shibo Prasad Pandah* (1), where he said :

"I have little doubt that he (the accused) acted with a desire to protect himself by an appeal to the Magistrate, rather than to injure others."

The rule is made absolute. The conviction and sentence are set aside. The fine, if paid, will be refunded.

M.N./R.K.

*Rule made absolute.*

### A. I. R. 1929 Calcutta 350

SUHWARDY AND GARLICK, JJ.

*Raman Chandra Das Dalal* — Defendant—Appellant.

v.

*Bhola Nath Hati and another*—Plaintiffs—Respondents.

Appeal No. 790 of 1926, Decided on 13th July 1928, from appellate decree of Dist. Judge, Birbhum, D/- 15th February 1926.

**(a) Easements Act, S. 29 — Easement of running water—Overburdening by addition of foul water is not permissible.**

The discharge of foul effluent into a drain through which there may be a presumed grant of running water is not permissible in law as it imposes an overburden on the servient tenement : *Philimore v. Watford Rural Dist. Council*, (1913) 2 Ch. 434 ; *Hill v. Cook*, 26 L. T. 185, *Cawkwell v. Russel* 26 L. J. Ex. 34, Foll. ; *Clarke v. Sommersetshire Drainage Commissioners*, 59 L. T. 670, Ref.

[P 351 C 1]

**(b) Easements Act, S. 31—Excessive user may be rendered impracticable but whole user cannot be obstructed.**

In the case of excessive user the aggrieved party may render such user impracticable but he has not the right to obstruct the exercise of the user in its entirety : *Renshaw v. Bean*, 18 Q. B. 112 Held modified ; *Tapling v. Jones*, 11 H. L. C. 290 ; and *Colls v. Home and Colonial Stores*, (1904) A. C. 179, Ref.

[P 352 C 1]

**(c) Easements Act, S. 4—Right to allow passage to sweepers may not be an easement.**

It is doubtful if the right to allow sweepers to pass is a right of easement which can attach itself to a tenement.

[P 352 C 2]

*D. N. Chakravarty, Bankim Chandra Mukkerjee and Ramini Mohan Banerjee*—for Appellant.

*Surendra Nath Ghosal*—for Respondents.

**Judgment.**—The plaintiffs and the defendant are neighbours. Their houses are contiguous with a small lane dividing the two premises in the town of Bolepur. In the lane there is a drain 1' 2" wide at the head. The plaintiffs' case is that the land over which this drain runs belongs to them and that they left it for their own convenience between their and the defendant's houses. This was about 30 years ago. The defendant has now wrongfully obstructed it by building a wall over a portion of it lengthwise thereby obstructing the flow of water and the passage of sweepers. The defendant's case is that the drain was made by mutual consent of parties over their joint land in order to carry rain-water and the washings of the houses. In 1329 the plaintiffs erected a privy on the first floor the foul water of which is now flowing into the drain. The defendant, therefore, has walled up his portion of the drain which he says he is entitled to do. The trial Court held that the land on which this drain exists belonged to the plaintiffs and therefore the defendant had no right to put up a wall upon it. Coming to this conclusion the learned Munsiff did not think it necessary to consider the right of the plaintiffs based on easement ; but he observed that there was no evidence of express grant and that since the time when the drain was built was known, the plaintiffs could not claim user from time immemorial. He further remarked :

"Even if it be supposed that the plaintiffs have easement right by prescription so far as the flow of rain-water from the roofs of the houses of the parties is concerned, as the time since the construction of the privy does not cover the prescription period and because no additional burden can be imposed upon the servient tenement the issue is decided against the plaintiffs."

The defendant appealed. The learned District Judge did not agree with the finding of the Munsif that the land on which the drain was erected belonged to the plaintiffs. He found upon evidence that the defendant's story that both the houses were constructed in 1302 and that the parties agreed give up equal extent of land for the drain was correct.



But the learned Judge held that the flow of foul of water from the privy did not place any additional burden upon the servient tenement and it did not so radically change the nature of the fluid passing along the drain as to warrant the defendant closing it up. The reasoning of the learned Judge is expressed in not very clear language but what he means can be gathered from his judgment. He says that the drain used to carry rain-water and also other water which could not be said to be pure :

"the water that passed along the drain has never been pure. The impurities so far have been chemical and mechanical. Organic impurities are now added."

If the learned Judge by these words means that where a person acquires a right of flowing water not quite pure through a drain he has thereby the right to the flow of foul water from privy carrying human organic matter, he is wrong. That the discharge of foul effluent into a drain through which there may be a presumed grant of running water is not permissible in law as it imposes an overburden on the servient tenement is established by numerous authorities in England. *Philimore v. Watford Rural District Council* (1) which was a counter case to the case before us, it was held that a grant of flow of water did not authorise the discharge of a sewage effluent. Eve, J. indicated the claim and said that :

"this consideration and the fact that every one must have appreciated that sooner or later an effluent would have to be dealt with and that the obvious, if not the only, channel into which such effluent would be discharged was the one into which they have in fact discharged it, all combine to preclude the plaintiff from now complaining of the discharge of the effluent. I do not accept this view."

In *Clarke v. Sommersetshire Drainage Commissioners* (2) the easement was the right to pollute a stream by pouring in the refuse of a fellmongery and the washings of dyes used in a coloured rug manufactory. The fellmongery was abandoned and the manufacture of leather boards substituted. The pollution was less than that caused by the old business, yet it was held that the user was so different that the prescriptive right did not extend to the new trade and the

easement was lost. In *Cawkwell v. Russell* (3) the plaintiff alleged to have a right of user for general drainage and the right of user was only to use the drain not for foul drainage but for ordinary refuse water. Pollock, C. B. held that as the plaintiffs failed to prove a prescriptive right to conduct foul water from the privy into the drain in question the defendant was entitled to a verdict in his favour. The same view was taken in *Hill v. Cook* (4) and *Cawkwell v. Russell* (3) was approved. The learned Judge accepted the defendant's case that the drain was originally intended to carry rain-water as also the discharge of the washings of the houses which the learned Judge characterized as containing chemical and mechanical impurities. The plaintiff's case in para. 6 of the plaint was that they prepared this drain for the purpose of discharging rain-water, plastering and whitewashing their premises and for other necessary purposes. So that it may be fairly held on the evidence as has been held by the learned Judge that the drain was intended to carry rain-water and such other water as would come out of the houses in ordinary course. It is admitted that there is no evidence of a grant and so in the circumstances of the case no right of easement can be claimed. It was a matter of arrangement between the parties rather than the conferment of mutual rights of easement. Whatever that may be, if there was an agreement it was clearly an agreement for the purposes mentioned ; if it is an easement it is limited to those purposes. The discharge of foul water from privies was not one of the purposes in the contemplation of the parties when they made the agreement. I am quite clear in my mind that in the circumstances of this case the discharge of foul water from the privy is a case of excessive user and adds to the burden on the servient tenement or it is a case in which the plaintiffs have gone beyond the arrangement between the parties at the time of the construction of their houses.

Now, the question is what relief, if any, can the plaintiffs get and whether the conduct of the defendant is justifiable? At one time the law was laid down that where the owner of a dominant tenement uses the easement in an ex-

(1) [1918] 2 Oh. 434=82 L. J. Oh. 514=57 S. J. 741=11 L. G. R. 980=77 J. P. 453=109 L. T. 616.

(2) [1921] 59 L. T. 670.

(3) [1856] 26 L. J. Ex. 34.

(4) [1872] 26 L. T. 185.



cessive manner the servient tenement is entitled to obstruct the legitimate user of the easement which is lost to the dominant tenement holder: *Renshaw v. Bean* (5). The view of law, however, was subsequently modified by the House of Lords in *Tapling v. Jones* (6) and *Colls v. Home and Colonial Stores* (7). The law as it now stands is that in the case of excessive user the aggrieved party may render such user impracticable; but he has not the right to obstruct the exercise of the user in its entirety.

"If the owner of an easement exceeds his rightful user or does anything which would after long user produce an increased right, the servient owner may in all cases obstruct or prevent the excessive user or new mode of enjoyment, if he can do so without obstructing the rightful user: *Goddard on Easement* p. 349".

Now in the present case the defendant has built a wall covering a portion of the drain. It has not been proved that he has exceeded the limit of his portion. As a matter of fact it has been found by the Commissioner who held a local enquiry that the portion of the drain still left open is eight inches in width which is more than one-half of the width of the drain. The defendant cannot therefore be said to have obstructed the plaintiffs in the proper exercise of the right of user they had in the drain.

Looking at the plaint made by the plaintiffs in the suit it seems difficult to give them any relief in it. They have come to Court on the allegation that they are the owners of the drain. They have failed to prove that case and it is found that defendant is the owner of one-half of the drain. Plaintiff's portion has not been encroached upon by the defendant and it is not found that there is any obstruction to the flow of water through the portion that has been left open.

The next question raised is with regard to the right of sweepers to pass along the drain in order to clean the plaintiff's privy on the first floor. The Munsiff remarks that no easement by prescription even can be acquired for cleaning the privy. The learned Judge says that sweepers come to clean the drain and therefore their right of passage could not be obstructed. In the first place, it is

difficult to say that the right to allow sweepers to pass is a right of easement which attaches itself to a tenement and in the second place according to the evidence and the finding of the Munsiff it appears that sweepers passed since when the privy was erected by the plaintiff in 1329.

As the result of the above considerations, this appeal must be allowed, the decree of the lower appellate Court set aside and the plaintiff's suit dismissed with costs in all the Courts.

If the plaintiff removes the privy or ceases to discharge foul water into the drain plaintiffs may claim removal of the obstruction put up by the defendant if he establishes his easement as was suggested in *Cawkwell v. Russel* (3).

In view of our judgment in the appeal the cross-objection is dismissed.

M.N./R.K.

Appeal allowed.

## A. I. R. 1929 Calcutta 352

B. B. GHOSE AND BOSE, JJ.

*Khajeh Habibulla* — Judgment-debtor — Appellant.

v.

*Kaviraj Jogendra Nath Sen* — Decree-holder — Respondent.

Appeal No. 452 of 1927, Decided on 27th July 1928, from original order of 1st Class Sub-Judge, Dacca, D/- 17th August 1927.

Civil P. C., S. 60 (1) — Uncertain, future and fluctuating profits cannot be attached.

The future, fluctuating and uncertain profits, which a judgment-debtor is entitled to receive out of certain immovable property not belonging to him, are not saleable and, therefore, not liable to attachment: 30 *All.* 246 and 7 *W. R.* 266, *Rel. on.* [P 353 C 2, P 354 C 1]

*J. C. Gupta* and *Nripendra Chandra Das* — for Appellant.

*Brojolal Chakravarti*, *Bhupendra Chandra Guha* and *Ananta Kumar Banerji* — for Respondent.

**B. B. Ghose, J.** — This is an appeal by the judgment-debtor against the order of the Subordinate Judge directing that a certain interest of the judgment-debtor should be sold. The application of the decree-holder was to attach and sell something which has been described in this way:

"As Khaza Soleman Quader along with 116 others has executed a wakfnama . . . . and appointed the present judgment-debtor Nawab

(5) [1887] 18 Q. B. 112.

(6) [1865] 11 H. L. C 290=13 W. R. 617=11 Jur. (n. s.) 309=34 L. J. C. P. 342.

(7) [1904] A. C. 179=73 L. J. Ch. 484=20 T. L. R. 475=53 W. R. 30=90 L. T. 687.



Khaza Habibullah as mutwali of the said wakf properties; it is prayed that the decretal amount may be realized by the attachment and sale of all the interests and profits with regard to the money to which the said judgment-debtor has been and is entitled as mutwali by virtue of the said wakfnama. Under the provisions contained in Cl. 3 of the aforesaid wakfnama, the revenue, rents, cesses due to the superior landlords, taxes and collection charges, monthly allowances of the beneficiaries etc., are to be deducted from the annual proceeds of the properties mentioned in the schedule below and covered by the wakfnama, and after a further deduction of 5 per cent from the remaining sum the judgment-debtor Nawab Khaza Habibullah is entitled to a 4 annas share of the surplus. It is prayed that the decretal amount be realized by the attachment and sale of the aforesaid 4 annas share. A sum of Rs. 2,000 at least becomes due to the judgment debtor on account of the said 4 annas share. And the same is distributed every year in the months of Aswin and Chaitra amongst the mutwali and beneficiaries."

The objection of the judgment-debtor was that this property is not saleable, as the money receivable by the judgment-debtor under the terms of the wakfnama is an unascertained sum and, therefore, not capable of being attached. The Subordinate Judge held that the right of the judgment-debtor to  $\frac{1}{4}$  share of the profits in the wakf properties which is sought to be attached is transferable; it is immovable property and so should be attached and sold in the manner laid down in the Code of Civil Procedure. He says it is not a moveable property: It is not the money which is receivable by the mutwali, but the right to get the money which is sought to be attached in this case. It is really difficult to understand what the Subordinate Judge meant by the observation that this right of the mutwali to receive an  $\frac{1}{4}$  share of the surplus income of the property after defraying all expenses is an immovable property. If the property is really wakf property then the mutwali has no interest in the property itself, because as it is often said the property is dedicated to God. It may be called payment of an allowance to the mutwali for his trouble in managing the property, distributing allowances to the beneficiaries and for the performance of other works which might have been imposed upon him by the wakfnama. This allowance of 4 annas share of the surplus after defraying the expenses cannot from the nature of it be a fixed amount. It is an unascertained amount which must be fluctuating from time to time ac-

cording to circumstances. The question is, is this property a saleable property? Because unless it is so it cannot be attached under S. 60, Civil P. C.

Various cases have been cited before us in support of the contention of each party. The learned advocate for the appellant relies upon the case of *Sher Singh v. Sri Ram* (1). In that case it was decided that the future profits which the judgment-debtor is likely to get is not saleable. In that case the Calcutta cases on the point have been referred to and followed. The nearest approach, however, to the present case is the case *Jagarnath Roy v. Kishen Pershad* (2). In that case the right to the surplus profits of a shebait from debuttar property was apparently sought to be sold. Loch, J., observes with reference to this claim to sell the profits:

"The thing itself is also of so uncertain a nature that its sale would be a source of constant litigation. The rents and profits may be sufficient only for the support of the temple services, or the surplus after paying the charges may be considerable. It may fluctuate year by year; and a stranger purchasing such a right, if legally saleable, would be obliged to enforce that right by annual litigation to discover what he had to receive. I think, therefore, that the sale of such an undefined right, if right, it can be called, should not be allowed."

Macpherson, J. observed in the same case:

"The application to attach and sell the surplus profits of the sheba, or such portion of the proceeds of the debattar lands as the shebait appropriates to his own use, also fails. For there is nothing before us to show what those profits are, or that there are any profits in which the judgment-debtor takes a beneficial interest, or to which he is personally entitled. A wholly vague and uncertain right, the existence of which is doubtful, and the extent of which, if ascertainable, has in no degree been ascertained, cannot be sold in execution of a decree."

In my judgment in the present case the surplus income the 4 annas of which the judgment-debtor is entitled to get must necessarily fluctuate from time to time. It is an uncertain amount which the decree-holder wants to attach. Besides as I have already observed there is the difficulty of attaching the future profits. The judgment-debtor has no right to the immovable property out of which this income is to be derived

(1) [1908] 30 All. 246=5 A. L. J. 251=(1908) A. W. N. 101.

(2) [1867] 7 W. R. 266.



Under these circumstances in my opinion the property, if property it can be called, is not saleable and not liable to attachment.

The appeal is, therefore, allowed and the application for execution against this so-called property is dismissed with costs in both Courts. The hearing fee is assessed at five gold mohurs.

**Bose, J.**—I agree.

M.N./R.K.

*Appeal allowed.*

**\* A. I. R. 1929 Calcutta 354**

MUKERJI AND MULLIK, JJ.

*Badal Chandra Prohel* — Plaintiff — Appellant.

v.

*Srikrishna Dey Nag*—Respondent.

Appeal No. 1272 of 1926, Decided on 23rd July 1928, against appellate decree of Sub-Judge, 3rd Court, 24-Parganas, D/- 29th January 1926.

**\* (a) Civil P. C., S. 24 (4) — Suit filed in Small Cause Court transferred by mutual consent of parties to Sub-Judge's Court—Latter trying the suit as ordinary money suit—Still no appeal lies from the decree passed.**

A suit for recovery of Rs. 870 on account of price of milk was instituted in the Court of Small Causes at Sealdah, having pecuniary jurisdiction up to the limit of Rs. 1000. A suit for rent between the parties being pending at the time in the Third Court of the Munsiff at Alipur, the District Judge of 24 Parganas, at the instance of the defendant and on the consent of the plaintiff, transferred the suit to the Court of the Munsiff to be tried along with the said rent suit. The Munsiff was invested with Small Cause Court powers up to Rs. 250. He registered the suit as an ordinary money suit and tried it as such and decreed it for Rs. 432 with interest and proportionate costs.

**Held:** that the consent to the transfer readily given by both parties on the ground of mutual convenience as another suit between them was pending in that Court carried with it the necessary consequence which followed under the law itself, namely, S. 24, Sub-S. (4) and neither party could be heard to complain that a right of appeal was taken away. Besides the provision of sub-S. (4) was more or less a statutory recognition of the general rule that the incidents of a trial are to be governed by the law as applicable to the conditions which existed at the institution of the suit, unless these incidents have been expressly varied by the legislature: 31 Cal. 1057 Diss. from; A. I. R. 1923 Mad. 444, Rel. on. (Case Law discussed.) [P 357 C 2]

**(b) Civil P. C., S. 24 (4)—Court of Small Causes includes Court invested with Small Cause powers.**

The expression "Court of Small Causes" in

S. 24 sub-S. (4) includes a Court vested with the powers of a Court of Small Causes and the procedure for the trial of a suit transferred under that subsection is governed by the provisions of the Provincial Small Cause Courts Act and no appeal lies from the decision: 38 All. 425; 39 All. 214; 40 All. 525; A. I. R. 1924 All. 761; A. I. R. 1923 Pat. 49; 38 Mad. 25; 31 Bom. 314; 27 C. L. J. 461, Foll.; 31 Cal. 1057, Diss. from. [P 356 C 2]

*Peary Mohan Chatterjee and Bankim Chandra Ray* for *Gurudas Mukherjee*—for Appellant.

*Sitaram Banerjee and Satindra Nath Ray Chaudhury*—for Respondent.

**Judgment.**—The question involved in this appeal relates to the true meaning of Cl. (4), S. 24, Civil P. C. (Act 5 of 1908.)

The suit was for recovery of Rs. 870 on account of price of milk alleged to have been supplied to the defendant. It was instituted in the Court of Small Causes at Sealdah which has pecuniary jurisdiction up to the limit of Rs. 1000. A suit for rent between the parties being pending at the time in the Third Court of the Munsiff at Alipur, the District Judge of 24 Parganas, at the instance of the defendant and on the consent of the plaintiff, transferred the suit to the Court of the Munsiff to be tried along with the said rent suit. The Munsiff was invested with Small Cause Court powers up to Rs. 250. He registered the suit as an ordinary money suit and tried it as such and decreed it for Rs. 432 with interest and proportionate costs. The defendant appealed from the decision and obtained a modification of the decree which had been passed by the trial Court, the amount of the decree being reduced to Rs. 127-1-0. The plaintiff has then preferred this appeal.

The contention that has been urged on behalf of the appellant is that under S. 24, sub-S. (4), the Munsiff should be deemed to have tried the suit as a Court of Small Causes and accordingly no appeal lay from his decision. The question, therefore, is one of construction of that subsection.

The question is, by no means, free from difficulty and the authorities bearing on it are exceedingly conflicting. It will be convenient to deal first of all with a few of the earlier decisions of the Allahabad and the Bombay High Courts which introduced this conflict.

The earliest decision of the Allahabad High Court is the case of *Kauleshar Rai*



*v. Dost Muhammad* (1). In that case a suit instituted in the Court of a Subordinate Judge in the exercise of his Small Cause Court jurisdiction, was on the retirement of the officer, ordered by the District Judge to be dealt with by his successor, who was not invested with Small Cause Court jurisdiction and it was held that the argument that as the case was not transferred or withdrawn but only the Court had gone out of existence and therefore S. 25 of the Code then in force (S. 24 of the present Code was inapplicable,) had no force and it was also held that no appeal lay from the decision of the said successor as the decision was by reason of S. 25 (4), Civil P. C., that of a Court of Small Causes. In the case of *Mangal Sen v. Rup Chand* (2) a suit valued at Rs. 69 was filed as a Small Cause Court case in the Court of a Subordinate Judge who had Small Cause Court powers. The Subordinate Judge took leave, and his successor not having Small Cause Court powers the District Judge transferred the suit to a Munsiff who had Small Cause Court powers up to Rs. 50 to be tried as a Munsiff's Court case. The Munsiff did so; and it was held, without expressing any opinion as to whether the view of the applicability of S. 25, Civil P. C., taken in *Kauleshar Rai v. Dost Muhammad Khan* (1) was correct or not, that under S. 35, Provincial Small Cause Courts Act 9 of 1887 the proceeding before the Munsiff should be regarded as a proceeding in a Small Cause Court suit.

In the earlier decisions of the Bombay High Court a different view was taken. It was held by that Court that the Courts of Subordinate Judges invested with jurisdiction of a Judge of a Small Cause Court under S. 28, Act 14 of 1869 do not thereby become Courts of Small Causes constituted under Act 11 of 1865, but they merely exercise a similar jurisdiction: *Bhagvan v. Balu* (3). This decision was followed in the case of *Ramchandra v. Ganesh* (4) in which the facts were these: A suit was originally filed in the Court of a Subordinate Judge invested with Small Cause Court powers and it was afterwards transferred by the

District Judge under S. 25, Civil P. C. of 1882 to the Court of the Assistant Judge who had no such powers. That Judge tried the suit and from his decision an appeal was preferred to the District Judge who reversed the Assistant Judge's decision. The High Court was invited to set aside the decision of the District Judge on the ground that the suit was cognizable by a Court of Small Causes and it was filed in the Court of the Subordinate Judge who was invested with the Small Cause Court powers, and that although it was transferred to the Court of the Assistant Judge, such transfer did not alter its character, and the Court to which it was so transferred should be regarded as a Court of Small Causes and from the decree of such a Court no appeal lay to the District Judge. This contention was overruled, the expression "Courts of Small Causes" in S. 25 of the Code of 1882 being construed to mean Courts properly and strictly so called and not to include Courts only invested with the jurisdiction of Courts of Small Causes.

To summarize the position disclosed by these earlier cases of the Allahabad and Bombay High Courts the following propositions may be noted:

1st. A case of succession is governed by S. 25 of the Code: *Kauleshar Rai v. Dost Muhammad* (1) but on this question no opinion was expressed in *Mangal Sen v. Rup Chand* (2).

2nd. The expression "Court of Small Causes" means not merely Courts constituted as such by the Provincial Small Cause Courts Act but also Courts presided over by officers invested with Small Cause Court powers: *Mangal Sen v. Rup Chand* (2), contra, that the expression means only the former class of Courts: *Bhagvan v. Balu* (3); *Ramchandra v. Ganesh* (4).

3rd. In a suit transferred or withdrawn under S. 24 of the Code finality attaches to the decisions of the trying Court: *Kauleshar Rai v. Dost Muhammad* (1).

With the first of these propositions or its negative we are not concerned in this appeal, and I do not propose to discuss it here beyond saying that in the case of *Dulal Chandra Deb v. Ram Narain Deb* (5), the case of *Kauleshar Rai v. Dost Muhammad* (1) and *Mangal Sen v. Rup Chand* (2) were dissented from and

(5) [1904] 31 Cal. 1057.

(1) [1883] 5 All. 274.

(2) [1891] 13 All. 324=(1891) A. W. N. 96.

(3) [1883] 8 Bom. 290.

(4) [1898] 23 Bom. 382.



it was held that when a Munsiff vested with the powers of a Court of Small Causes is transferred and is succeeded in office by a Munsiff not vested with such powers, and the Court of Small Causes is in consequence abolished the successor has jurisdiction, under S. 35, Provincial Small Cause Courts Act and S. 17, Civil Courts Act 12 of 1887 to try in his ordinary civil jurisdiction all suits pending on the files, whether they be suits falling within the ordinary civil jurisdiction of his predecessor or within his jurisdiction as the Court of Small Causes and that no order of transfer under S. 25, Civil P. C. is necessary to enable the successor to try the suits. In the same case, although it was not necessary for the decision because the case, in the opinion of the learned Judge, was governed by S. 35, Provincial Small Cause Courts Act and not by S. 25 of the Code and the learned Judge observed as regards the other two propositions enunciated above, that they were inclined to agree with the view taken in *Ramchandra v. Ganesh* (4) that when an order is made under S. 25, Civil P. C., the Court which eventually tries the suit tries it as a Court of Small Causes, and that the expression "Court of Small Causes" in S. 25, Cl. (4) of the Code means a Court of Small Causes constituted under the Provincial Small Cause Courts Act 1887 and does not include a Court vested with the powers of a Court of Small Causes, and that such a Court can try such suit in its ordinary civil jurisdiction with the result that the decision therein would be open to appeal.

The reasons which weighed with the learned Judges in arriving at the view that they took were that a contrary view would be against the general practice followed in this province, that inexperienced or junior officers may have to try the suit under a summary procedure with no right of appeal being allowed from his decision and that a simple order of transfer passed under S. 25, would have the effect of vesting the officer with a jurisdiction which is entirely within the competency of the Local Government to confer by an order duly notified in the Gazette under S. 25, Bengal North Western Provinces and Assam Civil Courts Act 12 of 1887. To these reasons may be added the considerations that arise upon the words used

in S. 7, Civil P. C., Act 5 of 1908 and Ss. 2 and 35, Provincial Small Cause Courts Act 9 of 1837 and which were relied upon by the learned Judges of the Bombay High Court in the case of *Ramchandra v. Ganesh* (4) and which indicate an intention on the part of the legislature to make a distinction between the two classes of Courts: see also *Balkrishna v. Lakshman* (6) and *Krishna Velji v. Bhau Mansaram* (7). These reasons have been refuted as unsound in a very large number of decisions of the different High Courts. It has been said that the apprehension that disastrous consequences will follow is idle as the subsection does not necessarily mean that the case will be transferred to a Court which is not a Small Cause Court constituted under the Act nor a Court invested with the jurisdiction of a Court of Small Causes, that although a comparison of the different sections of the Civil Procedure Code and of the Provincial Small Cause Courts Act shows that the two Courts are of two different classes, yet the generic name "Court of Small Causes" may not unreasonably be said to include both, and that the difficulty as to the right of appeal will still remain even if the limited meaning be given to that expression.

On these and other grounds which will be found discussed in these decisions it has been held in those Courts that the apparent intention of the legislature is that if a Small Cause Court suit is transferred it should not change its nature by reason of such transfer, but should continue to be tried as a Small Cause Court suit and subject to all the legal incidents of such a suit. It is now settled in Allahabad, Patna, Madras and Bombay that the expression "Court of Small Causes" in S. 24, sub-S. (4), includes a Court vested with the powers of a Court of Small Causes and that the procedure for the trial of a suit transferred under that subsection is governed by the provisions of the Provincial Small Cause Courts Act and no appeal lies from the decision: *Chhotey Lal v. Lakhmi Chand* (8), *Sukha v. Raghunath Das* (9),

(6) [1879] 3 Bom. 219.

(7) [1893] 18 Bom. 61.

(8) [1916] 38 All. 425=34 I. O. 113=14 A. L. J. 549.

(9) [1917] 39 All. 214=37 I. O. 809=15 A. L. J. 69.



*Chaturi Singh v. Mt. Ramia* (10), *Megi Mal v. Hira Lal* (11), *Bhagwan Das v. Keshwar Lal* (12), *Sankararama v. Padmanabha* (13) and *Narayan v. Bhaga* (14).

The Calcutta High Court in the case of *Madhusudan Gope v. Behari Lal Gope* (15) dissented from the view expressed in *Dulal Chandra Deb v. Ram Narain Deb* (5) as regards the limited meaning that the latter decision was inclined to attribute to the expression "Courts of Small Causes" as used in S. 24, sub-S. (4), Civil P. C., and following the consensus of authorities of the other High Courts at the present moment held that the expression includes both classes of Courts. The learned Judges said, however:

"What procedure the Munsiff should have adopted and what finality attaches to his decision it is not necessary for the purposes of this rule to determine."

This reservation, however, is immaterial because the provisions of the Provincial Small Cause Courts Act, Ss. 27 and 32 make the decree or order passed by such a Court final. Besides the value of the observations made in the case of *Dulal v. Ram Narain* (5) has also been considerably diminished by the decision in the case of *Akshay Kumar Shaha v. Hira Lal Dosad* (16) in which it has been held that "Court of Small Causes" includes a Court vested with the powers of a Court of Small Causes.

Having given the question all the consideration that it deserves we have come to the conclusion that the observations of the learned Judges in the case of *Dulal v. Ram Narain* (5) are not sound, and that the view that has been taken in the later decision of this Court referred to above and also the view that is current in the other High Courts is correct. It may be stated here that the respondent gains little even if the limited meaning which *Dulal v. Ram Narain* (5) stands for is given to sub-S. (4) of S. 24, Civil P. C., because here the transfer was from a Provincial Small Cause Court. The real solution of the difficulty

lies in a proper exercise of the powers of transfer given by S. 24 of the Code. The section speaks of a transfer to a Court "competent to try or dispose of" the suit. In the present case the defendant moved for transfer and on the plaintiff consenting the case was transferred to the third Court of the Munsiff of Alipur, who had pecuniary jurisdiction to try the suit, but was not vested with Small Cause Court powers up to the requisite amount. Far from taking any objection as regards the competency of the tribunal to which the suit was to be transferred, the parties by consent got the suit transferred to this particular Court. To a case of this character it may well be said that the Munsiff assumed jurisdiction under an agreement between the parties. The law in cases of this kind has, in our opinion, been correctly stated in these words, in the case of *Sankaranarayana Pillai v. Ramaswamiah Pillai* (17):

"If parties agree to a Court proceeding without jurisdiction *extra cursum curiae*, i. e., beyond the ordinary powers of a Court the parties cannot thereafter appeal from the decision of the Court. But where the Court has jurisdiction over a cause, mere agreement between the parties that the Court may decide the cause disregarding rules of procedure and evidence without giving up a right of appeal expressly or by necessary implication, does not deprive the parties of their right of appeal."

Here the consent to the transfer, to this Court which evidently was readily given by both parties on the ground of mutual convenience as another suit between them was pending in that Court carried with it the necessary consequence which followed under the law itself namely S. 24, sub-S. (4), Civil P. C., and neither party can be heard to complain that a right of appeal was taken away. Besides the provision of that subsection is more or less a statutory recognition of the general rule that the incidents of a trial are to be governed by the law as applicable to the conditions which existed at the institution of the suit, unless these incidents have been expressly varied by the legislature.

We are accordingly of opinion that no appeal lay from the decision of the trial Court. We, therefore, allow the appeal and reversing the decree passed by the Subordinate Judge, restore that of the

(17) A. I. R. 1923 Mad. 444=47 Mad. 39.

(10) [1918] 40 All. 525=46 I. C. 993=16 A. L. J. 548.

(11) A. I. R. 1924 All. 761.

(12) A. I. R. 1923 Pat. 49=1 Pat. 696.

(13) [1912] 38 Mad. 25=23 M. L. J. 373=17 I. C. 425=(1912) M. W. N. 1086.

(14) [1907] 31 Bom. 814=9 Bom. L. R. 327.

(15) [1918] 27 C. L. J. 461=44 I. C. 881.

(16) [1908] 35 Cal. 677=7 C. L. J. 407.



Munsiff, but we do not propose to make any order for costs either in this Court or in the Court of appeal below.

R K.

*Appeal allowed.*

### \* A. I. R. 1929 Calcutta 358

RANKIN, C. J., AND BUCKLAND, J.

*Manindra Chandra Nandy* — Appellant.

v.

*Lalmohun Roy and others* — Respondents.

Appeal No. 109 of 1927, Decided on 8th January 1929, against original decree of Pearson, J. D/- 9th August 1927, in Original Suit No. 2111 of 1924.

(a) Letters Patent (Calcutta), Cl. 12 — High Court in 1908 had authority and jurisdiction as granted by Letters Patent.

The jurisdiction of the High Court as it stood in 1908 when the Civil Procedure Code was republished depended upon S. 9, High Courts Act of 1861. It was to have such power and authority as Her Majesty may by Letters Patent grant and direct. [P 361 C 2 ; P 362 C 1]

\* (b) Letters Patent (Calcutta), Cl. 12 — Construction put by all High Courts enunciated.

The construction of Cl. 12 upon which all the High Courts are agreed is that as regards suits for land the High Court can take cognizance if the land is situate wholly within the local limits or where the land is situate in part only within such limits if leave has been first obtained ; and that as regards suits other than those for land the High Court has jurisdiction if the cause of action has arisen in part only within the limits if the leave of the Court shall have been first obtained or if the defendant dwells or carries on business or personally works for gain within these limits,

[P 362 C 1]

(c) Letters Patent (Calcutta), Cl. 12 — Cl. 12 is not overridden by Civil P. C., S. 21.

Although the legislature had power in 1908 to override the Letters Patent the legislature has not by introducing S. 21, Civil P. C., overridden the provisions of Cl. 12. [P 364 C 1]

\* (d) Letters Patent (Calcutta), Cl. 12 — No leave obtained as to property out of jurisdiction — Objection as to jurisdiction can be taken for first time at appellate stage — High Court has no jurisdiction as to such property — Civil P. C., S. 21.

A suit for land part of which only was situate within the ordinary original civil jurisdiction of the High Court and the other part was situate in the mofussil was brought on the Original Side without leave being obtained as under Cl. 12.

*Held* : that as regards all properties outside the original jurisdiction of the High Court the suit was without jurisdiction and that effect must be given as to the objection about juris-

diction though taken in the appellate Court for the first time. [P 364 C 1, 2]

\* (e) Provincial Insolvency Act (1920), S. 38 — All creditors not signing — No insolvency proceedings started — Debtor taking advantage of the deed — Composition is valid.

A composition deed of trust was executed for the benefit of the creditors but was signed by the debtors and trustees only. One or two days prior to the deed an agreement for composition was entered into between the trustees and some of the creditors. All the creditors had not signed the agreement but they had also not started insolvency proceedings against the debtors. The composition deed was acted upon by the debtors.

*Held* : that the deed was perfectly a good deed of trust. [P 365 C 1, 2]

(f) Letters Patent (Calcutta), Cl. 12 — Land, subject of suit, swept away subsequently by prior encumbrancers — Suit still continues to be one for land.

A suit by trustees under a composition deed regarding certain properties within the original jurisdiction of Calcutta High Court does not cease to be a suit for land merely because the properties have been entirely swept away by prior encumbrancers. [P 365 C 2 ; P 366 C 1]

*B. C. Mitter, S. C. Bose and P. N. Sen* — for Appellant.

*N. N. Sircar and B. K. Ghose* — for Respondents.

**Rankin, C. J.** — This was a suit by the trustees of a deed of arrangement for the benefit of the creditors which was executed by defendants 1 and 2 on 1st April 1921 and in connexion with which an agreement was executed one or two days before between certain creditors and the trustees. The proceedings began by way of originating summons taken out by the trustees of the deed against the debtors only. That originating summons was taken out in July 1924. By an order made in the matter, on 18th December 1924 the plaint presented together with the originating summons under the rules of the High Court as they stood before 1926 was directed to be treated as a plaint in the ordinary sense. When that action came on for disposal it was ordered on 9th July 1925 that it be adjourned to enable the plaintiff to implead various mortgagees. Under this order the plaintiff impleaded first of all certain persons who had mortgages upon the properties comprised in the deed of arrangement which were prior to the title granted to the trustees by the deed of arrangement. In addition to such mortgagees the present appellant, the Maharaja of Cossimbazar, who is a relative of the debtors



was impleaded as a defendant by reason that on 10th December 1923 the debtors had executed in his favour a mortgage by which they purported to assign to him the properties which they had previously assigned to the trustees for creditors by the deed of 1st April 1921. The case was tried before my learned brother Pearson, J., and this is an appeal from his decree.

It appears that it was contended before the learned Judge, first, that the conveyance of the properties effected by the deed of trust of 1st April 1921 was invalid. In support of this contention various reasons were assigned. It was contended that the conveyance was fraudulent. It was contended that it was intended to be a conveyance for the benefit of certain creditors who had executed the agreement, and that some of these creditors not having executed or assented the conveyance never took effect. It was contended further that by reason of the fact of certain creditors having sued or threatened to sue the debtors or in one case having taken payment contrary to the terms of the deed from the debtors the deed of trust was null and void.

The Maharaja—the present appellant—had a further contention which he submitted to the learned Judge. He said that at the time when the deed of trust was executed the trustees had not only permitted the debtors to remain in possession of the properties but had failed to take the precaution to get possession of the title-deeds. The question refers to properties not within the original jurisdiction of the High Court. It was said that the debtors never disclosed to the Maharaja the existence of the deed of trust for the benefit of creditors, that the Maharaja had no notice whatever of that deed, that he took on the faith of the fact that the debtors were in possession not only of the properties but of the title-deeds and that, therefore, in any case his claim under the mortgage could not be postponed in favour of the trustees under the deed of arrangement.

The facts of the case are reasonably clear. The debtors had various zamindari properties, certain Calcutta houses which had been mortgaged and certain businesses and prior to the time when the deed of arrangement was entered into they were financially embarrassed. They have indeed from time to time and in circumstances of urgency been borrowing

money from their relative—the Maharaja. It would appear that they had borrowed in January 1921 over half a lac of rupees and it is clear enough that the circumstance of their embarrassment did come to the notice of the Maharaja. They held a meeting in March 1921 of their creditors. The deed of 1st April 1921 purports to be a conveyance to the trustees of all the properties comprised in the deed and there were elaborate provisions contained in that deed as to the terms upon which these debtors were assigning their properties for the benefit of the creditors.

The scheme of the deed of arrangement was that the creditors would give nine months' time to the debtors for payment of the debts, that the debtors were to keep up the necessary payments on the properties in the meantime and receive and realize the rents and profits, that if at the end of that time the debts were not discharged the creditors would be at liberty to take possession and realize their security, and that when the creditors had realized their security the debtors were to be liable to pay the whole of the balance. The deed provided that this was to be done within one month after the completion of the sale by the trustees.

It does not appear that the property comprised in the deed was the whole of the debtor's property, nor does it appear that the amount left out was insignificant. It was, if not large, at all events substantial. It does not appear either that all the creditors were originally intended to be parties to this arrangement. The appellant Maharaja was one of the creditors who were not mentioned and there appear to have been other creditors who were left out. The agreement which was executed by many of the creditors mentioned though not by all of them was an agreement whereby the creditors on their part agreed with the trustees that a proper deed of arrangement should be entered into.

That was a scheme which was accepted by many creditors. There can be no doubt at all that it was made known to and assented to by many of the persons who were intended to be beneficiaries of the deed. Not only so, but it appears that the debtors did get first of all the nine months which they were stipulating for. Not only is that the case, but the



debtors proceeded at their own hand to make contracts for the sale of their properties and they carried out those contracts by executing conveyances, the trustees knowing that they were engaged in so doing and the trustees afterwards curing the defect in their title by executing a release of the rights of the trustees and so getting the obstacle to title created by the deed of arrangement cleared away. The nine months were extended from time to time by the trustees. It was extended first of all to the end of the year 1922, and then again by further extension at the request of the debtors contained in the correspondence exhibited it was extended to the end of the year 1923.

It was when this last extension was about to come to an end that on 10th December 1923 the debtors purported to convey all the properties all over again to the Maharaja. The Maharaja's mortgage, like the deed of arrangement, comprised some three Calcutta properties and a great many mofussil properties. The three Calcutta properties were at all material times in this position that they were mortgaged to prior encumbrancers and in December 1923 when the Maharaja's mortgage was executed the debtors were not in possession of those properties at all, still less of the title-deeds. Those properties were in possession of the receiver in mortgage suits to enforce the prior encumbrances. In the end those mortgage suits succeeded and the properties were sold and the claim of the mortgagees exceeded the amount that was provided by the security. It is not in evidence but it was stated by Sir Benode Mitter at the Bar and not denied by the Advocate-General on behalf of the trustees that a personal judgment in favour of the mortgagees and against the debtors had been passed in the mortgage suit. All that the Advocate-General says upon that point is that the accounts of the receiver have not been finally adjusted and that there may be some room for dispute about small sums of money in respect of these.

At the time when the Maharaja took his mortgage, so far as the Calcutta properties are concerned there is no case to be made to the effect that he was misled or put off his guard by reason of the fact that he found the mortgagors in possession of the land or in possession of the title-deeds. The mortgage to the Maha-

raja is of this character :— It appears that having lent, as I have already stated, a substantial sum of money to the debtors before they had entered into the deed of 1st April 1921 the Maharaja throughout 1921 in April June, July, September and October was making advances to the debtors of substantial if not very large amounts. In November 1921 he claims to have lent no less than Rs. 68,000 more. In 1922 in the month of September he claims to have lent them Rs. 20,000. On 28th February 1923 he claims to have lent them no less than Rs. 2,30,000 and he says, though there is nothing in support of this save his own evidence, that it was on that occasion that he asked for a mortgage and was promised that a mortgage would be given. The mortgage, in fact, was not given till 10th December of that year and that mortgage purports to convey all these properties without discriminating in any way as to which of these properties were unencumbered and which of these properties were already encumbered.

The learned Judge has dealt with both the branches of the case. He has found that the deed of arrangement of April 1921 is a good and valid deed. On the question whether the Maharaja has proved that in the case of the mofussil properties he was misled or put off his guard by negligence of the trustees in not getting possession of the title-deeds, whether he has proved that in fact in December 1923 the debtors were allowed to retain the title-deeds, whether he made satisfactory enquiries so as to explain this circumstance that this registered deed affecting the Calcutta and mofussil properties which was executed by his own relatives never came to his notice, on these points the learned Judge has found in favour of the trustees of the deed. He has not been satisfied with the evidence of the Maharaja so as to postpone these trustees of the deed to the Maharaja's mortgage.

There are several questions of jurisdiction which were raised in one form or another before the learned Judge at the trial. So far as regards those questions which were raised the learned Judge has rejected the objection that he had no jurisdiction and, in my opinion, there is nothing to be said against his ruling upon those points.

In this appeal brought by the Maharaja the first point taken is a point of jurisdiction which was not presented to the



learned Judge at all and that is the point that this is a suit for land part only of which is within the jurisdiction of this High Court on its Original Side, and that no leave has been obtained under Cl. 12, Letters Patent, so as to give this Court jurisdiction in respect of any of the mofussil properties. It is not useful now to recite the history of the cumbrous arrangement by which originating summonses on the Original Side were until lately required to be presented accompanied by a document called a plaint and in the form of a plaint. It would appear that this requirement was due to the fact that the opening words of S. 129, Civil P. C. were not adverted to. However that may be, under the Rules as they stood at the time with which we are concerned a person who took out an originating summons had to present with it not an affidavit merely but a document in the form of a plaint. This document was not really a plaint and was never treated in the same way as a plaint in the ordinary sense was treated. Orders as to leave under Cl. 12 were not made in respect of such plaints, at all events with the same certainty and uniformity as in the case of plaints ordinarily so called.

When, therefore, the learned Judge came to the conclusion that the trustees of the deed could not fight out their battle with these debtors by originating summons and made an order that this document should be treated as a proper plaint it escaped his observation and the observation of all the parties that leave under Cl. 12 had not been enforced upon this document and that there might be a difficulty in granting the leave at a stage of the case which might be said no longer to be the commencement. The position, however, is that this suit is before us as upon a plaint, no leave having been granted under Cl. 12, Letters Patent. Accordingly Sir Benode Mitter for the Maharaja contends that as regards all the properties save the three properties within the limits of the ordinary original civil jurisdiction of the High Court the suit is incompetent and must be held to be without jurisdiction. To my mind there is no answer to this contention save one, namely, the answer made by the Advocate-General on behalf of the trustees that S. 21, Civil P. C. cures that defect for the purposes of this appeal; and I proceed to consider whether S. 21

of the Code does apply so as to entitle this Court on appeal from the original jurisdiction to say that the suit should not be dismissed in so far as there was no jurisdiction in the learned Judge to entertain it. This question I find to be troublesome. It is dealt with by the Code in Ss. 117 and 120. Section 117 is a broad general provision to say that the provisions of the Code shall apply to the High Courts and it is quite clear that that large tracts of the Code do apply to the High Courts both in their appellate and in their original jurisdiction. S. 120 is a very limited exception.

"The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, Ss. 16, 17 and 20."

When we are considering whether S. 21 applies to the High Court in the exercise of its original civil jurisdiction the argument is naturally pressed before us that if Ss. 16, 17 and 20 are expressly excepted from a bundle of provisions dealing with the place of suing it is hard to resist the conclusion that S. 21 is not excepted from application to the Original Side. On the other hand, it must be conceded that as against this principle there is another principle attracted—a principle of very plain strength, namely, that if S. 16 is not to be applied, for example, to the Original Side, any other section which appears to be incidental or ancillary thereto or to be a further working out of what is laid down by S. 16 can hardly be intended to be applicable. It might be as well to examine this matter with some attention to the function of the Code in Ss. 16 to 25 inclusive. I will premise that the jurisdiction of the High Court as it stood in 1908 when this Code was republished depended upon S. 9, High Court Act of 1861. That was an Act of the Imperial Legislature and it is said that:

"Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby."



It was to have such power and authority as Her Majesty may by Letters Patent grant and direct.

Now, the Letters Patent as it stood in 1908 contained a direction in Cl. 12. Cl. 12 is a clause which if it was to be construed for the first time according to its grammatical construction and in strict accordance with its wording might perhaps have to be given a somewhat different meaning to that which is well settled now in all the High Courts in India. The effect of the construction upon which all the High Courts are agreed is that as regards suits for land the High Court can take cognizance if the land is situate wholly within the local limits or where the land is situate in part only within such limits if leave has been first obtained; and that as regards suits other than those for land the High Court has jurisdiction if the cause of action has arisen wholly within the limits or where the cause of action has arisen in part only within the limits if the leave of the Court shall have been first obtained or if the defendant dwells or carries on business or personally works for gain within these limits. The Letters Patent as they stood in 1908 contained a Cl. 44 which has since been amended by the Letters Patent of 1919. The clause that then stood was:

"All the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council."

Now, that being the position of affairs as regards the Original Side, when the legislature in 1908 came to amend and re-edit the Code of Civil Procedure, what was the legislature intending to do by the clauses that are now under consideration? It is necessary to remember that in different provinces of India there are different arrangements as regards Courts subordinate to the District Court. In this province the lowest grade is that of the Munsiff. In other provinces the lowest grade of judicial officers is that of Subordinate Judges. Taking this province by way merely of example and referring to the Act of 1882, the Assam and Bengal Civil Courts Act, one finds that in legislation applicable to each individual province it has already been laid down what Courts are to exist for the purposes of civil work. It has already been laid down that the Local Government is by notification to assign certain territorial jurisdiction to each of those

Courts. It has already been laid down that certain grades of officers are to have certain pecuniary limits to their jurisdiction and in some cases the pecuniary limit to an officer's jurisdiction may be entirely personal to himself. When, therefore, the legislature in 1908 came to make the provisions we are now considering, it has to face first of all the High Court with a jurisdiction which was defined by the Letters Patent. It had to face also an agreement different in different provinces by which various kinds of judicial officers under the District Courts were exercising under different limits and under different arrangements various civil powers. In these circumstances I propose to go through these particular sections one by one to see whether any light is thrown upon the question whether S. 21 applies in a case like the present.

The first section is S. 15. This is the opening section under the heading "Place of Suing" and it is to the effect that every suit shall be instituted in the Court of the lowest grade competent to try it. In view of what I have said as to the different arrangement of Courts subordinate to the District Courts in different provinces it seems reasonably clear that that provision is necessary to enable the subsequent sections to take effect all over British India so as to point out a single Court which is the proper Court for each individual case. The District Judge and the Subordinate Judge and the Munsiff may all have the same territorial jurisdiction theoretically, but this is to say as between which of them in a particular case the proper place of suing is to be. I ask myself—does that apply to the High Court in its original jurisdiction because S. 15 is not one of the sections mentioned in S. 120? It seems to me reasonably clear that it does not. The High Court has no jurisdiction in a case of a Small Cause Court type under Rs. 100; but the Presidency Small Cause Court to which by the way S. 15 is not applicable at all has concurrent jurisdiction up to a certain point with the High Court, and there is a special provision in the Presidency Small Cause Courts Act as to what is to happen if a person brings a suit in this Court above Rs. 100 which might have been brought in the Small Cause Court. It cannot be said that S. 15 has any application in practice or in substance to



the original jurisdiction of the High Court. I do not here pause to enquire into the position of the City Civil Court in Madras or matters of that kind. In substance it does not seem to me that it would be a valid argument to say that because S. 15 is not mentioned in S. 120 therefore it must have some application to the original jurisdiction.

The next section is S. 16 which is not, by the terms of S. 120, to be applied to High Court. The reason of that exception as also of Ss. 17 and 20 is perfectly plain. It is that but for the exception it might be well contended that Cl. 12, Letters Patent had been overridden altogether and that the jurisdiction of the High Court was to be found by reference to Cls. 16, 17 and 20. S. 16 is not quite the same though it is not very different from the arrangement to be found in the Letters Patent. It has been said in at least one case that the words "Suit for land" mean the same thing as Cls. (a) to (f) in S. 16; but that it strikes me as a little hazardous. Broadly speaking the difference is that in the case of suits for land where a part of the land is outside the jurisdiction leave is required under the Letters Patent and it is not required under S. 17 of the Code.

I come now to S. 18 and that applies where it is uncertain whether the land in suit is within the jurisdiction of one Court or another. The Court in which the suit is brought may record a statement of this uncertainty and thereupon proceed with the case and that section in its last clause contains a provision not unlike the provision afterwards repeated in S. 21. It is very important, therefore, to make up one's mind whether it can be said that S. 18 applies to the High Court in its original jurisdiction. As to that it seems to me that *prima facie* the words :

"where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situate."

must be read as having reference to the words in S. 16 :

"shall be instituted in the Court within the local limits of whose jurisdiction the property is situate,"

And if I look at the substance of the matter it appears to me to be this that as it is the function of S. 16 in view of the various local Acts such as the Assam and Bengal Civil Courts

Act to lay down Rule so as to distribute among the provincial Courts the business which is likely to arise in respect of immovable properties. S. 18 must be intended to meet cases of dubiosity in the application of that distribution and that it is *prima facie* wrong to suppose that S. 18 which in a way gives jurisdiction to a Court can operate outside the scope which the legislature has given to itself in S. 16. If one is distributing jurisdiction among certain sets of Courts upon certain principles it is easy to say first of all that the substantive principles are to be such and such and with reference to the same subject matter it is legitimate to go on to say that in cases of uncertainty the jurisdiction which is now being given shall include a certain special jurisdiction for the avoidance of unnecessary litigation; but it is a very different matter to read such a section as S. 18 as giving in effect a further jurisdiction to a Court like the original side of the High Court with reference to which we know that the principles governing jurisdiction are not intended to be affected by this part of the Act. It is possible that one reason why S. 18 is not mentioned in S. 120 is this that S. 18 like S. 19 is dealing not with any one Court but with cases of two Courts. S. 18 like S. 19 would certainly apply if one assumed it to be possible that a small area of land came into question as to which it was uncertain whether it was within or without the Marhatta ditch, and if the suit were brought in a mofussil Court bordering upon the original jurisdiction limits; but these two sections deal with two or more Courts and it may be that had the legislature added Ss. 18 and 19 to the three sections which are mentioned in S. 120 doubt or difficulty would have been raised as to whether the neighbouring mofussil Court could act in such a case on the principles laid down by the sections. That is a possible reason why they have not been mentioned.

As regards S. 19 which deals with compensation for wrongs it matters nothing whether it is made applicable or not made applicable to the original jurisdiction because the principle therein laid down is well within the principles recognized by Cl. 12 of the Letters Patent.

Section 20 again is expressly excluded from being applied to High Courts.



Then we come to the section in question that

"No objection as to the place of suing shall be allowed by any appellate or revisional Court"

unless certain conditions apply. There again, it appears to me that it is one thing to say as regards Courts among which you are distributing jurisdiction that not only shall they have what may be called their proper or substantial jurisdiction but that in some cases of doubt or oversight or mistake they shall have a special or anomalous jurisdiction for the sake of avoidance of litigation, and it is a very different matter to say that by a clause placed as this is in the middle of clauses which are not intended to alter the Letters Patent of this Court, even though the right of appeal is granted by the Letters Patent in addition to the Code, is in effect to exercise jurisdiction which is not warranted by the Letters Patent. It appears to me that although the legislature had power in 1908 to override the Letters Patent the legislature is not likely to have intended so to do in the manner which is now contended for.

To continue with this bundle of sections, Ss. 22 and 23 do not seem to take effect upon the original jurisdiction because S. 23 in pointing out the Courts that are to exercise the powers given by S. 22 speaks of Courts subordinate to other Courts and the High Court on the Original Side does not seem to be brought effectively within S. 23.

Section 24 throws no light upon the matter as it is a case where certain powers are expressly conferred upon the High Court and clearly upon the High Court in its original jurisdiction, nor is any further light thrown upon the matter by S. 25. I ought to say that I reject altogether, as having no force at all, the argument that because the words "revisional Court" are mentioned along with the words "appellate Court" in S. 21 this shows that the section does not apply to the Original Side. It is nobody's contention that the section applies only to the Original Side and it is, in my judgment, a point that is altogether bad.

For these reasons it appears to me that it would be unsafe and wrong to hold that S. 21 ought to be applied to the present case and I accept the argument of Sir Benode Mitter to the effect that as regards all properties outside the original juris-

diction of the High Court this suit was without jurisdiction, and that we must give effect to that extent, at all events, to the objection though it is taken in this Court for the first time.

In these circumstances, the question arises as to the case before us so far as it is within the power of the Court under Cl. 12 of the Letters Patent. The Advocate-General on behalf of the plaintiff asks us to grant a declaration such as is asked for by the plaintiff in respect of the three Calcutta properties which at the time of the suit still belonged to the trustees and which subsequent to the suit have been sold by the prior encumbrancers in satisfaction of the prior encumbrances. So far as this question is concerned it is no way necessary to embark upon a discussion of what I have called the second branch of this case upon the merits. There is no question here of the debtors at the time of the Maharaja's mortgage having been in possession of the title-deeds or indeed in possession of the properties and the one question which arises on the merits as regards the Calcutta properties is the question whether or not the trust deed of 1st April 1921, is a good and valid document. If it be a good and valid document, then the question arises whether now in view of the fact that the whole importance of this question as regards the Calcutta properties has really been terminated by the properties being swept away by prior encumbrancers it is proper to make any declaration solely as regards them.

On the first question whether the deed of 1st April 1921 was a good and valid document I have the greatest difficulty in taking the case of the debtors or of the Maharaja with any seriousness. The debtors appear to me (in particular if it be true as the Maharaja says that he took his mortgage in December 1923 without any notice of the document of April 1921) to be rascally and absurd people who owe it to their good fortune or to their relative's weakness that they are not being made the subject matter of some enquiry by a criminal Court. Let us recall how the matter stands. There was a conveyance in trust to those trustees on behalf of the creditors in April 1921. The debtors got their nine months' time. They got another year's time. They got a third-year's time



asking for it by letters to the trustees. They were permitted to sell with their own hands and the trustees came in afterwards and made good their title. The trustees knew that the debtors were endeavouring to dispose of their properties and they were allowing them to do so. Then without any question being raised upon the subject they gave a mortgage to their relative in December 1923 not for any further advances but for advances which they had been getting from him in the meantime and there is not a scrap of paper to show that in February 1923 when they borrowed over two lacs they promised to give him any mortgage at all. Let us ask first of all, is it contended in this case to this day that the deed of trust of April 1921 was fraudulent in the sense of S. 53, T. P. Act? I do not think that has been mentioned before this Court. But in any case it would be an extravagant suggestion and it would be further extravagant to pretend that the creditors who were the real beneficiaries under that deed were themselves, taking with notice of its fraudulent character. That consideration may be put on one side. I understand again that if a man makes a deed for the benefit of creditors and communicates it to nobody or communicates it only to the trustee and no creditor either gets to know of it or to assent to it or to act upon it, the deed is a mere mandate and may be revoked. I understand again that it may be possible to execute a deed of arrangement for the benefit of creditors, to communicate it to the trustee and to make it a term that unless all or certain creditors assent the deed is to be of no force or effect. If all do not assent such a person may no doubt if he acts timely and promptly and fairly revoke and say that the condition upon which he was willing to execute the deed has not been fulfilled. That is not suggested. In this case the debtors themselves acted upon the deed, sold the properties with the assent of the trustees and paid money over to the trustees for distribution to the beneficiaries of the deed.

It is merely talking nonsense to suggest that because some creditors mentioned in the agreement of March 1921 failed to sign or because a particular creditor having signed failed to keep his bargain these debtors could in law treat

this document as of no effect. It does not occur to me as a reasonable supposition that when these debtors executed the mortgage of 10th December 1923 they were either honest or thought they were honest. To my mind this branch of the case is hopelessly bad and I think that the trustees succeed entirely in establishing that this is a perfectly good deed of trust, I need not explain that had these debtors been adjudicated insolvent on a petition presented at such time that this deed of arrangement could have been availed of as an available act of insolvency then no doubt this arrangement would have fallen to the ground. Such a deed of arrangement under one or other of the definitions of acts of insolvency it would have been almost hopeless to defend. In this case no one appears, so far as I know, to have attempted to make these debtors insolvent and no order of adjudication has ever been made upon a petition presented in time to enable the execution of this deed to be treated as an act of insolvency. I am of opinion, therefore, that this case must be regarded on the footing that the deed was a perfectly good one.

It is not possible in connexion with the Calcutta properties for this Court to consider or decide whether or not the Maharaja can still make a good title on the document to mofussil lands by reason of the fact, as alleged, that the trustees were negligent in leaving the title-deeds with the debtors, that the Maharaja was diligent and that, in fact, in spite of registration he had no notice. That argument applies only to the mofussil properties with which this Court has, in my opinion, no right to intermeddle. The question, therefore, is as regards the Calcutta properties—whether this Court should treat this as a suit having reference to them only and should give a declaration to the trustees although in substance as a matter of business there is no longer any importance in the trustees asserting claim to the equity of redemption in these properties.

I have come to the conclusion that in the present case it would not be right to give any such declaration. I quite agree that the suit as regards these Calcutta properties at the time it was brought was a suit for land. I quite agree that the properties have, as in my view they have, in substance been entirely swept



away by prior encumbrancers would not make the suit cease to be competent as a suit for land. But in my judgment this declaration should only be given as a matter of discretion and the discretion has to be exercised upon the whole state of the facts as it appears at the time the declaration is granted. It does seem to me that an entirely idle and useless declaration of this sort should be made with any idea that the judgment of the Court would in that event be a more powerful assistance in some other litigation upon the principle of *res judicata*. We have no right to deal with the whole of this matter, that is to say, we must in any case leave the Maharaja's contention about the title-deeds for the decision of some other Court. I am not going to give a declaration which I regard as having no possible utility but merely as an excuse for affording an argument to one or other of the parties which covers only half of a case in some other Court. I am of opinion that it would not be right to give a declaration merely for that ulterior purpose and I am of opinion that on its merits this suit would never have been brought for a declaration in respect of the Calcutta properties alone. After all the primary fault is with the plaintiff. It was his business to see that he started this litigation in a proper way and not by originating summons. In the second place, it was his business to see that he got the necessary leave; and, in my judgment, as against him it is not right that we should give a declaration as regards the Calcutta properties having regard to the fact on its merits that there is no occasion for such a declaration to be given.

It appears to me that the remaining question is the question of costs. As regards that matter as the plaintiff's suit in the end is dismissed no view that one can take of either the debtors' conduct or the Maharaja's conduct would make it proper to maintain the order for costs that has been made against him. In my judgment, the circumstances of this case do not require us to order the plaintiff to pay any costs either to the Maharaja or to the debtors at first instance. As regards this appeal, however, it appears to me only right that the Maharaja appellant should have his costs, but in no circumstances can any cost of this appeal be given to the debtors.

In these terms the appeal is allowed, the learned Judge's decree is set aside and the plaintiff's suit dismissed.

**Buckland, J.**—I agree.

R.K.

*Appeal allowed.*

### **A. I. R. 1929 Calcutta 366**

**MUKERJI, J.**

(*Shebait*) *Hari Prosanna Barman*—  
Plaintiff—Appellant.

v.

*Nishapati Sai*—Respondent.

Appeal No. 85 of 1928, Decided on 18th January 1929, against appellate decree of Sub-Judge, Burdwan, dated 8th September 1927.

(a) **Bengal Tenancy Act, S. 88**—Whether division is recognized under S. 88 is question of law and appellate Court has to see the facts justifying inference of sub-division.

Whether there has been a division of the tenancy such as is recognized by S. 88 or not is a question not of fact but of law and the Court of second appeal has got to see what are the facts that have been found as justifying an inference of law to the effect that there has been a sub-division within the meaning of S. 88. [P 367 C 1]

(b) **Bengal Tenancy Act, S. 88**—Inference of sub-division cannot be drawn merely from separate realization of rent.

Merely because there has been separate realization of rent no inference can be drawn to the effect that there was a sub-division which would come within the purview of S. 88: 22 W. R. 295; 22 W. R. 336; 31 Cal. 1026 and 6 C. W. N. 823, *Rel. on.* [P 368 C 1]

*Panchanan Ghose for Gopendra Nath Das*—for Appellant.

**Judgment.**—This appeal has been preferred from the decree of the Subordinate Judge of Burdwan affirming on appeal the decree passed by the Munsiff, 4th Court, Burdwan. The appeal arises out of a suit for rent. The plaintiff instituted the suit for rent for recovery of paddy rent for two years, namely, 1330 and 1331 at the rate of two maps one sali of paddy per annum with cesses and damages. The suit was instituted on the allegation that the defendant's tenancy consisted of two plots of land. The defence set up was that of the two plots,—Nos. 1 and 2 mentioned in the plaint, No. 2 did not form a part of the tenancy but a different plot of which the plaintiff was in possession of a part of it instead, and so the rent should be suspended. It was also pleaded on behalf of the defence that under an arrange-



ment between the parties the defendant was in possession of plot 1 only for which he had to pay only half the rent. The trial Court held that plot 2 of the plaint did not appertain to the jama and that the other plot of the jama which was not mentioned in the plaint was in the landlord's possession, but as there was sub-division of the jama the defendant was not entitled to get any suspension or abatement of rent and the defendant therefore was liable to pay half the rent. The learned Munsiff therefore made a decree in favour of the plaintiff at the rate of half the rent claimed; namely, for two maps, 1 sali of paddy as rent for the two years in suit together with cesses and damages. Calculating the price at a certain rate and on the basis of a certain standard, to which it is not necessary to refer as no objection has been taken thereto here, the learned Munsiff gave the plaintiff a decree for Rs. 25-1 anna and 7 pies together with proportionate costs and interest at 6 per cent per annum.

This decree, as I have already stated, has been affirmed on appeal by the Subordinate Judge.

The learned Subordinate Judge has not thought it necessary to go into the question as to whether plot 2 of the plaint appertained to another jama or not, or whether the other plot which the defendant said formed part of this tenancy was one in respect of which the plaintiff had dispossessed the defendant because he found that there was sub-division of the jama and that in consequence thereof the defendant was liable to pay half the rent claimed in the suit for being in possession of plot 1. It is this finding on the question of sub-division which both the Courts below have arrived at and recorded in their judgment that is challenged before me in this second appeal.

At the outset it should be observed that the question whether there has been a division of tenancy such as is recognized by S. 88, Ben. Ten. Act or not is a question not of fact but of law, and looking at the matter as one of law and not of fact one has got to see what are the facts that have been found as justifying an inference of law to the effect that there has been a sub-division within the meaning of S. 88, Ben. Ten. Act. Now the learned Subordinate Judge has drawn this inference from the contents of three

counterfoil receipts. Added to these may be mentioned two thokas which are on the record and which were also relied upon by the learned Munsiff. On examining these documents it seems to me that far from supporting any case of sub-division within the meaning of S. 88, Ben. Ten. Act, the said documents point to a contrary conclusion. The three counterfoil receipts show the name of the tenant as one Sonatan Shau deceased and the total rental as two maps one sali. In one of the rent receipts one map ten gandas was entered as having been realized gujrat Hemangini Dasi marfat one Bibhuti Banerji. In the second counterfoil it was stated that one map ten gandas was realized gujrat Hemangini Dasi. The third counterfoil receipt shows that one map ten gandas of paddy was realized gujrat Pashupati Shau who was probably some predecessor of that defendant, marfat Hemangini Dasi. The Subordinate Judge made a distinction between the words gujrat and marfat in these rent receipts and was able to hold that Hemangini and Pashupati were persons from whom rents were separately realized on account of the shares payable by them. This finding need not be disputed for the present purposes. He has also recorded a finding to the effect that the gomashtha's authority to grant such receipts has not been questioned by the plaintiff.

These two findings of the Subordinate Judge, if accepted, come to this that the gomashtha and for the matter of that the landlord, the plaintiff realized rents from Hemangini and the predecessor of the defendant separately for the shares of rent payable by them. This, however, by itself, fails far short of what is requisite to constitute a sub-division within the meaning of S. 88, Ben. Ten. Act. S. 88 says that a division shall not be binding on the landlord unless it is made with his express consent in writing or with that of his agent duly authorized in that behalf. From the contents of these three documents can it be said that there was consent in writing to the division of the holding? That is the question which has to be considered in the present case. The thokas on which the learned Munsiff relied show that the tenancy was recorded with Sonatan Shau deceased as the tenant. The arrears of rent are mentioned in the thokas as being two maps



one sali per year and on the credit side realization of rent separately from Pashupati and some other person whose name is not quite legible is entered, it being shown that one map ten gandas of paddy were realized from each of them. These documents all go to indicate that the tenancy was being treated by the landlord as one tenancy in the name of the deceased tenant Sonatan Shau, and even if the thokas be taken as constituting a rent roll for the purpose of the proviso to S. 88 there is nothing to indicate that there was any consent to divide the holding or distribute the rent payable among the different tenants. Separate realization from the two tenants may have been made only for the sake of convenience. If it be found, as it has been found in the present case, that in all these papers the rental was mentioned as being one undivided rental and the area of the tenancy as one undivided whole in respect of a tenancy standing in the name of one tenant who was deceased, I am unable to hold that merely because there has been separate realization of rent any inference can be drawn to the effect that there was a sub-division which would come within the purview of S. 88, Ben. Ten. Act.

As authority for the view I take I may refer to *Gour Mohun v. Anund* (1); *Ruheemuddy v. Poorno Chunder* (2). A point similar to this came up for consideration before this Court in the case of *Jnanendra Mohan Chowdhury v. Gopal Das* (3). In that case relying upon the decision in the case of *Moharant Beni Pershad Koeri v. Gobardhan Koeri* (4), it was held that when a holding is in occupation of several tenants at one entire rental the fact that landlord's Tahsildar has accepted from the various tenants proportionate parts of the rent does not bind the landlord to recognize a separation of the tenancy in the absence of evidence to connect the landlord with the receipt of any proportionate share of rent by the Tahsildar. In the present case the authority of the gomashtha not having been questioned, it may be conceded that the plaintiff landlord did in point of fact accept from the

two tenants proportionate parts of the rent due from them :

"Even then if the inference be accepted that rent has been paid separately by defendant 2 and realized by the landlord for a long series of years, that in itself is not sufficient to constitute a division of the tenure and what is in itself insufficient to denote a division of the tenure can hardly be accepted as sufficient to supply the defect in the receipt in the present case."

Beyond the documents to which I have referred and which are not sufficient to establish that there was a division of the tenancy, there is nothing else in the present case to show that there was such a division. It was never the plaintiff's case in his plaint that there was a sub-division of the holding and in fact this suit was instituted on the footing of the tenancy having been undivided one with an entire rental payable by the defendant.

I am accordingly of opinion that the decree of the Subordinate Judge should be set aside and that the case should be sent back to his Court so that he may now proceed to deal with the other two questions that arise in connexion with it and which were left open in view of the finding on the question of sub-division that is to be found in the said judgment. The said two questions are: first, whether plot 2 mentioned in the plaint or some other plot not mentioned therein appertains to the jama in suit, and second, whether the defendant has been dispossessed by the plaintiff in respect of any portion of the land which forms part of his jama. On the findings that he may happen to come to in connexion with the aforesaid two questions will depend the ultimate decision of the suit. The learned Subordinate Judge will deal with the appeal finally after determining the aforesaid questions and any other questions that may possibly arise.

Costs of this appeal will abide the result.

R.K.

Case remanded.

(1) [1874] 22 W. R. 295.

(2) [1874] 22 W. R. 336.

(3) [1904] 31 Cal. 1026=8 C. W. N. 923.

(4) [1902] 6 C. W. N. 823.



## \* A. I. R. 1929 Calcutta 369

B. B. GHOSE, J.

*Adaitya Dass*—Petitioner.

v.

*Prem Chand Mondal*—Opposite Party.

Civil Revn. No. 1508 of 1928, Decided on 20th February 1929, against decision of Munsiff, 2nd Court, Contai, D/- 8th September 1928.

\* Contract Act, S. 2 (d)—Plaintiff asking defendant to bring Thakur on particular festival and inviting guests for feeding on that day—Defendant failing to bring Thakur and consequently guests going away without taking food—No evidence to prove that defendant promised to bring Thakur on plaintiff inviting guests—There is no consideration for the promise and no suit for damages would lie.

Plaintiff asked the defendant to bring a Thakur to his house on a certain date for a festival. On that day he made arrangements for Bhog and feeding of guests. The defendant promised to bring the Thakur to his house on that date but failed to do so. Thereupon, the guests who had arrived did not partake of the food prepared by the plaintiff and went away. This caused loss to the plaintiff and the plaintiff, therefore, sued the defendant for damages.

*Held* : that in the absence of any finding to the effect that the defendant promised to bring the Thakur to the plaintiff's house in consideration of the plaintiff's inviting a number of people to dinner, there was no case for damages against the defendant although he had failed to keep his promise. There was no consideration for the promise which the defendant made to the plaintiff for bringing the Thakur to the plaintiff's house : 14 Cal. 64, Dist. [P 370 C 1]

*Sitaram Banerji and Harendra Nath Mukerji*—for Petitioner.

*Manmatha Nath Ray and Surja Kumar Aich*—for Opposite Party.

**Judgment.**—This rule was granted at the instance of the defendant who has been made liable for Rs. 37 and odd as damages for what has been called a breach of contract. The case is somewhat peculiar. The plaintiff's allegation was that he asked the defendant to bring a Thakur to his house on a certain date for a festival. He had made arrangements for Bhog and feeding of guests. The defendant promised to bring the Thakur to his house on that date but failed to do so. Thereupon, the guests who had arrived did not partake of the food prepared by the plaintiff and went away. This caused loss to the plaintiff and the plaintiff,

therefore, sued the defendant for damages. The learned Small Cause Court Judge allowed half of the claim made by the plaintiff, because he thought that no satisfactory evidence had been given as to the amount of the loss incurred by him on account of the defendant's failure to bring the Thakur. It is not necessary for the purpose of this case to decide who the real shewbait of the Thakur was or who its owner was. The plaintiff's case is that one Jiban Das had the Thakur which he left in the custody of the defendant. The defendant's case seems to be that he is the owner of the Thakur and he being an old man, his nephew performs the Sheba and is in charge of the deity now. The Small Cause Court Judge has found that there was what is called a Chukti by the defendant to bring the Thakur to the plaintiff's house on that particular day. He has also found that the plaintiff had invited number of guests who dispersed after sometime in the evening as the Thakur was not brought and no Bhog was offered. It may be taken as a fact that the learned Small Cause Court Judge intended to find that the guests did not partake of the food that was prepared by the plaintiff. The question is : does the act of the defendant give rise to any legal liability for which he should be cast in damages or, in other words, was there any contract enforceable in law for breach of which the defendant would be liable for damages? It is contended on behalf of the petitioner that there was no consideration for the promise, which could be legally enforced and that being so, there was no breach of a legal contract for which the defendant could be made liable for damages. In support of his argument he put forward the familiar illustration of A asking B to dinner and the failure of B to attend, in which case there being no legal obligation on the part of B, there would not lie suit for damages for breach of the promise to come and dine.

The learned advocate for the plaintiff opposite party argues that there was consideration for the promise made by the defendant to bring the Thakur to his house, because the plaintiff did invite a large number of persons to partake of the Bhog on the belief that the defendant would bring the Thakur to his house. He refers to the definition of consideration in the Contract Act in support of his contention. On reading the definition it seems to me



to be very difficult to say that the plaintiff who is in the position of the promisee did something at the desire of the promisor, i. e., the defendant petitioner in this case. There is nothing in the facts found which can support the contention that the defendant asked the plaintiff to invite a number of persons as a consideration for the promise of his taking the Thakur to his house. Reliance, again, is placed on behalf of the opposite party to the case of *Kedar Nath Bhattacharji v. Gourie Mahomed* (1) in support of his argument. There, the defendant put down his name as a subscriber for the building of a Town Hall in Howrah. The learned Chief Justice, Sir Comer Petheram, in delivering the judgment of the Court observed at p. 66 :

"It is clear that there are a great many subscriptions that cannot be recovered. A man for some reason or other puts his name down for a subscription to some charitable object, for instance, but the amount of his subscription cannot be recovered from him because there is no consideration."

In that particular case, however, he found on the facts that there was consideration for the promise made by the subscriber to pay money for the building of the Town Hall. This case may be said to be akin to the facts of the case which I have now to deal with : but it does not cover the facts of the present case. If there had been any finding to the effect that the defendant promised to bring the Thakur to the plaintiff's house in consideration of the plaintiff's inviting a number of people to dinner, there might possibly have been a case for damages against the defendant if he had failed to keep his promise. But there is nothing in this case which may be construed as consideration for the promise which the defendant is said to have made to the plaintiff for bringing the Thakur to the plaintiff's house. Under these circumstances, in my opinion, the suit of the plaintiff was not maintainable. The rule is, accordingly made absolute and the suit of the plaintiff dismissed with costs in both the Courts. Hearing fee, one gold mohur.

R.K.

*Rule made absolute.*

## \* A. I. R. 1929 Calcutta 370

JACK AND MITTER, JJ.

*Tara Prosanna Bal and others*—Plaintiffs—Petitioners.

v

*Asoke Prosanna Bal and another*—Opposite Party.

Civil Rule No. 1 of 1929, Decided on 12th February 1929, against order of Sub-Judge, Mymensingh, D/- 19th December 1928, in partition suit No. 211 of 1928.

\* Civil P. C., Sch. 2, Para. 3—Partition suit—Parties filing petition of compromise in terms of which Court passed preliminary decree—Earlier part of that petition defining shares of parties and latter part laying down procedure to effect division including appointment of arbitrators—Petition not applying for order of reference—There was no valid order of reference—Although latter part of petition relating to arbitration proved abortive, preliminary decree based on its first part will stand—Compromise—Civil P. C., O. 23, R. 3.

Parties to a partition suit arrived at a compromise and jointly filed a petition of compromise in terms of which the Court passed a preliminary decree. The earlier part of the petition set out the respective shares of the parties and the latter part laid down the procedure by which the actual division was to be effected. This procedure included appointment of certain persons as arbitrators. But the petition nowhere made any mention of the application for an order of reference which the parties were to make. The arbitration did not prove successful.

*Held* : that there was no valid order of reference inasmuch as there was no application by the parties for such an order. [P 372 C 2]

*Held further* : that although the latter part of the petition of compromise relating to procedure and appointment of arbitrators proved abortive, still the preliminary decree passed by the Court on the basis of the earlier part of it will stand : *Cameron v. Cuddy*, (1914) A. C. 651, *Rel. on.* [P 372 C 1,2]

*Sarat Ch. Basak, Amarendra N. Bose, Bhupendra Nath Das and Bhupendra Nath Dutt Roy*—for Petitioners.

*Benode Mitter, Birendra K. De, and Ramendra Ch. Roy*—for Opposite Party.

**Mitter, J.**—The facts on which this rule depends may be briefly stated thus: The plaintiffs who are the petitioners before this Court instituted a suit for partition. The parties to the partition proceedings agreed ultimately to settle their differences on certain terms which were embodied in a petition. That petition was filed in Court and, on the basis of that agreement a preliminary decree



was passed on 17th September 1928. The order runs as follows :

"Parties have filed a petition of compromise. Ordered that the suit be decreed in terms being in preliminary form and that the petition of compromise be made a part of the decree and that the case be put up for orders on 17th January 1929."

On 24th September 1928, the preliminary decree was signed and sealed. It is necessary to set forth some of the terms of the petition of compromise in order to understand the points raised in this rule. The first ten paragraphs of the petition of compromise adjusted the rights of the parties to the moveable and immovable properties which formed the subject-matter of partition and they also related to the adjustment of the claim for accounts. Para. 11 and the subsequent paragraphs related to the procedure which was to be adopted for the purpose of working out the rights of the parties as agreed to and settled by the first ten paragraphs. Para. 11 stated that the division of the moveable and immovable properties with reference to which the parties had settled their rights in the earlier paragraphs of the petition of compromise was to be made by two arbitrators of the name of Babu Satya Ranjan Guha and Babu Sasi Kumar Bose, latter being a relation of the parties. It was also stated that the division was to be made within six months from the date of the compromise. It was further stated that whatever award the arbitrators might make would be binding on the parties. It was also recited in the petition that, in case there was a difference of opinion between the two arbitrators, the matter was to be referred to a third person as umpire and, if again there was difference of opinion between these three persons, the opinion of the majority would prevail. Para. 12 recited that, if the arbitrators were unable to finish their work within six months, it would be open to them to apply to the Court to have an extension of time. If for any reason, para. 13 recited, the arbitrators were unable or were unwilling to carry on the work of arbitration, then it would be open to the civil Court to appoint a commissioner for the purpose of effecting the partition of the divisible properties. It is not necessary to refer in detail to the subsequent paragraphs of the petition of compromise. It is sufficient to state

that some of these provisions referred to the appointment of a common manager to carry on the management of the estate sought to be partitioned so long as the works of the arbitrators were not finished. There is nothing in this petition of compromise which suggests that the parties were to apply to the Court for a reference to arbitration, and, as a matter of fact, while this petition of compromise was made a part of the decree of Court, no orders were passed by the Court with reference to arbitration and that was done, it seems to me, for a very good reason because the petition did not refer to any application for arbitration nor was the Court's attention drawn by the advocates on both sides to the necessity of an order of reference to arbitration. The plaintiffs themselves apprehended that the petition of compromise was not sufficient in itself to show that there was a clause by which the parties agreed to apply to the Court for reference to arbitration ; for, I find that on 27th November 1928, the plaintiffs put in a petition asking for a formal order of reference to arbitration. They stated in their petition that they had already appointed \*Babu Satya Ranjan Guha and Babu Sasi Kumar Bose as arbitrators by a solenama and that, therefore, it was necessary that the Court should direct a reference to the arbitrators to arbitrate ; otherwise, technical and subtle difficulties might arise. This application, it is necessary to state, was made without notice to the other side the defendant opposite party, and was heard in his absence and the Court made this ex parte order :

"It seems that a formal order of reference should be drawn up and sent to the arbitrators so that no technical questions may arise in future."

As soon as the defendant came to know of this order, he moved the Court on 29th November 1928 and filed two petitions complaining of the illegality of the order of reference made on 27th November and pointed out in para. 3 of his petition that, as there was no stipulation in the petition of compromise to the effect that the parties were to apply to the Court with reference to arbitration, the Court was not right in making the reference. This application of the defendant was heard in the presence of both sides and the Court passed an order on 19th December 1928 revoking



the reference to arbitration. This order forms the subject-matter of the present rule.

It is contended by the learned advocate for the petitioners that it was not open to the Court to revoke the reference to arbitration as none of the causes which are mentioned in S. 5, Sch. 2, Civil P. C., existed in the present case. The Subordinate Judge came to the conclusion that there was no valid reference in this case. He remarked that "the preliminary decree is no doubt binding upon the parties; but as matters stand now, I do not think that it would be proper to have the partition effected by the two gentlemen mentioned in the petition of compromise."

The Subordinate Judge also stated that it was not right to allow Babu Sasi Kumar Bose to work as common manager of the parties. It is necessary to note here one circumstance, namely, that notwithstanding the provision in the petition of compromise to the effect that Sasi Babu was not to employ for the management of the property sought to be partitioned any officer of any of the parties, the said gentleman appointed one of the plaintiffs and his officers to collect the rents of the estate and it is said that it was in distinct violation of the agreement on which the preliminary decree was based. The Subordinate Judge accordingly ordered that the common manager should also be removed from the common managership and directed him to file all the papers that were in his custody relating to the estate. On these facts, the main question which falls for determination is as to whether there has been a valid reference to arbitration within the meaning of S. 3, Sch. 2, Civil P. C. On behalf of the opposite party, Sir Binod Mitter has contended that, in order to find the jurisdiction of the Court to refer a particular matter to arbitration, two elements are necessary. The first element necessary is that there must be an agreement between all the parties to the suit that any matter in difference between them shall be referred to arbitration and the second element necessary is that the parties must apply to the Court for an order of reference. It is said that the second element is wanting in the present case. I think this contention of the learned counsel for the opposite party must prevail. From what I have stated above it is apparently clear that there was no

mention in the petition of compromise of any application which the parties were to make to the Court for the purpose of referring the matter which formed the subject-matter of dispute between them to arbitration. The plaintiffs discovered that subsequently and tried to remedy the defect by putting in the application of 27th November without notice to the opposite party. It is an elementary rule of law obtaining in every system of jurisprudence that no one is bound by an order which was made in his absence. When the defendant came to know of the order, he was quite justified in saying that the ex parte order which was made in his absence was not binding on him and the Court after hearing both sides made the order which is now complained of. It is said on behalf of the petitioners that there has been a substantial compliance with the first part of S. 1, Sch. 2 seeing that the petition of compromise was filed before the Court and the Court passed a preliminary decree on it. I do not think that there has been any compliance at all; for, it does not appear that the Court's attention was drawn to the fact that the parties had applied to the Court for an order of reference. As I have already pointed out, no such terms could be found in the petition of compromise. All that the Court did was to pass a preliminary decree in accordance with the terms of the compromise which were presented by the parties. The Court's function ended then and there and it was not asked to do any other thing. In these circumstances, I think that this rule ought to be discharged in the view that there was no valid order of reference as is found by the learned Subordinate Judge.

It is then said on behalf of the petitioners that this is a course which will have the effect of setting aside a compromise decree in part and it will be extremely prejudicial to the plaintiffs petitioners seeing that the opposite party will be entitled to retain the benefit of the compromise in part and will not be bound by the terms which are not favourable to him. It is also said that it is not possible to divide the petition of compromise into two parts so as to make the order made by the Court effective for any purpose. I do not think that there is any force in this contention. Reading the petition of compromise it



appears to me that the first ten paragraphs refer to the rights of the parties in the moveable and immovable properties which formed the subject-matter of the partition suit and the other paragraphs relate to the mode in which the partition was to be effected. It is true that all the stipulations in the agreement formed an integral part of the same agreement ; but as it is possible to divide it into two parts and to treat the first part as relating to the rights of the parties and the subsequent part as relating to the machinery by which those rights are to be worked out no practical difficulty will arise in carrying out the order made by the Court below. That such a course is permissible receives ample support from a decision of the Privy Council which has been cited to us namely, the case of *Cameron v. Cuddy* (1) where in somewhat similar circumstances Lord Shaw observed as follows :

When an arbitration for any reason becomes abortive, it is the duty of a Court of law, in working out a contract of which such an arbitration is part of the practical machinery to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is the duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character and it furnishes by an appeal to a Court of justice the means of working out and of preventing the defect of bargains between the parties. It is unnecessary to cite authority on the subject but the judgment of Lord Watson in *Hamlyn and Co. v. Talisker Distillery* (2) might be referred to.

It is said on behalf of the petitioners that whatever might be said with regard to the agreement these principles cannot apply to a case where on the basis of the agreement a decree of Court is passed. But it has now been firmly established on high authority that an agreement is none the less an agreement because superadded to it is the command of the Judge. This agreement although embodied in a decree of the Court, possesses all the infirmities of an ordinary contract. Therefore, the same principle which is said to govern the agreement in the case before the Privy Council just referred to will also govern the present case, although the agreement in the present case has been followed by a decree

of Court. For these reasons, I am of opinion that the rule must be discharged with discharged with costs, hearing-fee five gold mohurs.

Jack, J.—I agree.

S.N./R.K

Rule discharged.

## A. I. R. 1929 Calcutta 373

C. C. GHOSE AND BUCKLAND, JJ.

*Satyabrata Sen*—Appellant.

v.

*Gopal Das Aurora & Co.*—Respondents.

Appeal No. 91 of 1927, Decided on 18th November 1927, against original order of Costello, J.

Letters Patent (Calcutta), Cl. 12—Suit to enforce equitable mortgage is one for land.

The practice of the Calcutta High Court for more than half a century has been to regard suits for the enforcement of equitable mortgage of property situate outside the jurisdiction as suits for land : *A. I. R. 1927.Bom. 278 (F. B.) not. Foll.* [P 374 C 1]

S. N. Banerjee and P. C. Basu—for Appellant.

C. C. Ghose, J.—In this case the plaintiff is the appellant before us. What happened is as follows: The plaintiff lent and advanced in Calcutta on 18th July 1924, a sum of Rs. 5,000 to the defendants named in para. 4 of the plaint, the said defendants executing a promissory note for the said amount. It appears that at the time when the said advance was made the title-deeds of a certain property outside the territorial jurisdiction of this Court were deposited with the plaintiff as collateral security for the said amount. The defendants not having repaid to the plaintiff the amount of the principal and of the interest which had accrued due, the plaintiff presented a plaint in this Court on 10th August 1927, for admission, praying for a declaration that an equitable mortgage had been created by the deposit of the said title-deeds and for the usual mortgage decree. No part of the mortgaged premises being situate within the jurisdiction of this Court, the plaintiff prayed for leave under Cl. 12 of the Letters Patent to institute the suit in this Court. Costello, J. refused such leave and his order was as follows:

"Following the established practice of this Court I refuse leave under Cl. 12 of the Letters Patent. The plaint is therefore rejected

(1) [1914] A. C. 651=110 L. T. 89=83 L. J. P. C. 70.

(2) [1894] A. C. 202=58 J. P. 540=71 L.T. 1.



I express no opinion of my own as to whether or not the established practice is well founded having regard to the terms of Cl. 12 and certain decisions thereon in other High Courts."

It is against this order of Costello, J., that the present appeal has been preferred. Mr. Banerjee who appeared for the appellant contended that the practice of this Court not to entertain suits for enforcement of mortgage of premises situate outside the jurisdiction of this Court is not correct and in support of his contention he relied on the Full Bench case in the Bombay High Court: *Hatimbhai Hassanally v. Framroz Eduljee* (1). He also drew our attention to several cases decided in this Court and contended that the practice hitherto followed in this Court is not warranted, having regard to the fact that, at any rate, a part of the cause of action had arisen within Calcutta and that the whole question should be reviewed by us.

We have not had the advantage of having the question argued on behalf of the respondents to this appeal, and in the absence of any argument on behalf of the respondents and speaking for myself, I am by no means satisfied that the practice hitherto followed in this Court is wrong and should be departed from, nor am I convinced that the decision of the majority of the Full Bench in the Bombay High Court is one which should be followed. In my view this appeal should be dismissed.

**Buckland, J.**—The way this matter comes before us does not admit of giving the questions involved that full consideration which a point of such moment requires. The practice of the Court for more than half a century has been, to regard suits, of this kind as suits for land. I should not be prepared to disturb this practice except after hearing the matter fully argued on both sides. The dissenting judgments in *Hatimbhai Hassanally v. Framroz Eduljee Dinshaw* (1) only increases the difficulty, for the learned Judges who took divergent views all give reasons of great cogency for their opinions. I am not convinced that the view of the law taken by the Court for so many years is wrong and I agree in the order to be made.

R.K.

*Appeal dismissed*

## \*\* A. I. R. 1929 Calcutta 374

## Full Bench

RANKIN, C. J., AND C. C. GHOSE, B. B. GHOSE, PANTON AND MUKERJI, JJ.

*Lakshan Chandra Naskar* — Plaintiff  
— Appellant.

v.

*Ramdas Mandal* — Defendant—Respondent.

Full Bench Ref. No. 1 of 1929, Decided on 23rd April 1929, in Appeal No. 2260 of 1927, from appellate decree of Sub-Judge, Second Court, Alipore, D/- 13th June 1927.

\*\* (a) Civil P. C., S. 47—Decree adjusted—Adjustment not recorded—Sale in execution of decree—Judgment-debtor cannot plead adjustment even by way of defence in suit for possession by decree-holder purchaser: 24 Cal. 355; 27 Cal. 946; 7 C. W. N. 607; 4 I. C. 168=9 C. L. J. 464 and 71 I. C. 378=A. I. R. 1922 Cal. 311=27 C. W. N. 280, Overruled.

An objection to an execution sale on the ground that decree in execution of which the sale took place was satisfied prior to the sale cannot be pleaded by the judgment-debtor by way of defence in a suit by the decree-holder as purchaser for possession of the property sold in execution of the decree: 24 Cal. 355; 27 Cal. 946; 7 C. W. N. 607; 4 I. C. 168=9 C. L. J. 464 and 71 I. C. 378=A. I. R. 1922 Cal. 311=27 C. W. N. 280, Overruled. 16 C. W. N. 805 and 25 Bom. 337 (P.C.), Appr. 19 M. L. J. 1; 32 Mad. 242 and A. I. R. 1921 Mad. 279, doubted and not followed.

[P 379 C 1,2].

\*\* (b) Evidence Act, S. 40—S. 40 applies where Court had jurisdiction to decide matter.

Section 40 applies to a case in which the Court has jurisdiction to decide a matter and one party says it should not do so because that matter has been decided before: 6 Cal. 171, held no good law in view of 23 Cal. 533 (P.C.), 19 All. 277 (P.C.) and 25 Cal. 522, (P.C.) [P 379 C 1]

*Sarat Chandra Jana*—for Appellant.  
*Hem Chandra Dhar*—for Respondent.

**Rankin, C. J.**—The plaintiff in 1909 obtained a money decree against the defendant and his brother for Rs. 27-8-0. After much contest it has been found by the lower appellate Court that in 1913 the defendant and his brother transferred to the plaintiff 10 cottahs of land in satisfaction of all debts on whatever account due to the plaintiff and that thus the decretal amount was discharged. It



is clear, however, that this adjustment of the decree was not certified by the plaintiff under O. 21, R. 2 and that the judgment-debtors failed to apply to the Court within the ninety days prescribed by Art. 174, Sch. 1, Lim. Act 1908, to have the adjustment recorded. Cl. 3 of the rule took effect accordingly; the adjustment "shall not be recognized by any Court executing the decree." In this state of things the plaintiff in 1914 sought to have execution of the decree; the defendant set up the adjustment as an objection in the execution case: but this objection being clearly unsustainable it was not persisted in and was dismissed for default on 23rd November 1914. The land in suit was sold in execution and purchased by the plaintiff in 1915 and in 1916 delivery of possession was given to the plaintiff under O. 21, R. 95. The lower appellate Court has come to no specific findings on the matter but the plaintiff's averment was that he had peaceable possession until 1919 when the defendant committed various acts of trespass and soon thereafter dispossessed the plaintiff. Whether the possession given to the plaintiff in 1916 was effective and complete or so ineffective and incomplete as to deserve the adjective "symbolical" is of no importance in the present suit which was instituted in 1925. The only question is as to the plaintiff's title there being no room for objection to the claim on the ground of limitation. The plaintiff put in evidence the sale certificate dated 22nd May 1915. The defendant contends that the decree having been satisfied in 1913 the proceedings of 1914—16 were had in fraud of the defendant and that this is a defence which the Court in the present suit must entertain as it goes to the validity of the plaintiff's title.

This raises an important question and the reference to this Full Bench states the question in this form:

"Whether an objection to an execution sale on the ground that the decree in execution of which the sale took place was satisfied prior to the sale might be pleaded by way of defence in a suit by the purchaser for possession of the property sold in execution of the decree although such objection was raised in execution proceedings but was not determined on account of the laches of the judgment-debtor in allowing the objection case to be dismissed for default?"

Now I think that for the purposes of the present case the circumstance that

the objection was raised before the executing Court and the circumstance that the objection was before that Court abandoned are devoid of all importance. The defendant was forbidden by Cl. 3, R. 2, O. 21, to raise before any Court executing the decree the plea that the decree had been satisfied and it may safely be supposed that his failure to persist in that plea is explained by the fact that it could not be entertained. He is no worse off and no better off for having thought of raising it. As he could neither bring a suit nor apply under S. 47 there is no question of the defendant having lost by laches his right to impeach the sale. Thus the present case is altogether free of any complication such as may arise when the objection taken to defeat an auction-purchaser's suit in ejectment is of a kind which might and should have been taken and decided in the executing Court. If for example the objection be that the judgment-debtor's interest in the property was of a kind that was not saleable in execution, a question may arise whether the objection comes too late, whether the defendant having (for example) suffered an order for sale or an order confirming the sale can take the objection at a late stage and dispute the previous orders. This question may arise upon the judgment-debtor's application under S. 47 to set aside the sale as in *Durga Charan v. Kali Prasanna* (1). If it be true that S. 47 permits the defendant in a subsequent ejectment suit to assert by his defence the invalidity of the sale it may be that the same question can arise in a suit. It was thought to arise and it was dealt with in *Murullah v. Sh. Burullah* (2) and *Dwarkanath Pal v. Tarini Sankar Roy* (3).

In these cases the Court was proceeding on the footing of an erroneous doctrine laid down in *Bhiram Ali v. Gopi Kanth* (4) to the effect that a non-transferable occupancy holding was not saleable in execution, a doctrine which has now been negatived in *Chandra Binode v. Alabux* (5). Apart from this doctrine and apart from the question whether S. 47 can apply to bar a defendant, *Bhiram*

(1) [1899] 26 Cal. 727=3 C.W.N. 586.

(2) [1905] 9 C.W.N. 972.

(3) [1907] 34 Cal. 199=5 C.L.J. 294=11 C.W.N. 513.

(4) [1897] 24 Cal. 355=1 C.W.N. 396.

(5) A.I.R. 1921 Cal. 15=48 Cal. 184 (S.B.).



*Ali's* case (4) appears to have proceeded on the ground, not that the sale was liable to be set aside, but that the plaintiff took nothing by his purchase. It may be doubted whether this reasoning was sound. If a judgment-debtor has no interest the purchaser takes nothing by his purchase. But if he has an interest and the execution Court purports to pass it by a sale the objection that it was not transferable or saleable would seem, in the defendant's mouth at least, to be an objection to the propriety of the sale; and if this objection is not based on want of jurisdiction in or fraud practised on the execution Court, it is not evident to me that the defendant in another Court can raise the point at all, unless indeed it can be said that apart from S. 47 the merits of an order in execution can be revised by a separate suit between the parties. The cases to which I have referred and *Beni Madhab Rai Charan* (6) thus raise more than one question of difficulty. It is not necessary here to discuss them all.

We are required to consider what consequences the legislature has intended to attach to a failure on the part of a judgment-debtor who has satisfied the decree, to get the satisfaction or adjustment recorded under R. 2, O. 21. For this purpose the rule has to be read with S. 47 of the Code which enacts that

"all questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit."

It is clear enough nor is it disputed that Cl. 3, R. 2, O. 21, prevents the adjustment from impeding in any way the course of execution. The decree-holder can insist upon and obtain an order for attachment, an order for sale, an order confirming the sale, a sale certificate and delivery of possession of the property sold. Is this intended by the legislature to be provisional, as a means whereby the execution Court may carry out its work with celerity but subject to the judgment-debtor's right to set it all aside by appropriate proceedings based on the ground of fraud or on other grounds. Now, the Code does provide instances of an intention that in some cases an execution Court should act sub-

ject to check or control by the result of a subsequent suit. Claims by third parties to property attached in execution are to be investigated in manner provided by O. 21, R. 60 and by R. 63 the losing party may bring a suit to establish his right. A similar arrangement is made by R. 103 as regards claims by a third party which arise or are preferred at the time of delivery of possession. But questions between decree-holder and judgment-debtor as to whether the decree has been satisfied or adjusted are not so treated by the Code, and it is clear enough that a judgment-debtor who has failed to have an adjustment recorded can neither bring a suit to set aside the sale on the footing of the adjustment nor apply under S. 47 for any such relief. The former course is forbidden by S. 47 and the latter by Cl. 3, R. 2, O. 21. He may bring a suit for damages for the decree-holder's breach of contract or for recovery of the money paid under the adjustment; these are not questions of execution of the decree nor are they proper to be raised in a Court whose duty is confined to executing the decree. They may in some wide sense be questions "relating to the discharge or satisfaction of the decree" but they are not within the meaning of these words as used in S. 47. Whether damages be recovered or not, the sale in execution will stand; and the executing Court will neither be troubled with a dispute as to the fact of an adjustment, nor required to adjust the rights of the auction purchaser on the footing that the sale has become void.

If these be admitted consequences of a failure to get an adjustment recorded, the question arises whether it is consistent with the language and intention of the legislature to suppose that the judgment-debtor who is so effectually debarred from challenging the sale either in the execution Court or as plaintiff in an independent suit, is at liberty, after retaking possession of the property, to challenging the validity of the sale as defendant to an ordinary suit in ejectment. This is the construction for which the defendants contend, and on the meaning of S. 47 he cites as authority: *Bhiram Ali's* case (5), already mentioned; also *Nil Kamal v. Jahnabi* (7); *Durga Charan v. Karamat*

(6) A.1.R. 1926 Cal. 247.

(7) [1900] 27 Cal. 946.



*Khan* (8); *Chandramoni v. Halijennissa* (9); *Venkataramanachariar v. Mee-natchi Sundaram Aiyar* (10); *Thathu Naik v. Kondu Reddi* (11); *China Dandsi v. Tatiah* (12) and *Suradhani v. Sitoo* (13).

These decisions have been doubted in *Ramsona v. Naba Kumur* (14): cf. also *Malkarjun v. Narhari* (15), and in my opinion they are wrong and should be overruled upon this question. I am unable to see that they are consistent either with the language or the purpose of the legislature in enacting S. 47. A question between plaintiff and defendant as to whether the decree has been satisfied or is a decree of which the plaintiff is entitled to have execution is clearly one of a class of questions which "shall be determined by the Court executing the decree." This does not mean merely that the execution Court must determine it, if it is raised in the course of the execution proceedings. It means that the Court executing the decree is given exclusive jurisdiction over this matter as being one which relates to the execution. The words "and not by a separate suit" show clearly that the section is forbidding for this purpose the use of the ordinary means whereby rights are determined. This is on my reading of the section an express negative to carry out and make clear the purpose of the section in pointing to a particular Court as the proper Court. This reading is enforced in my opinion by the facts that the Court to which the section points (1) is governed by particular rules which affect the rights of the parties e. g., O. 21, R. 2 (3) (2) is not governed under S. 141 by the same procedure as is applied to suits; (3) is a Court before which the parties are already arraigned by service of the prescribed notices and (4) is the Court which has seisin of the execution. To say that questions relating to the execution of the decree "shall be determined by the

Court executing the decree" means more than that such Court has jurisdiction to determine them. How much more? Merely that the Court when called upon is not to shirk its duty? Certainly not. It means that a party to any suit which has been decreed, who finds it necessary to raise such questions as are mentioned must get them determined in the execution and cannot carry them for decision to another jurisdiction. As between parties and their representatives the act of the Court in effecting a sale is to confer title to property and not merely title to litigation:

"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible per Lord Macnaghten *Prosunno Kumar v. Kali Das* (16)."

That is one part of the purpose of S. 47. Another part of its purpose is to ensure that execution matters shall be dealt with by the executing Court and on the principles laid down for execution cases. It seems to me that in S. 47 the prohibition of a suit is a provision in aid of the previous direction which means that questions within the scope of the section shall be determined in execution and not otherwise. In these circumstances the argument that the section says "and not by a separate suit" as distinct from "and not in a separate suit" seems to me to be pedantic rather than substantial. The ordinary rule on questions of jurisdiction is that relief which a Court cannot give to a plaintiff it cannot give at all. It is only in a Court which has jurisdiction to grant specific performance or rescission of a contract or the setting aside of a conveyance that a defendant can make good a defence which depends upon his right to have such relief *Mostyn's case* (17), *Warren v. Murray* (18), *Walsh v. Lonsdale* (19), *Manchestor Brewery v. Coombs* (20) and the case is even stronger when one is construing a section of which the purpose is to keep execution questions for the executing Court. It is in my

(8) [1909] 7 C. W. N. 607.

(9) [1909] 9 C. L. J. 464=4 I. C. 168.

(10) [1909] 19 M. L. J. 1=1 I. C. 193.

(11) [1909] 32 Mad. 242=1 I. C. 221=5 M. L. T. 248.

(12) A. I. R. 1921 Mad. 279.

(13) A. I. R. 1922 Cal. 911.

(14) [1912] 16 C. W. N. 805=10 I. C. 90=13 C. L. J. 404.

(15) [1900] 25 Bom. 337=27 I. A. 216=2 Bom. L. R. 927=7 Sar. 789 (P.C.).

(16) [1892] 19 Cal. 688=19 I. A. 166=6 Sar. 209 (P.C.).

(17) [1876] 1 C. P. D. 145.

(18) [1894] 2 Q. B. 648=64 L. J. Q. B. 42=43 W. R. 3=71 L. T. 458.

(19) [1882] 21 Ch. D. 9=52 L. J. Ch. 2=31 W. R. 109=46 L. T. 858.

(20) [1901] 2 Ch. 608=79 L. J. Ch. 814.



opinion as good an objection to a defence as it is to a plaint to say that the question which it seeks to raise

"could only have been determined by the order of the Court which executed the decree : cf. *Prosunno Kumar's* case (16) (at 688)."

when a judgment-debtor's property has been sold in execution and the judgment-debtor has been put out of possession by the Court's delivery of possession to the purchaser, it seems clear both on principle and authority that he cannot upon any allegation of fraud claim to ignore the sale. He may have a right to set the sale aside in appropriate proceedings and some cases this right may be admitted at least in equity as a defence to a claim. I will assume, without deciding the question, that this right may be asserted by a defendant even after the Limitation Act has made it impossible for him to institute proceedings to enforce it. But if there is no right to have sale set aside the case is very different. Here it has to be conceded that neither in execution nor by a suit could the defendant at any time have asserted that the sale was liable to be set aside at his instance. There is only one Court in which he could have claimed the relief and in that Court he had failed to do what was necessary to enable to set up his case. Upon what principle can he claim as a defendant to be in a better position to challenge the sale than he would have occupied in a proceeding brought by himself for the purpose? It seems to me that we have to choose in this case between two views of the intention of the legislature. On one view the failure to get an adjustment of the decree recorded involves that the defendant must treat the sale as valid and seek his remedy in damages or otherwise without challenging the sale. On the other view he must suffer ejectment under R. 95, O. 21 and can by no proceedings seek to be restored to possession, but, if he seizes possession, he can claim that the sale was never binding upon him and that he is the rightful owner. This it would seem to follow, he can do at any time, provided that his ouster of the decree-holder auction-purchaser was within twelve years of delivery of possession. In my opinion the former view is correct and the latter view is erroneous. It is part of the purpose of S. 47 to ensure that so far as

regards parties to the suit the executing Court shall, where the decree itself is valid, settle and decide the right to have execution and give a title to the purchaser. It is no part of its purpose to put a premium upon the forceful or wrongful seizure of possession, or to make titles valid or invalid according as the one party or the other is plaintiff or defendant in any litigation subsequent to the sale—a thing which is matter of pure chance. How little the defendant's possession has to do with the matter can be seen by the circumstance that he cannot resist eviction under R. 95, O. 21. On the contrary, I agree in the conclusion arrived at in *Jagneswar v. Kailash* (21), that under R. 92, O. 21 an order confirming the sale is intended as a judicial determination between the parties that none of the objections exists upon which the validity of the sale could have been questioned. The legislature in enacting Cl. 3, R. 2, O. 21, cannot have been ignorant that decrees would be executed despite unrecorded adjustments, and that such cases would commonly, if not necessarily, raise a question of fraud. On a question of title and on a question of fraud it is highly difficult in my judgment to suppose that the legislature intended neither that the sale should hold good nor that the judgment-debtor should be able by proceedings of his own to have it set aside.

It remains to consider an argument adduced by the learned advocate for the defendant to the effect that the right he claims is given to him by S. 44, Evidence Act. That section refers, not to all judgment, orders or decrees that may be put in evidence, but to those only which are relevant under Ss. 40, 41 or 42. It is said that S. 40 has some application to this case.

"The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit, or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial."

I have not succeeded in understanding what judgment or order is thought to have been tendered by the plaintiff under this section. The plaintiff to prove this title produced his sale certificate dated 22nd May 1915 which was Ex. 3. He did not have to produce, and I do not find from the record that he did in fact



produce, or exhibit the order for sale or the order confirming the sale. He produced the sale certificate as his title-deed just as he might with appropriate proof have produced a conveyance executed by the defendant. Nothing was at any time put in evidence for the purpose of saying that it prevented the Court from taking cognizance of the suit or any part of the suit or any part of the defence. This is not a case like *Rajib. Panda v. Lakhan Sindh* (22) where the plaintiff put forward a compromise decree to prove his right to khas possession. A sale certificate is not a plea of res judicata. The plaintiff does not say:

"We litigated before as to whether the land was yours or mine and the Court held it to be mine."

He says :

"The Court sold it to me in execution and by the act of the Court your title passed to me."

The defendant wishing to show that the act of the Court did not pass the title, is barred, not by S. 11 of the Code, but by S. 47. He is barred just as he would be barred if he brought a probate suit before a Munsiff, or a suit for a lac of rupees in the Small Cause Court. S. 40, Evidence Act, applies to a case in which the Court has jurisdiction to decide a matter and one party says that it should not do so because that matter has been decided before. In the present case the trial Court had no jurisdiction to entertain the defence raised and it could so decide upon the pleadings upon a mere inspection of the defendant's own statement of his case. We were referred to the case of *Gujju Lal v. Fatteh Lal* (23), which is no longer authoritative in view of decisions of the Privy Council of *Ram Ranjan v. Ram Narain* (24), *Bitto Kunwar v. Kesho Prasad* (25), *Tepu Khan v. Ranjani* (26); but in my judgment there is nothing in the reasoning of that case which assists the defendant on the present point.

I would in answer to the question referred to us say that an objection to an execution sale on the ground that the decree in execution of which the sale

took place was satisfied prior to the sale cannot be pleaded by the judgment-debtor by way of defence in a suit by the plaintiff as purchaser for possession of the property sold in execution of the decree.

The second appeal should be allowed and the decree of the Munsiff restored with costs in all the Courts. Hearing fee before Full Bench ten gold mohurs.

C. C. Ghose, J.—I agree.

B. B. Ghose, J.—I agree.

Panton, J.—I agree.

Mukerji, J.—I agree.

R.K.

Reference answered

### A. I. R. 1929 Calcutta 379

C. C. GHOSE AND MALLIK, JJ.

*Daya Chand Parruk*—Petitioner.

v.

*Bhim Singh and others* — Opposite Party.

Civil Rules Nos. 1512 and 1653 of 1928, Decided on 30th January 1929.

Land Acquisition Act (1 of 1894), S. 31—Karta can withdraw compensation.

Karta of a joint Hindu family is allowed to withdraw the compensation money: 32 C. W. N. 815, *Foll.* [P 380 C 1]

*Benod Mitter, Rishindra Nath Sarkar, Kushi Prasanna Chatterjee and Santomoy Majumdar*—for Petitioner.

*Bepin Chandra Mullick, Govinda Chunder Dutt and Susil Chunder Sen*—for Opposite Party.

**Facts.**—Certain land was acquired under the Land Acquisition Act and compensation award was deposited in the office of the President of the Tribunal by the Collector under S. 31, Land Acquisition Act. The property acquired belonged to a Hindu Mitakshara joint family of which the petitioner was the karta. He applied for withdrawing of the compensation money on behalf of the family. The President of the Tribunal refused the application for withdrawing the compensation by the karta of the family, holding that the karta was not a person who had power to alienate the property as contemplated in S. 32, Land Acquisition Act. The petitioner relied on the decision of the Calcutta High

(22) [1900] 27 Cal. 11=3 C. W. N. 660.

(23) [1881] 6 Cal. 171=6 C. L. R. 439.

(24) [1895] 22 Cal. 533=22 I. A. 60=6 Sar. 530 (P.C.).

(25) [1897] 19 All. 277=24 I. A. 10=1 C. W. N. 265 (P.C.).

(26) [1902] 25 Cal. 522=2 C. W. N. 501.



Court 32 C. W. N. 815 but the learned President distinguished the ruling from the facts of the present case.

The petitioner then moved the High Court and obtained a rule. Their Lordships at the time of issuing the rule directed that notice of the rule should be served on the minors, the other members of the joint family.

**Judgment.**—We examined the records in these two rules and we are of opinion that those rules must be made absolute.

As regards the rule which was obtained by Mr. Sushil Sen there is not much difficulty because all the parties interested in the compensation money that was awarded are before us and they are agreeable that the compensation money should be allowed to be withdrawn by the karta of the family.

As regards the other rule, namely, the one obtained by Sir Benod-Mitter, in our view this case cannot be distinguished from case of *Dindyal v. Ram Sahu* (1). In the last mentioned case the karta of the family was allowed to withdraw the compensation money. We see no reason why a similar order should not be made in this case.

No order is made as to costs in either of these rules.

R.K.

*Appeal dismissed.*

(1) [1928] 32 C. W. N. 815.

### A. I. R. 1929 Calcutta 380

SUHWARDY AND GARLICK, JJ.

*Promothonath Mittra and others* — Defendants—Appellants.

v.

*Gostha Behari Sen and others*—Plaintiffs—Respondents.

Appeal No. 1220 of 1926, Decided on 16th August 1928, from decree of 4th Addl. Dist. Judge, 24-Perganas, D/- 13th February 1926.

(a) **Specific Relief Act, S. 42 — Cosharer granting lease of whole property—Other cosharer refusing to join—Lessee suing for possession and mesne profits — Lessee held entitled to get lease from the grantor and possession of his share and refund of proportional selami—Specific Relief Act, Ss. 14, 15 and 16.**

A cosharer professed to grant a lease of the entire interest in a property of which he held a share only, had the draft of the kabuliyat made, agreed to give an amalnama or autho-

rity to the lessee to take possession of the property and received the full selami stipulated from the lessee and accepted rent. The other cosharers refusing to execute the kabuliyat, the cosharer refused possession of his share. Lessee sued for amalnama and possession.

**Held :** that the suit was not for specific performance of a contract and thus coming under Ss. 14, 15 and 16 but was for a declaration and consequential relief to which the plaintiffs were entitled. [P 381 C 2]

(b) **Specific Relief Act, Ss. 14 to 17—Law as to specific performance being codified in Ss. 14 to 17, English authorities can be resorted to only for explaining these sections.**

*Per Suhrawardy, J.*—The law on the point of specific performance must be taken to have been codified by Ss. 14 to 17, Specific Relief Act; and English authorities can only be resorted to for the purposes of explaining those sections: *A. I. R. 1923 P. C. 45, Foll.*

[P 382 C 2]

*N. Sarkar, Dwarkanath Chakravarty, Narendra Chandra Bose and Satyendra Nath Mitter*—for Appellants.

*Bhupendra Kumar Ghose* — for Respondents.

**Garlick, J.**—The facts of this case are that the plaintiff wanted a lease of 6 bighas of land 12 annas of which belonged to defendants 1 to 7 whom I shall call the Mitras and four annas belonged to defendants 8 & 9 who represent some minors whom we may call the Boses. The plaintiff negotiated with the Mitras. They agreed to give him a bemeadi lease for a selami of Rs. 300 and annual rent of Rs. 60. It was apparently assumed that the four annas cosharers would join in the lease. In pursuance of this agreement the plaintiff paid Rs. 300 as selami to the Mitras and executed a registered kabuliyat which had been drawn up in their cutchery. They agreed to give him an amalnama signed by the 16 annas cosharers. Defendants 8 and 9 however refused to join in the lease so the amalnama was never given. The Mitras offered to pay back to the plaintiff his Rs. 300 but he would not take it and insisted on getting a lease. As defendants 8 and 9 would not join in granting a lease he filed this suit against all the cosharers, praying for an amalnama, possession of the land and mesne profits. The defence of the Mitras was that the settlement was conditional on the four annas sharers agreeing to it. Defendants 8 and 9 denied that they ever made any agreement with the plaintiff. The first Court held that defendants 8 and 9 never agreed to grant a lease and that there was



only a conditional contract by the 12 annas maliks to settle the land with the plaintiff provided that the other cosharers agreed. He held that the contract failed because the other cosharers never agreed. It was suggested in the lower Court that the plaintiff might get an amalnama and possession from the 12 annas sharers only. The Court of first instance refused this on the ground that this was never in the contemplation of any party and that a partial settlement would lead only to complications.

On appeal to the District Judge it was held that though the plaintiff was not entitled to a lease from the 16 annas cosharers he was entitled to a lease from the 12 annas cosharers in respect of their share. The order of the lower appellate Court was that the plaintiff be declared to be a lessee of the plaint lands in terms of the draft kabuliyat so far as the 12 annas share of the Mitras was concerned and that he should get possession of 12 annas share of the land jointly with the defendants 8 and 9. Defendants 1 to 7 were ordered to refund to the plaintiff  $\frac{1}{4}$  of Rs. 300 selami which they had received. The lower appellate Court also ordered an enquiry to be made as regards the amount of mesne-profits to be paid to the plaintiff. Defendants 1 and 7 have appealed and their main ground of appeal is that the plaintiffs' suit was a suit for specific performance of a contract and that a decree for partial performance such as has been given by the lower Court could not legally be given under Ss. 14, 15 and 16, Specific Relief Act. It is pointed out that the agreement if any, was an agreement to grant a lease by the 16 annas cosharers and not by the 12 annas cosharers. It is argued that the lower appellate Court has made a new contract for the plaintiff and also that it has allowed specific performance of a portion of a contract which was one and indivisible. It was also argued that the contract was conditional and that it came to an end when the condition became impossible of performance and that the plaintiff as a matter of fact had never prayed in his plaint for performance of a portion of the contract namely 12 annas share of it.

If the suit is regarded as a suit against the 16 annas maliks for a joint amalnama then it is a suit for specific performance. But in form it is rather a suit for decla-

ration of title and for possession. In the plaint nothing was said about specific performance of a contract. The plaintiff alleged that his kabuliyat had been accepted and he claimed only an amalnama, possession and mesne profits. If it is a suit for specific performance it must come under either of Ss. 14, 15 and 16, Specific Relief Act. S. 14 applies when the portion of the contract which cannot be performed bears so small a proportion to the whole that the deficiency is trivial. That is not the case here. A fourth part of a contract is not an insignificant portion of the whole. S. 16 only applies when a contract can be divided into independent parts one of which can be enforced without regard to the other. That section does not apply here for a contract about a 12 annas undivided share cannot be regarded as an independent portion of a contract relating to 16 annas of the suit bond. The only section which might apply is S. 15. S. 15 applies if one party is unable to perform a considerable portion of his contract but the other party consents to accept performance of such portion as is possible of performance and is willing to forgo all compensation with regard to the rest of it. That section would apply here if the plaintiff were willing to take a lease from the 12 annas maliks and gave up his claim against the four annas maliks and also gave up all claim to compensation with regard to the four annas. But that was not the plaintiffs' case and that is not the relief which has been given to him. He has been declared to be a lessee of only the 12 annas cosharers of the land but not without compensation for the deficiency; for defendants 1 to 7 have been ordered to refund a quarter of the selami to him.

But the decree as a matter of fact is not a decree for specific performance of a contract. The decree is in the form of a declaration that the plaintiff is already a lessee of the plaint land to the extent of the 12 annas share of defendants 1 to 7 and that he will get possession of that share. He will get a refund of a part of the selami and will get mesne profits for the period subsequent to the date of the kabuliyat which he has already executed. This decision of the lower appellate Court seems to us to be in accordance with the admitted facts. Defendants 1 to 7 had agreed to give the plaintiff a lease of their share of the land and they had ac-



cepted from him a kabuliyat which was drawn up in their office. The lease had been actually granted so far as they were concerned. There is nothing further to be done by them. The plaintiff is already a lessee of that share. No amalnama is necessary. All that he requires is possession. The decree granted is not a decree for specific performance but is a declaratory decree with consequential relief. I see no reason why this decree should not be upheld. In my opinion the appeal should be dismissed with costs.

**Suhrawardy, J.**—I agree. The case has been argued before us on the basis that the suit was one for specific performance of a contract and it is argued on the authority of the well-known case of *Price v. Griffith* (1), that there could not be a partial decree and that the plaintiff's entire suit should be dismissed. The facts as found by the learned Subordinate Judge are that the Mitters professed to grant a lease of the entire interest in the property, that they executed a memorandum giving the terms according to which the lease by the defendants should be executed. They had the draft of the kabuliyat made and corrected in their office by their own men, the manager of the Mitters gave an amalnama or authority to the plaintiff to take possession of the property, that the Mitters received Rs. 300 the full selami stipulated from the plaintiff and accepted from the plaintiff rent for one quarter of 1326. On these facts the conclusion arrived at by the learned Additional District Judge is that the plaintiff is entitled to succeed in a suit for recovery of possession of land. The learned Judge has not put it in so many words; but what he means to find is that there was a concluded and completed contract of lease between the parties. It is not discovered that the Mitters are not able to give to the plaintiff title to the entire 16 annas. But so far as their 12 annas share is concerned, there was nothing more to be done in order to complete the lease. There is no question of specific performance of any contract in this case because so far as Mitters' share is concerned the lease was complete. It is a suit for declaration of title to land and for recovery of possession. The title of the plaintiff having

been established, he is entitled to a decree for possession also.

With regard to the argument that has been so strenuously addressed to us as regards specific performance, the law does not seem to be so settled as the appellants take it to be. *Price v. Griffith* (1) has been explained in *Hexter v. Pearce* (2) where it is pointed out that the passage in *Price's* case which support the appellant's view was an obiter and is not to be followed in every circumstance. The case of *Lumley v. Ravenscroft* (3), following *Price's* case made certain reservations where it was observed:

"the case of course will be different. If nothing more than partial performance is possible by reason only of the default of the defendant, because no man ought to be allowed to take advantage of his own wrong."

*Burrow v. Scamwell* (4) is another case in point where it was held that a partial lease is possible where the grantor is unable to grant a lease in its entirety. This view was also taken in *Shyama Charan Kotal v. Kumud Dasi* (5) though some of the expressions used in the case seem to go beyond the law as appears to have been settled by authorities. As the Judicial Committee has pointed out in *William Graham v. Krishna Chandra Dey* (6) the law on this point must be taken to have been codified by Ss. 14 to 17, Specific Relief Act: and English authorities can only be resorted to for the purpose of explaining those sections. S. 15 for instance provides for partial performance of a contract under certain circumstances. Even if this case were a case where Specific Relief Act was applicable I would have had no hesitation in decreeing the plaintiffs' suit under S. 15, Specific Relief Act. The law as expressed in *Mortlock v. Buller* (7), that a plaintiff is entitled to what he has got is still good law. As I have said the case is a pure case of declaration of title and recovery of possession and the plaintiff according to the finding of the Court below has succeeded in establishing his title.

(2) [1900] 1 Ch. 341=69 L.J. Ch. 146=16 T. L.R. 94=48 W.R. 330=82 L.T. 109.

(3) [1895] 1 Q.B. 683=64 L.J. Q.B. 441=59 J. P. 277=43 W.R. 584=72 L.T. 382.

(4) [1881] 19 Ch. D. 175=51 L.J. Ch. 296=30 W.R. 310=45 L.T. 605.

(5) [1918] 27 C.L.J. 611=42 I.C. 378.

(6) A.I.R. 1925 P.C. 45=52 Cal. 335=52 I.A. 90 (P.C.).

(7) 10 Ves. 292.

(1) [1851] 1 De. G. M. & G. 80=15 Jur. 1033=21 L.J. Ch. 78.



The appeal therefore fails and is dismissed with costs.

M.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 383

B. B. GHOSE AND PANTON, JJ.

*Satish Chandra Chakravarti*—Judgment-debtor—Appellant.

v.

*Sarat Kamini Devi*—Decree-holder—Respondent.

Appeal No. 238 of 1928, Decided on 11th February 1929, against appellate order of Sub-Judge, Zillah Mymensingh, D/- 28th February 1928.

**Civil P. C., S. 2—Decree in a suit for possession and mesne profits—Partly final partly preliminary—Time for execution of the decree of possession, runs at the latest from the date of the final decree of the appellate Court—Lim. Act, Art. 182.**

When a decree is made for possession, that portion of the decree is final; and when a decree is made for mesne profits in a suit it is only preliminary, because the final decree for mesne profits cannot be made unless the amount due is found upon further enquiry. In such a suit, although one decree is made, it is partly preliminary and partly final. The final part of the decree can be executed apart from the preliminary part and it falls within the provision of Art. 182, Lim. Act. Time for execution of the decree for possession runs at the latest from the date of the final decree of the appellate Court and not from the time when the decree ascertaining the mesne profits was passed. [P 383 C 2, P 384 C 1]

*Annada Charan Karkoon*—for Appellant.

*Phanindranath De*—for Respondent.

**Judgment.**—This is an appeal by the judgment-debtor against an order of the Subordinate Judge dismissing his appeal in the matter of execution in which he raised an objection that the execution of the decree for possession had been barred by limitation. The suit brought by the respondent decree-holder was for possession of certain properties and for mesne profits apparently including the mesne profits even after the date of the suit. The trial Court dismissed the suit. On appeal by the plaintiff it was decreed. This decree which is dated 23rd January 1922 was for possession as well as for mesne profits; and an order was made by the lower appellate Court for sending the case to the trial Court for ascertainment of mesne profits. The defendant-appealed against that decree to the High Court which was dismissed on 17th July 1923. After that, an enquiry was

made as to the amount of mesne profits which must have been for a period of three years, according to O. 20, R. 12, Civil P. C., after the date of the decree. This was made on 30th April 1926. The decree-holder did not take possession before that date. He applied for execution of the decree for delivery of possession as also for mesne profits on 24th March 1927. Both the Courts below have held that time should run from the date of final disposal of the case which, they thought, was the date when mesne profits were assessed, that is in April 1926. The judgment-debtor contends before us in his appeal that limitation for the execution of the decree for possession runs from 17th July 1923 when the appeal to the High Court was dismissed. The contention on behalf of the decree-holder respondent is that the Courts below were right in holding that limitation ran from April 1926 on the ground that it was an entire decree which the decree-holder was entitled to execute and so long as the mesne profits had not been ascertained, the decree was only a preliminary one. That contention of the respondent can hardly be supported on principle.

A decree according to the explanation of the term in S. 2, Civil P. C., may be final as well as preliminary, and a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of; it is final when the adjudication completely disposes of the suit. The next provision is that a decree may be partly preliminary and partly final. Now a suit for possession as well as mesne profits, may be taken to be a suit for two claims joined together for which two separate suits may be brought. O. 11, R. 4, Civil P. C., entitles the plaintiff to join two claims for possession and mesne profits in one suit. When a decree is made for possession, that portion of the decree is final; and when a decree is made for mesne profits in that suit it is only preliminary, because the final decree for mesne profits cannot be made unless the amount due is found upon further enquiry. Therefore, further proceedings have to be taken for ascertaining the amount due for mesne profits, before the claim for mesne profits can be completely disposed of. In such a suit, although one decree is made, it is partly prelimi-



nary and partly final. The final part of the decree can be executed apart from the preliminary part, and it falls within the provisions of Art. 182, Lim. Act. Time for execution of the decree for possession, therefore, runs at the latest from the date of the final decree, of the appellate Court. The judgment and order of the Court below so far as it holds that the application for execution of the decree for possession is not barred by limitation must be set aside and we hold that that part of the application must stand dismissed with costs.

There is no appeal with regard to the execution about the decree for mesne profits. The application for execution of the decree for that amount is within time and the decree-holder will be entitled to proceed with the execution of that portion of the decree.

The appellant is entitled to his costs of this appeal which we assess at two gold mohurs.

P.R./R.K. *Appeal partly allowed.*

### A. I. R. 1929 Calcutta 384

RANKIN, C. J., AND C. C. GHOSE, J.

*Basiraddi*—Appellant.

v.

*Sukh Sagar Saha and others*—Respondents.

Appeal No. 922 of 1927, Decided on 7th March 1929, against appellate decree of Sub-Judge, 2nd Court, Faridpur, D/- 15th December 1926.

**Specific Relief Act, S. 9—Interference by trespassers, with the holder of an invalid under-raiyati lease, is not permissible.**

It is unreasonable to permit an under-raiyat to be interfered with by a trespasser apart altogether from S. 9 merely because the lease from his landlord is for a longer term than the law permits. The fact that a person is in possession paying rent to his landlords is a sufficient interest in the property to enable him to recover it against the defendants, the defendants showing no title whatever, still less a better title: 20 C. W. N. 182, *Dist. (Cases Referred)*. [P 384 C 2]

*Rupendra Coomar Mitter and Hira Lal Ganguli*—for Appellant.

*Gunada Charan Sen and Jatis Chandra Guha*—for Respondents.

**Rankin, C. J.**—In this case the plaintiff took an under-raiyati lease from the pro forma defendants 5 and 6 whose title is not in dispute. The lease he took purported to be unregistered and therefore it is made invalid by S. 85, Ben. Ten. Act. Nevertheless the plaintiff went into pos-

session under it, paid rents to his landlords, made no objection, and in that condition of things in or about 1924 he was dispossessed, according to the findings of fact, by defendants 1 to 4, the defendants 1 to 4 having no shred or pretence of title whatever, they being merely trespassers. The question is whether the plaintiff can recover in ejectment, his suit not being brought under S. 9, Specific Relief Act. It is said that as he cannot prove his title from his landlords by reason of the permanent lease being invalid and not evidence he is liable to be ejected without any remedy by any trespasser apart from S. 9, Specific Relief Act. That seems to me to be an erroneous proposition of law though I quite agree that the theory of this matter is somewhat difficult to reconcile in some of the decided cases. But the case of *Kartik Mandal v. Bama Churn Mandal* (1) relied upon by the appellant is a different case. That is a case where a person sought for the first time to get possession of lands granted to him by an invalid lease and was resisted by the defendant when he went to obtain possession. There are however, cases in this Court which show that the Court is not so unreasonable as to permit an under-raiyat to interfere with by a trespasser apart altogether from S. 9, Specific Relief Act, merely because the lease from his landlord is for a longer term than the law permits. This matter has been decided in the case of *Beni Malhab v. Raj Chandra Pal* (2) and again in the case of *Gour Mandal v. Peari Majhi* (3). We have also been referred to the cases *Adhar Chandra Pal v. Dibarkar Bhuyan* (4) and *Shama Charan Roy v. Surja Kanta* (5). It appears to me that these cases are right on principle and that the fact that a person is in possession paying rent to his landlords is a sufficient interest in the property to enable him to recover it against the defendants, the defendants showing no title whatever, still less a better title. In my opinion, this appeal must be dismissed with costs.

**C. C. Ghose, J.**—I agree.

P.R./R.K.

*Appeal dismissed.*

(1) [1916] 20 C. W. N. 182=29 I. C. 502.

(2) [1910] 14 C. W. N. 141=2 I. C. 202.

(3) [1918] 22 C. W. N. 61=43 I. C. 864.

(4) [1914] 41 Cal. 394=25 I. C. 76.

(5) [1910] 15 C. W. N. 163=6 I. C. 806.



## A. I. R. 1929 Calcutta 385

MUKHERJI AND MALLIK, JJ.

*Chandi Charan Law*—Appellant

v.

*Lal Bewa and others*—Respondents.

Appeal No. 2246 of 1926, Decided on 13th February 1929, against appellate decree of Addl. Sub-Judge, Noakhali, D/- 29th July 1926.

(a) Bengal Tenancy Act, S. 106—Tank recorded as niskar of defendant—Suit by plaintiff under Bengal Tenancy Act for correcting the entry but failing—Subsequent suit in civil Court for possession and declaration that tank is his mal and not defendant's niskar is barred—Civil P. C., S. 11.

Plaintiff sued to recover possession of a tank with its banks on declaration of his title therein alleging that it was not the niskar property of the defendant but part of his mal property. The tank and its banks were recorded in the Record-of-Rights as held by defendant 1 in niskar right. The plaintiff had prior to this suit instituted a suit under S. 106 for correction of the entry alleging that it was his mal property but failed therein.

*Held*: that the decision in the suit under S. 106 operated as a bar to the present suit: (Case Law considered.) [P 386 C 2]

(b) Record-of-Rights—Entry against Plaintiff—He must prove that it is not correct.

Where the entry in the Settlement khatian is against the plaintiff, the plaintiff has to rebut the presumption of its correctness.

[P 387 C 1]

*Narendra Chandra Bose and Satyendra Nath Mitter*—for Appellant.

*Bhagirath Chandra Das*—for Respondents.

*Biraj Mohan Majumdar*—for Deputy Registrar.

**Judgment.**—This appeal has arisen out of a suit to recover possession of a tank with its banks on declaration of the plaintiff's title therein. The suit has been dismissed by both the Courts below.

The tank and its banks were recorded in the Record-of-Rights, eight annas, as held by defendant 1 in Niskar right and the remaining eight annas, as held by defendants 2 to 50 in different tenure rights under the plaintiff. The plaintiff instituted a suit under S. 106, Ben. Ten. Act for correction of the entry in so far as it related to the former eight annas, alleging that it was his mal property but failed therein. He then instituted the present suit alleging as regards the former half that it is not the niskar property of defendant 1 but is part of his own mal property, and as regards the latter half

that defendants 2 to 50 have no concern with or rights to the same.

The Courts below have held that the decision in the suit under S. 106, Ben. Ten. Act operates as a bar to the present suit. This view is challenged and it is said that as the Revenue Officer had no jurisdiction to go into the question of title and could not make a decree for recovery of possession the decision cannot bar the present suit.

From the decree in the suit under S. 106, Ben. Ten. Act which is on the record it appears that the plaintiff prayed therein that the entry in the khatian might be corrected by recording that defendant 1, had no niskar right and that the land was held by the defendant under the plaintiff and was liable to assessment of rent. It is quite true that the prayer for possession was not and could not be included in the suit under S. 106. This is a proposition for which no authority is needed; but as this relief will not be available to the plaintiff until he can get some sort of title established, what has to be seen is whether the declaration of the title that he seeks for, is barred by reason of the decision in the suit under S. 106. In support of the proposition that the Revenue Officer had no authority to determine the question, reliance has been placed upon certain decisions, which, as well as those in which a contrary view has been taken, will now be noticed.

In the case of *Mohunt Padmalav Ramanuj Das v. Lukmi Rani* (1) there is a passage in the judgment of Woodroffe, J., which would seem to indicate that the question of possession alone should be considered in a suit under S. 106; but Coxe, J., observed that "it is evident that in proceedings under the Bengal Tenancy Act no disputes of title between rival proprietors, considered merely as proprietors, can legitimately arise" (p. 13) and again that suits under S. 106 are "suits between tenant and tenant or between landlord and tenant in which questions other than those of possession may legitimately arise" (p. 15).

The observations of Woodroffe, J., should, therefore, be taken as limited to the peculiar facts of the case, namely that the dispute concerned two rival proprietors without any question arising between any of them and the tenants. The case of *Ram Chandra v. Nandananda* (2) in

(1) [1907] 12 C.W.N. 8.

(2) [1913] 19 O.L.J. 197=20 I.O. 298=18 C.W.N. 988.



which *Mohunt Padmalav's* case (1) was referred to, does not help the appellant because there the question of possession had not at all been investigated, and while remanding the case for an investigation of that question it was observed that the Bengal Tenancy Act deals with relations of landlords and tenants and it is not part of its purpose to regulate disputes between rival proprietors except in so far as such disputes affect their relation with their tenants, and the view of Coxe, J., in *Mohunt Padmalav's* case (1) was adopted and affirmed by the learned Judges. The view of Coxe, J., in *Mohunt Padmalav's* case (1) was agreed in by Carnduff, J., in *Ensar Ali v. Yakub Ali* (3). Another case on which considerable reliance has been placed on behalf of the appellant is that of *Aswini Kumar v. Sarada Charan* (4). In that case there was an observation to the effect that "these matters (meaning prayer for declaration of title and recovery of possession) are entirely foreign to the jurisdiction of the Revenue Officer under S. 106."

The suit, in that case, as far as may be gathered from the report, was a suit between two rival proprietors, but whatever that may be, not much weight was attached to this observation in the latter decision in the case of *Apurba Krishna v. Atarmani* (5) in which all these cases were reviewed and it was said that in a suit under S. 106, Ben. Ten. Act, for correction of the Record-of-Rights, when the Revenue Officer proceeds to decide the dispute, he has to determine not merely whether certain words should or should not remain unchanged in the records but also whether the facts described by these words are correct. In the case last mentioned the contention that the scope of the suit should not extend to questions of title was overruled. There are a few other cases upon which reliance was placed on behalf of the appellant and so they deserve specific mention. One is *Kali Sundari v. Girija Sankar* (6). That case decided that where a plaintiff not only seeks for correction of entry in the Record-of-Rights which is in favour of the defendant but also asks for recovery of possession from the latter, whom he concedes, has been in possession from before the date of final publication, those reliefs could not pro-

perly be secured by a suit under S. 106 and the proper course for the plaintiff was to bring a civil suit, because as between landlords of neighbouring estates the only question that can be raised in a proceeding under S. 106 is as to possession at the date of the final publication. Another case is *Pran Krishna Saha v. Trailakya Nath Choudhuri* (7) where it is held that a person who is not in possession of land which is claimed as rent-free at the date of the Record-of-Rights, cannot have the mere question of his title to hold the land rent-free tried in a suit under S. 106 and as the Revenue Officer cannot give him possession he can get only complete remedy in a civil suit. These two decisions were passed in appeals in suits under S. 106, and if in the present case the plaintiff had alleged in his suit under S. 106 that he was out of possession and merely asked for declaration of his *mal* right, it might on the authority of these decisions have been held that the suits were incompetent.

We are not, however, concerned with any such question in the present case: it should be noted that in the suit under S. 106 the plaintiff never admitted that he was out of possession but on the other hand he proceeded there on the footing that the land was held under him by defendant 1. Another case relied upon on behalf of the appellant is that of *Asrafannessa v. Hem Chandra Chaudhury* (8). That was a case in which the dispute raised in the suit under S. 106 was one between rival co-owners only and was a dispute with which the Bengal Tenancy Act had little to do. Lastly was cited the case of *Ram Narayan Singh v. Sukhdeo Teli* (9); but beyond the fact that it approves of the decision in *Aswini Kumar Aich v. Saroda Charan Basu* (4) it has no relevancy. That a question of title of the present character may be gone into by a Revenue Officer and if decided by him concludes the parties under S. 107 has been held in *Apurba Krishna v. Shyama Ch. Pramanik* (10). It is not possible, in view of the pleadings so far as may be gathered from the decree under S. 106 and the pleadings in the present suit, to say that the dispute was between two rival proprietors.

(3) [1911] 13 I.O. 311.

(4) [1916] 24 C.L.J. 79=37 I.C. 253.

(5) [1920] 64 I.O. 889.

(6) [1911] 15 C.W.N. 974=11 I.C. 184.

(7) [1915] 19 C.W.N. 911=27 I.C. 883.

(8) A.I.R. 1927 Cal. 216=54 Cal. 114.

(9) A.I.R. 1928 Pat. 579=7 Pat. 786.

(10) [1920] 24 C.W.N. 223=54 I.C. 952.



The decisions of the Courts below, so far as the first contention of the appellant is concerned, appears to us to be correct.

As regards the other eight annas share it has been urged that the onus of proof has been wrongly placed. We are of opinion that the Settlement khatian is against the plaintiff, the plaintiff has to rebut the presumption of its correctness; and although apart from that presumption it would be for the defendants to establish the limits of their tenures which lie within the zamindari of the plaintiff, still where, as here, that presumption exists the point of view from which the Subordinate Judge dealt with the matter cannot be said to be incorrect. It has also been urged that the question of the plaintiff's title by purchase of one anna share should have been gone into, but the Subordinate Judge in our opinion has given sufficient reason for declining to accede to the appellant's prayer in this respect.

We accordingly dismiss the appeal with costs.

R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 387

RANKIN, C. J., AND BUCKLAND, J.

*Sundermull and others*—Defendants—Appellants.

v,

*John Carapiet Galstaun*—Plaintiff—Respondent.

Appeal No. 80 of 1928, Decided on 10th December 1928, from original decree of Lord-Williams, J., D/- 13th July 1928.

(c) Civil P. C., O. 34, R. 6—Personal remedy is not available till security exhausted.

When a mortgagee brings a suit to enforce his mortgage, the Court will not allow him to enforce it by a personal judgment against the borrower until he has exhausted his remedies against the security. [P 389 C 1]

(b) Civil P. C., O. 34, R. 6—Court has independent power to grant personal judgment.

The power of the Court to give relief by granting a personal decree does not depend upon O. 34, R. 6, which is a provision giving direction to the Court as to the time and manner at and in which the relief is to be given. It is open to the Court on motion in a consent decree to give a personal judgment against the mortgagors. [P 389 C 1, 2]

(c) Civil P. C., O. 34, R. 6—Consent decree silent about personal judgment—Silence does not mean right is foregone.

The mere fact that the terms of a consent decree about the grant of a personal judgment

are silent is not a reason for holding that the lender was to forego his right to recover his money back from the borrower, if the security is found to be deficient. [P 389 C 2]

*Langford James* and *S. C. Bose*—for Appellants.

*N. N. Sarkar, S. M. Bose* and *R. C. Ghosh*—for Respondent.

**Rankin, C. J.**—This is an appeal from an order made by Lord Williams, J., upon a motion brought pursuant to a notice dated the fifth day of June 1928 in the course of a suit to enforce a mortgage. It appears that the mortgage security was created in or about 1919 and that a sum of 12 lacs was advanced upon the security.

The suit in the course of which the order complained of is made was brought by the mortgagee Mr. Galstaun in June 1921 and that, as originally framed, was a suit against defendants 1 and 2—the parties who had entered into the transaction with him. Defendant 3 was a puisne encumbrancer and at some stage of the suit certain other persons, some of whom were minors were made parties to the proceeding on the theory that they might claim that they were interested in the mortgaged property being joint members of a Hindu Mitakshara family along with defendants 1 and 2.

The suit did not come on in the ordinary way for trial because it appears that on 25th March 1925 it was settled on the basis of certain terms scheduled to the consent decree of that date. It was declared with the consent of the parties appearing through their respective counsel that the said terms of adjustment ought to be carried out and the same were ordered and decreed accordingly. The whole of the arrangement is given not in the body of the decree but in the schedule, that is to say, the language of the parties themselves is in the schedule. Broadly speaking, the arrangement was this that these alleged Mitakshara co-sharers agreed that they had no interest in the mortgaged property, agreed to its being treated as a property which defendants 1 and 2 were entitled to pledge.

As regards defendant 3 he was not in a position to object to the enforcement of the mortgage. Defendants 1 and 2, in these circumstances, proceeded to deal with the matter in this way that the arrears of interest upon the loan calcu-



lated up to the end of January 1925 were to be liquidated by the delivery of certain goods. That left to be dealt with a net sum of twelve lacs (Rs. 12,00,000) principal due upon the mortgage as from 1st February 1925 and with reference to this sum it was not necessary to make any calculation because there was a clean sum of twelve lacs (Rs. 12,00,000) that was going to be dealt with by the arrangement. Now, the terms make defendants 1 and 2 admit that the sum of twelve lacs is due for principal. They then made them consent to a "decree absolute for sale" for the said amount carrying interest at the rate of 7 per cent per annum from 1st February 1925 until payment in full. So the agreement is an agreement to an immediate decree absolute. The terms go on to provide for stay of execution of that decree:

"the decree will not be executed by the sale of the mortgaged properties or otherwise for a period of 5 years on certain conditions."

The conditions of the stay were that defendants 1 and 2 would pay off one lac in each year and that they would pay interest by equal monthly instalments on the amount due from time to time by the 15th of each month. There is a clause which says that in the event of default in making those payments the whole of the balance of the decretal amount, interest and costs then due and unpaid will at once "become due" and the plaintiff will be at liberty:

"to execute the decree by sale of the mortgaged properties in suit through Court in the usual way."

I am not of opinion that any light is thrown upon the present controversy by any other terms in this consent decree. A certain sum became the decretal amount, and order absolute for sale was made. It was stayed for a period of 5 years upon certain terms. It was provided that if these terms were not complied with, the plaintiff was to be at liberty to execute the decree by sale of the mortgaged properties in suit through Court in the usual way. It appears that default was made and on 27th January 1926 the plaintiff made an application to enforce his decree. By that time it is obvious that it was necessary to make a calculation to find out how much had been paid of this sum of twelve lacs with interest at 7 per cent per annum from 1st February 1927. Accordingly there was a reference to the Registrar

and he did report on the matter. Ultimately a final order for sale under this consent decree was made on 9th August 1926. On that date there was really for the first time a final order for sale:

"It is ordered and decreed that the premises comprised in the mortgage in the said decree mentioned or a sufficient part thereof be sold with the approbation of the said Registrar to the best purchaser or purchasers." and so forth.

Thereafter last year and in the present year the properties were sold but they failed to produce sufficient to cover the amount. The order complained of, has been made by the learned Judge on the application of the plaintiff for a personal decree for the balance against defendants 1 and 2. It is to be pointed out that there is an order in the rules of the original side which gives a direction to this effect that when an ordinary preliminary decree is being drawn up it shall always include a clause to say that leave is reserved to the plaintiff to make an application for personal judgment after a sale has been carried out. In the present case the terms of the decree were not drawn up by the Court's office at all. The decree in this case so far as the Court was concerned was a decree that certain parties having agreed to certain things in the schedule it is ordered that it should be carried out. The learned Judge has rightly, in my judgment, come to the conclusion, that in this case there was a clear personal liability resting upon the borrowers in respect of the money lent and two contentions have been advanced before us.

The first is the contention as a matter of procedure and of an examination of the terms of O. 34, Civil P. C., to the effect that R. 6 does not in terms apply to this case and that it is not possible to get a personal decree in this suit whether or not any personal liability remains upon defendants 1 and 2.

The second contention is that upon a true construction of this consent decree the bargain between the parties was a bargain that the mortgage should be enforced in a certain way that it meant and intends that it was not to be enforced in any other way in particular, not to be enforced by a personal judgment. In my opinion both of these contentions fail. It has been pointed out, on the strength of the case reported in



*Bechu Singh v. Bicharam Sahu* (1) that when you read the rules in O. 34 the provisions for a preliminary decree and a final decree have to be read together. According to the strict interpretation the provisions as to a final decree apply only where there has been a preliminary decree of the kind contemplated by the previous rule. In the same way when we come to R. 6 it is contended that the words :

"where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount,"

that this rule operates only where the previous proceeding has been in exact compliance with Rr. 4 and 5. It is said that because in this case the consent decree was not a preliminary decree in complete accordance with R. 4 and because there has not been a final decree in complete accordance with R. 5, therefore, the operation of R. 6 cannot be tolerated in these proceedings and that there is no provision whereby judgment can be had against the defendants personally even supposing that there was no bargain to the effect that the defendants should be relieved of their personal liability. I reject that argument entirely. It is well settled in Indian law that when a mortgagee brings a suit to enforce his mortgage the Court will not allow him to enforce it by a personal judgment against the borrower until he has exhausted his remedies against the security. According to the view taken by many Indian Courts it is wrong at the time of making a final order for sale to order that if the proceeds are insufficient there will be a personal decree. The usual practice is certainly that the personal decree is not even granted until the sale has been carried out and the deficiency ascertained. It is a form of relief which, in the ordinary way, will not be given to a mortgagee unless and until this stage has been reached. I need not say that the power of the Court to give that form of relief does not depend upon R. 6, O. 34, which is a provision giving direction to the Court as to the time and manner at and in which the relief is to be given. In the present case if there was a departure by consent

from the strict form of order for sale it is to my mind, nonetheless erroneous to contend that there must needs be a substantial departure in principle and in substance from the provision of R. 6. As regards the power of the Court in the mortgage suit to make the order, I am not of opinion, that the inclusion of the clause reserving leave to the plaintiff operates any magic in this matter. I have no doubt at all that it was open to the Court on motion in this case to give a personal judgment against the mortgagors for the balance.

I come now to the only contention that appears to me to have any relation to the merits the contention, namely whether there is enough in this consent decree to show that the plaintiff gave up his right to a judgment for the balance against these mortgagors. The fact that in the terms of settlement nothing was said about a personal judgment, seems to me to have no such meaning as is contended for. In the ordinary way a decree such for example as might be passed by any mofussil Court under or by an analogy to the terms of the Code of Civil Procedure would contain no reference to the right to a personal judgment. An order of the kind contemplated by the Code would be made in due course. In this case the parties had not got to the stage at which, in law, the right to get a personal decree had accrued to them. I do not think that the mere fact that the consent terms are silent is any good reason for supposing the parties to intend the very extraordinary consequence to be operated by the mere silence that the lender was to forego his right to recover his money back from the borrower if the security be deficient. I agree with the learned Judge on an examination of the terms of the document that there is something in this document pointing to the contrary. I do not think it can be put higher than that. I do not say that it amounts to an impossibility but there is something in the document which points against the idea that it was any part of this bargain that the plaintiff should give up his right to a personal judgment. An ordinary decree absolute for sale is, strictly speaking, a decree that may only be executed by sale. But when a declaration is made that a certain sum of money is due upon a secu-

(1) [1909] 10 C. L. J. 91=1 I. C. 677.



rity one may and often does talk of executing the decree by sale and then afterwards by getting a personal judgment and enforcing that. In this case the decree absolute was to be stayed for 5 years. It was only stayed and the terms of the stay were :

"will not be executed by sale of the mortgaged properties or otherwise for a period of 5 years."

In my judgment those words would ordinarily point to the obtaining of a personal judgment for the balance unrealized by the sale. Then :

"to execute the decree by sale of the mortgaged properties in suit through Court in the usual way,"

must mean, in my opinion, that the ordinary process will apply because the conditions of the stay have not been fulfilled. If it had been intended that there should be an exception of so important a character as to deprive the plaintiff of the benefit of a personal covenant I can only say that I do not think that either of those clauses would have been used.

In my opinion, the order made by the learned Judge is right for the reasons which he has given and this appeal should be dismissed with costs.

**Buckland, J.**—I agree.

M.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 390

SUHRWARDY AND GRAHAM, JJ.

*Kamini Kumar Chakravarty*—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1060 of 1928, Decided on 21st February 1929.

(a) Criminal P. C., S. 360—Evidence read out immediately after cross-examination but some days after examination-in-chief — S. 360 is complied with.

Reading over to a witness his evidence even after some days of his examination-in-chief but immediately after his cross-examination is sufficient compliance with S. 360: A. I. R. 1927 P. C. 44, *Foll.*; A. I. R. 1926 Cal. 563, *Dist.* [P 391 C 1]

(b) Penal Code, S. 193—Prosecution for contradictory statements is not always desirable.

In every case of contradictory statements it is not desirable to prosecute a witness. A prosecution in these circumstances should be undertaken when it appears to Court that it is expedient in the interest of justice that a complaint should be made under S. 476, Criminal P. C.: A. I. R. 1928 Cal. 862, *Ref.* [P 392 C 1]

(c) Criminal Trial — Contradictory statements of a witness—Criminal P. C. S. 360.

There is no provision of law which requires that a witness should be given an opportunity to explain discrepancies in his evidence. But it is open to a witness if he wishes to do so to explain at the time when the deposition is read out to him. [P 392 C 2]

*Mritunjay Chatterjee* and *Debabrata Mukerji*—for Petitioner.

**Suhrawardy, J.**—This rule was issued on three grounds. The first is that the conviction is not sustainable in view of the fact that the evidence in respect of which the petitioner was prosecuted was not read over to him according to law. The facts are that the petitioner was a witness in a case and was examined-in-chief on 18th November 1927 and his deposition was read over to him by the Peshkar of the Sub-Deputy Magistrate before whom he gave his evidence while another witness was in the box. He was cross-examined on 9th December 1927 and the Magistrate read over the whole of the deposition including his examination-in-chief on that day. There is a note recorded under the deposition of both days that it was read over to the petitioner and admitted by him. The petitioner was charged with making contradictory statements in examination-in-chief and in cross-examination. The objection on the ground that the examination-in-chief of the petitioner was read over to him by the Peshkar on 18th November while another witness was being examined is now set at rest by the decision of their Lordships of the Judicial Committee in *Abdul Rahman v. Emperor* (1). It is not necessary to consider the cases previous to that decision which held that absence of strict compliance with the words of S. 360, Criminal P. C. made the statements inadmissible in evidence. Their Lordships further held that non-compliance with the provisions of S. 360 is curable under S. 537, Criminal P. C., that is, it will not vitiate the trial unless it is proved that it has caused failure of justice. The learned advocate for the petitioner rightly contends that it cannot be said in the present case where the petitioner has been prosecuted and convicted for making two contradictory statements that the non-compliance with the letter of the law has not caused failure of justice in

(1) A. I. R. 1927 P. C. 44=5 Rang. 53=54 I. A. 96, (P.C.).



this case. It is unnecessary to enquire whether this irregularity has really caused failure of justice in this case because whatever irregularity there was it was cured by the subsequent reading over of the whole of the evidence by the Magistrate himself at the end of his cross examination. It is urged that the reading of the examination-in-chief at a subsequent date was not strict compliance with the words of S. 360 and reliance has been placed on the ratio of the case of *Shamserali Hazi v. Emperor* (2). I do not think that this contention should prevail. S. 360 says that as the evidence of each witness is completed it shall be read over to him. The evidence of a witness is ordinarily completed when he has been examined-in-chief, cross-examined, and if necessary, re-examined. By the completion of the evidence in that section is not meant what the witness's deposition was on a particular day. The case relied upon was decided upon a totally different set of facts. There the witnesses were examined one after another for some time and then the depositions of these witnesses were read over to them altogether. In that case, therefore, the evidence of each witness was not read over to him after its completion. Even if there has been in this case any irregularity, it is according to the view of their Lordships of the Judicial Committee curable under S. 537; and there is nothing to show that the reading of the examination-in-chief on a subsequent day caused failure of justice because the defence of the petitioner is not that he did not make the statement but that the first statement that he made was on hearsay. This ground must be overruled.

The second ground is that the petitioner was not given an opportunity of explaining the discrepancies in his alleged statements before the prosecution was started; and the third is that the contradictory statement not being apparently irreconcilable the petitioner ought not to have been convicted at all. These two grounds may be considered together. There is no provision in the law that it is the binding duty of the Magistrate to give an opportunity to a witness to explain the contradictory statements. But in this case the Magistrate has considered the explanation which the petitioner

then gave and which he has given in the present trial. Whether the complaint made by the Court under S. 476, Criminal P. C. before an opportunity was given to the accused to offer sufficient explanation of his contradictory statements has vitiated the trial is a question which cannot be argued after conviction. As to the statements being reconcilable it appears to me that on a reading of the whole of the deposition of the witness no doubt is left in one's mind that the accused apparently made a statement in his examination-in-chief from which he resiled in his cross-examination. His contention is that what he stated in his examination-in-chief was on hearsay and the statement made in his cross-examination was the true statement, namely, that he had not seen the occurrence at all. In his examination-in-chief he said:

"I went there and saw Mahendra was being beaten by Jyotish, Rebati and Karuna with cane and lathi. Mahendra was tied with a rope to a post."

In his cross-examination he said:

"In my presence no body assaulted Mahendra. I saw Mahendra sitting in the yard. I did not notice whether his hands were tied. No man was found near him. Nemai got bail at the time of the occurrence. He took his seat inside the house."

Apparently the two statements cannot be reconciled. But the learned advocate for the petitioner argues that the first statement may be explained away by saying that what he said there was the information he had got from others. Our attention has been drawn to the record of the deposition of the petitioner in which the word "saw" was written over some other word which, it suggested was "heard." This cannot be because the word "heard" does not fit in the sentence and is inconsistent with the words following namely that Mahendra was being beaten. It cannot also be maintained that that statement was made on hearsay because the accused distinctly said that Mahendra was being beaten by some persons with cane and lathis. He went on to say:

"I asked Nemai why they were beating the complainant in the way. Nemai said he is very wicked. Nemai was then sitting on the Daili giving the order to beat the complainant. I left the place."

All these statements cannot be explained away by saying that they were what the accused heard from other persons. This ground that the statements can be reconciled must fail.



But it has been submitted that in every case of contradictory statements it is not desirable to prosecute a witness and reference has been made to *Keramat Ali v. Emperor* (3). Where the learned Chief Justice has observed that a prosecution in these circumstances should be undertaken when it appears to Court that it is expedient in the interest of justice that a complaint should be made under S. 476, Criminal P. C. This is quite true. This observation was made on an appeal from an order under S. 476 and the Court impressed upon the Sessions Judge who had passed the order under that section to find if it was expedient in the interest of justice to prosecute the witness as in that case it appeared to their Lordships that the appellant had given some explanation which might have been in the circumstances accepted. A passage has been quoted to us from *Lewin's Crown Cases* p. 270 where Holroyd, J. is said to have expressed himself as follows:

"Although you may believe that on one or other occasion she swore that which was not true it is not a necessary consequence that she committed perjury: for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time."

These observations are very wise and should always be kept in mind in dealing with cases of this character. In the present case, however, I think no such explanation can be given of the different statements made by the petitioner. It also seems to me that it is a case in which it is in the interest of justice that the offender should be prosecuted and punished. It is not uncommon in the Courts of this country to notice witnesses intentionally giving false evidence with no sense of responsibility and even going to the length of giving inconsistent evidence. Detection of such offences is not always possible but when they came to the notice of the Court they should be adequately dealt with. In my opinion this rule fails and should be discharged. The accused must surrender to his bail and serve out the remainder of the sentence.

**Graham, J.**—I agree that the rule fails upon each of the three grounds on

(9) A. I. R. 1928 Cal. 862=55 Cal. 1812.

which it was issued. As to the first point, I am of opinion that there was a substantial compliance with the provision of S. 360, Criminal P. C. and that if there was any irregularity it is cured by S. 537 of the Code. No objection was taken at the time of the trial nor has it been shown that the accused was prejudiced in any way: *Abdul Rahaman v. Emperor* (1). As regards the second ground there is no provision of law which requires that a witness should be given an opportunity to explain discrepancies in his evidence. But it is open to a witness if he wishes to do so to explain at the time when the deposition is read out to him. Finally as to the third ground, there seems to be no doubt whatever on the merits that the petitioner did commit perjury; and upon that point I have nothing to add to the judgment which my learned brother has just delivered. I agree that this rule should be discharged.

P.R./R.K. Conviction maintained.

### \* A. I. R. 1929 Calcutta 392

MALLIK AND GARLICK, JJ.

*Rasik Chandra Chakravarti*—Defendant 2—Appellant.

v.

*Jagabandhu Chakravarti and others*—Plaintiffs—Respondents.

Appeal No. 2672 of 1925, Decided on 7th June 1928, against appellate decree of Sub-Judge, Second Court, Bakerganj, D/- 18th June 1925.

\* (a) Transfer of Property Act, S. 73—Property sold for arrears of rent—Mortgagee is not confined to surplus sale proceeds but can follow property.

There is nothing in the wording of S. 73 which indicates that a mortgagee in a case where the mortgaged property is sold for arrears of rent must be confined to the surplus sale-proceeds and cannot follow the mortgaged property: 8 C. W. N. 332, Dist.; 24 Cal. 746, Foll.; 15 Cal. 546, Rel. on.

[P 394 C 1]

(b) Evidence Act, S. 115—Suit by mortgagee to set aside sale of mortgaged property—He is not estopped from enforcing mortgage.

The mere fact that the mortgagee brought a suit against purchaser of mortgaged property to have the sale set aside does not estop mortgagee from instituting a suit to enforce his mortgage claim against the mortgage property.

[P 394 C 2]



(c) Bengal Tenancy Act, S. 167—Incumbrance subsists till notice is served as prescribed.

Until the notice has been properly served under S. 167 upon the incumbrancer, the incumbrance subsists and it is obligatory on the purchaser to show that the notice has been served in the manner prescribed : 7 C. L. J. 262, *Foll.* [P 395 C 1]

*Brojendranath Chatterjee and Nil Kanta Ghosh*—for Appellant.

*Mohendra Kumar Ghosh for Suresh Chandra Taluqdar*—for Respondents.

*Biraj Mohan Majumdar*—for Deputy Registrar.

**Judgment.**—This appeal arises out of a suit brought by the plaintiff to enforce a simple mortgage-bond executed by defendant 1 in favour of plaintiff's father since deceased for a sum of Rs. 100 on the 25th Kartic 1385 B. S. To understand the case properly as also the arguments that were advanced before us it would be necessary to state the facts of the case in some detail. Defendant 1 the mortgagor, executed a first mortgage in favour of defendant 3's father in July 1909. On 11th November 1911 he executed in favour of the plaintiff's father a second mortgage, the suit for enforcement of which has given rise to the present appeal. On 7th August 1915, the property was sold in execution of a rent-decree and purchased by defendant 2. In 1917 the plaintiff brought a suit to have this rent sale set aside on the ground of fraud as also on the allegation that defendant 2 was a benamidar for defendant 1.

This suit, however, was dismissed on 3rd September 1919. Thereafter on 7th July 1920 defendant 1, the mortgagor, sold the property to defendant 3 in satisfaction of the first mortgage for Rs. 290 and after the sale by defendant 1 to defendant 3 they dispossessed defendant 2 from the property in suit. Thereafter defendant 2 brought a suit for recovery of possession from defendant 3 and defendant 1 and this suit was decreed on 8th May 1923. Plaintiff's suit for enforcement of the mortgage-bond was contested by defendant 2, on, amongst others, the allegation that as defendant 2 had purchased the lands in execution of a decree for arrears of rent the plaintiff could not follow the property in suit for the satisfaction of his mortgage-debt. The Court of first instance gave a decree to the plaintiff and in the decree it was directed that the balance of the sale proceeds after

the sale, if any, should be paid to defendant 2. On appeal the lower appellate Court found among other things that defendant 2 was only a benamidar for defendant 1, the mortgagor, and the Court of appeal below dismissed the appeal and confirmed the decree that had been made by the Court of first instance. Defendant 2 has appealed to this Court.

A number of points were taken on behalf of the appellant before us and I will take them up seriatim. It was first of all contended that the finding of the lower appellate Court on the question of benami was unnecessary inasmuch as the decree of the first Court which was confirmed by the lower appellate Court was based on the fact that defendant 2 is the real owner of the property and not a benamidar of defendant 1. The decree of the lower appellate Court as it stands whereby the decree of the Court of first instance was affirmed in its entirety is not strictly in accordance with the finding arrived at by the lower appellate Court on the question of benami. But the decree which the lower appellate Court made was made after the lower appellate Court had arrived at its finding on the question of benami and at the time when the lower appellate Court arrived at that finding there was nothing to prevent it from taking up and determining the question whether defendant 2 was the real owner or benamidar of defendant 1.

The lower appellate Court has found the question of benami in favour of the plaintiff on two grounds, first, because in a previous litigation between the parties the question that defendant 2 was a benamidar of defendant 1 was raised and in that litigation it was found that defendant 2 was a benamidar of defendant 1. It was said that the Court of appeal below in the previous litigation had not come to any clear finding on the point. But the judgment of the appellate Court in that litigation clearly shows that the appellate Court there upheld the finding of the first Court in that litigation to the effect that defendant 2 was a benamidar of defendant 1. The learned Subordinate Judge in the present litigation has also arrived at the same conclusion on the question of benami independent of the determination of the question in the previous litigation. It was contended before us that this finding of the lower appellate Court on the question of benami



is wrong in law inasmuch as the learned Subordinate Judge does not fully set out in his judgment the evidence and circumstances to lead to the conclusion that he came to on the point. There is in the judgment of the lower appellate Court, however, a statement that the learned Subordinate Judge had come to his finding on that point on a consideration of the circumstances disclosed in the evidence. The learned advocate for the appellants could not say that there was absolutely no evidence in the case in support of the finding.

The next point taken before us was that the plaintiff was under the provisions of S. 73, T. P. Act, precluded from proceeding against the property and that his only remedy was to proceed against the surplus sale-proceeds under S. 73. There is nothing in the wording of S. 73, T. P. Act, which would, in my opinion, indicate that a mortgagee in a case where the mortgaged property is sold for arrears of rent must be confined to the surplus sale-proceeds and cannot follow the mortgaged-property. In support of his contention the learned advocate for the appellant placed reliance on the observations of their Lordships in the case of *Hem Chandra v. Tafazzel Hossein Khan* (1). The observation that is to be found at p. 336 runs thus :

"The effect of this section is, as we understand it, that the mortgagee has no charge upon the property sold for rent, such charge being taken to be extinguished, and transferred, as it were, to the surplus sale proceeds."

But the case of *Hem Chandra v. Tafazzel Hossein Khan* (1) can in my opinion be distinguished from the facts of the present case. In *Hem Chandra v. Tafazzel Hossein Khan* (1) only one of the properties mortgaged was sold and the purchaser at the sale was no other than the mortgagee himself. That being so, there remained nothing in the property sold which could be followed by the mortgagee, the mortgagee himself having purchased the property. On the other hand, the case of *Beni Prosad Sinha v. Rewat Lall* (2) is in my opinion, a clear authority against the contention of the learned advocate for the appellant. In this case *Beni Prosad Sinha v. Rewat Lal* (2), (at p. 749) their Lordships observed :

"The object of S. 73 in our opinion is to relieve the mortgagee of the effect of the injury which he would suffer by the property which was a security for his money being sold, and to give him a right over the residue of the sale proceeds. It is not intended in any way to enlarge the interests of persons purchasing at a sale for arrears of revenue or rent. If that had been the intention any subsequent provision of law providing that a sale for arrears of revenue or rent could get rid of an incumbrance would be unnecessary. It is, in our opinion, intended to refer to cases where the law has otherwise provided that the effect of a sale for arrears of revenue or rent should nullify a mortgage."

Somewhat to the same effect is the decision in *Prem Chand Pal v. Purnimadas* (3). In the present case the purchase which defendant 2 made at the sale for arrears of rent was subject to the mortgage of the plaintiff which was an incumbrance and which was never annulled. I am therefore of opinion that S. 73, T. P. Act was no bar to the plaintiff's following the mortgaged property to satisfy his mortgage debt.

The learned advocate for the appellant next contended that even if S. 73 does not prevent the plaintiff from proceeding against the property, the plaintiff was by his conduct estopped from enforcing his mortgage claimed against the property which was in the hand of defendant 2 and the conduct of the plaintiff which according to the learned advocate for the appellant estopped the plaintiff enforcing the mortgage claim against the property was the fact that the plaintiff had instituted a suit in 1917 to have the sale set aside at which defendant 2 had purchased the property. I am unable to appreciate the force of this contention of the learned advocate. The plaintiff might have brought a suit to have the sale set aside but I do not understand how it can be contended that he was thereby estopped from instituting a suit to enforce his mortgage claim against the property in suit.

Another point that was taken by the learned advocate was that the incumbrance that was on the property at the time when defendant 2 purchased it was annulled under the provisions of S. 167, Ben. Ten. Act. It appears that defendant 2 after his purchase made an application to the Collector for service of notice under S. 167 but it appears also that that notice was not properly served. The contention on behalf of the appellant was that de-

(1) [1904] 8 C. W. N. 332.

(2) [1897] 24 Cal. 746.

(3) [1888] 15 Cal. 546.



defendant 2's (the purchaser's) duty ended when he made the application to the Collector and that although there might not have been a proper service of the notice, notice of the purchase was in some other way conveyed to the mortgagee. It was urged that in these circumstances it ought to have been held that the incumbrance had been annulled. I do not think this contention is well founded. It has been held in the case of *Radhay Koer v. Ajodhya Das* (4) that until the notice has been properly served under S. 167, Ben. Ten. Act upon the incumbrancer, the incumbrance subsists and it is obligatory on the purchaser to show that the notice has been served in the manner prescribed. The finding in the present case is that no notice under S. 167 had been served in the prescribed way.

The next point that was taken before us was that as the plaintiff's mortgage was subject to the first mortgage in favour of defendant 3's father and as defendant 2 got rid of that first mortgage by the suit which he (defendant 2) brought in the year 1920, the plaintiff's claim against the property should be diminished by the amount of the first mortgage. I do not think that there is much substance in this contention. Defendant 2, it is true, brought a suit against defendants 1 and 3 in the year 1920, but that was a suit for recovery of possession and there is nothing to show that the result of that suit was a satisfaction of the mortgage-debt due to defendant 3's father.

The last contention advanced before us was in connexion with the question of interest. It was said that the mortgaged property cannot be proceeded against for realization of interest inasmuch as so far as the interest was concerned the covenant was only a personal one. We fail to appreciate the force of this contention. The mortgage-bond would show that the stipulation was that the interest was to be added to the principal at the end of the year. All the contentions that were raised before us therefore fail and the appeal must be dismissed with costs with this little modification only that the balance of the proceeds, if any, which has been directed to be paid to defendant 2 will not be paid to defendant 2 who is only a benamidar.

**Garlick, J.**—I agree.

R.K.

*Appeal dismissed.*

(4) [1908] 7 C.L.J. 262.

## A. I. R. 1929 Calcutta 395

PAGE AND MALLIK, JJ.

*Dhirendra Nath Roy and others—*  
Plaintiffs—Appellants.

v.

*Bhabatarini Debi and others—*Defendants—Respondents.

Appeals Nos. 1338 and 1339 of 1926, Decided on 24th July 1928, against appellate decrees of Dist. Judge, Faridpur, D/- 11th February 1926.

**Landlord and Tenant—Tenancy indivisible—Lump sum for rent agreed to be paid—Landlord evicting tenants from part of premises demised—Landlord cannot claim rent for the rest.**

Where there is a tenancy and that tenancy is an indivisible one in which a lump sum for rent is to be paid in respect of the whole of the demised premises, if the landlord interferes with the due enjoyment of the premises or of any part thereof by his tenants by evicting them therefrom, it is not open to the landlord to assert that any portion of the rent is payable in respect of any portion of the premises. [P 396 C 1,2]

*Sarat Chandra Roy Chowdhuri, Babus Hemendra Chandra Sen and Surendra Nath Bose (Sr)—*for Appellants.

*Jogesh Chandra Roy and Surendra Nath Das Gupta—*for Respondents.

**Page, J.**—The two suits out of which these two appeals arise were brought by the plaintiffs who are now appellants to recover rent for the years 1319-1322, 1322-1325 in respect of land let out by them to the defendants under a kabuliyat of 22nd Magh, 1278. There had been a previous suit between the parties to recover arrears of rent for the years 1309-1312, and in that suit an issue was raised and decided whether the rent was not wholly suspended by reason of the landlords having deliberately evicted the tenants from three plots which were parcels of the land demised. In that suit it was determined that by reason of the deliberate interference by the landlords with the tenant's enjoyment of the demised premises the tenants were entitled to a total suspension of the rent until the landlords restored them to possession of the plots from which they had been evicted. In the present suits the proceedings eventually came before the High Court, and the question which the High Court had to determine was whether the decision in the previous suit was res judicata in the present suits. For the reasons which are set out in that judg-



ment their Lordships held that the decision in the previous suit was not res judicata. But from a perusal of the decision of the lower appellate Court their Lordships came to the conclusion that the learned Judge had not paid sufficient attention to the decision in the earlier rent suit, and that if he had had regard to it his conclusion might have been different. The case accordingly was remanded to the lower appellate Court in order that the appeal should be re-considered in the light of the observations of the High Court. After remand the learned District Judge came to a conclusion adverse to the landlord. He held that

"the plaintiffs' officer dispossessed the defendants of these plots and caused them to be ploughed up."

The learned Judge further held that the conduct of the landlords throughout these proceedings had been mala fide. Indeed, in the present suits which were for rent in respect of the premises demised under this kabuliyat the landlords had omitted in their plaint to insert those three plots, and it was only at a later stage of the proceedings that these three plots were mentioned in the plaint as being part of the demised property. That omission to mention these three plots for which the plaintiffs were receiving rents from the tenants of an adjoining mouja was regarded by the learned District Judge as mala fide conduct on the part of the plaintiffs, because at that time the plaintiffs were well aware of the proceedings which had taken place in the earlier rent suit. We are of opinion that there was ample evidence to justify the finding of the lower appellate Court that the plaintiffs had interfered deliberately with the enjoyment of the demised premises by their tenants, and that the enjoyment of the tenancy by their tenants had materially been diminished. Upon that finding the question which arises is whether the plaintiffs were entitled to obtain rent in respect of any portion of the demised premises, or whether the tenants under the law were entitled to claim a suspension of the whole of the rent due under the kabuliyat. In my opinion, the law is quite clear. Where there is a tenancy and that tenancy is an indivisible one in which a lump sum for rent is to be paid in respect of the whole of the demised premises if the landlord interferes with the due enjoyment of the

premises or any part thereof by his tenants, as in this case by evicting them therefrom it is not open to the landlord to assert that any portion of the rent is payable in respect of any portion of the premises, for in law in such circumstances every pice of the rent is payable out of every portion of the premises demised. There is a doctrine for which authority can be found, however, that in a mourashi mokarari kabuliyat such as the one in suit where it can be proved that certain portions of the rent are specifically assessed and appropriated to certain parcels of the demised land, and in respect of a distinct parcel of which the rent is specified there is an eviction by the landlord the landlord is entitled to receive, notwithstanding the eviction, his rent in respect of the other portions of the land which are separately and specifically assessed for rent. It is unnecessary to express any opinion as to the soundness of that doctrine in this case for our decision will turn upon the provisions of the kabuliyat of 1278. The learned advocate for the appellants has urged that from a perusal of the kabuliyat it is apparent that this is a case in which distinct rents are payable in respect of two distinct mouzas, Satbaria and Jadabpur. We are unable to assent to that contention.

It is true and obvious that at the top of the kabuliyat there is to be found a record of the jamas which had been payable in respect of the two mouzas Satbaria and Jadabpur. But there has been previous tenures in respect of those moujas, and it is apparent from the terms of the kabuliyat that it was intended by the parties that in respect of the properties which were the subject-matter of the moujas there should be one indivisible tenancy in respect of which one sum for rent should be payable in specified and periodical kists. Why then refer to the two separate moujas at all? For this reason it appears from the kabuliyat itself that there were arrears of rent payable in respect of the previous tenures, and for the purpose of considering what the consolidated rent should be in respect of the new tenure to be created the details of the earlier jamas were inserted in the kabuliyat. To my mind it is clear beyond doubt or controversy from the kabuliyat itself that one indivisible tenancy was created in



respect of which one lump sum should be paid for rent. In the kabuliyat certain exceptions and deductions from the rent payable are set out, but there is no allocation of these deductions or any of them either to the one mouja or to the other. Yet if there were two distinct rents payable in respect of two distinct properties such a discrimination certainly would have been made. Again, the total rent is payable without reference to the properties contained in the one jama or in the other, and moreover, it is stated that for any breach of any condition set out in the lease the landlords should be entitled to re-enter upon the demised premises as a whole. For instance, if there was a breach with respect to the boundaries of Satbaria not only would the landlord be entitled under the kabuliyat to re-enter upon Satbaria, but also upon Jadabpur. That in my opinion, is entirely inconsistent with the theory that this was a kabuliyat under which there were distinct rents specified in respect of distinct parcels of the demised property. In my opinion, for the reasons that I have given, amongst others, under this kabuliyat there was created one entire tenure in respect of all the demised properties. Under those circumstances in my opinion, the ordinary rule will prevail, and there will be a total suspension of rent until that portion of the demised property from which the defendants had been evicted is restored to them. The learned advocate for the appellants further urged that in this case it was not open to the tenants to plead that they were entitled to any apportionment of suspension of rent because from 1907 onwards they had taken no steps to regain possession of the land from which they were evicted. It is enough to state that this contention finds no place in the grounds of appeal to this Court, and we are not disposed to allow the appellants to raise it at this stage of the proceedings.

The result is that the decision of the learned District Judge is correct, and both the appeals are dismissed with costs.

**Mallik, J.**—I agree.

S.N./R.K.

*Appeals dismissed.*

## A. I. R. 1929 Calcutta 397

PAGE AND MALLIK, JJ.

*Rashmoni Bewa and others*—Defendants—Appellants.

v.

*Dhirendranath Roy and others*—Plaintiffs—Respondents.

Appeal No. 1713 of 1926, Decided on 2nd August 1928, from decree of Dist. Judge, Faridpur, D/- 4th May 1926.

(a) **Bengal Tenancy Act, S. 188**—**Cosharer landlord can sue for enhancement under kabuliyat.**

Co-owner landlords of the property within whose share the land in suit lies, are entitled to bring a suit for enhancement of rent based on a kabuliyat executed by the tenants in their favour: 7 C.W.N. 670, *Foll.*; 18 C. W. N. 942 and 35 Cal. 417, *Rel. on.* [P 397 C 2]

(b) **Bengal Tenancy Act, S. 51**—**Remission for patit lands—Condition of lands unchanged—Lessee is entitled to remission.**

Where it was not found that any portion of the land which was found to be patit at the time of the lease has been brought under cultivation since its execution, the lessees are entitled to the hajat remission granted on account of the lands being patit.

[P 398 C 1]

*Jahnabi Charan Das Gupta and Sajani Kanta Nag*—for Appellants.

*Sarat Chandra Rai Chaudhuri, Surendra Nath Basu (Sr.) and Hemendra Ch. Sen*—for Respondents.

**Mallik, J.**—The only point of law that arises in this appeal is whether the plaintiffs, who are 13 as. 4 gds. co-owners of the property within which the land in suit lies, were entitled to bring a suit for enhancement of rent. The suit was based on a kabuliyat executed by the defendants in favour of the plaintiffs. We have been taken through the terms of this document. Having regard to the terms of this kabuliyat, we are of opinion that the case is governed by the principles laid down in the cases of *Gobind Chandra Pal v. Hamidulla Bhuian* (1), *Darik Dhakai v. Aswini Kumar* (2) and *Joghesh Prokash Ganguli v. Maniraddi* (3). In this view of the matter the appeal fails and must be dismissed with costs.

There has been a cross-objection filed on behalf of the plaintiff-respondent and

(1) [1903] 7 C. W. N. 670.

(2) [1914] 18 C. W. N. 942=20 I. C. 659.

(3) [1908] 35 Cal. 417.



on his behalf it was contended that the lower appellate Court was wrong in giving to the plaintiff a decree at the rate of the talab jama after deducting the hajat of Rs. 40 instead of giving a decree at the full rate. It appears that in the kabuliyat in para. 1 of the document the annual rent was stated to be Rs. 62 odd and after deduction of Rs. 40 as hajat on the ground of some lands being patit, the talab jama was put down as Rs. 22 odd. It was urged on behalf of the plaintiff respondent that it was within the rights of the landlord to withdraw this hajat at any time he liked. In view, however, of the terms as embodied in para 1 of the kabuliyat, we are unable to give effect to this contention. The provision about hajat was made on the ground of patit lands and that being so, it is, in my judgment, pretty clear that this hajat concession was meant to continue so long as the lands which were found to be patit at the time of the lease would remain patit and that the landlord would not be entitled to withdraw this hajat concession unless and until he could show that the land which was found to be patit at the time of the lease or any portion thereof had, since the execution of the document, come under cultivation. In the present case there is nothing to show that any portion of the land which was found to be patit at the time of the lease have been brought under cultivation since the execution of that document. That being so, we are of opinion that the tenant defendant was entitled to this hajat remission and in this view of the matter, the cross-objection must fail and is dismissed.

**Page, J.**—I agree.

M.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 398

PAGE AND MALLIK, JJ.

*Nirod Kumar Roy*—Plaintiff—Appellant.

v.

*Raj Lakshmi Dasi*—Defendant—Respondent.

Appeal No. 2114 of 1926 Decided on 15th August 1928, from appellate decree of Dist. Judge, Faridpur, D/- 3rd May 1926.

**Bengal Tenancy Act, S. 51**—Lessee granted remission of rent under certain circumstances — Lessor can claim full rent on change of circumstances.

Under a kabuliyat it was agreed that the lessee should have some remission of rent under the circumstances existing at the time the tenancy was created, and that this remission was not to continue for ever under all circumstances.

*Held:* that the landlord was entitled to claim rent including the amount of remission which he had the right to withdraw when the circumstances had changed.

[P 399 C 1]

*Surendra Nath Basu (Sr.)*—for Appellant.

*Ramgati Sircar*—for Respondent.

**Mallik, J.**—This appeal arises out of a suit for arrears of rent and also for enhancement of rent under S. 52, Ben. Ten. Act, under S. 30 of the same Act. The plaintiff claimed rent at the rate of Rs. 40 odd including Rs. 11 odd which had been kept in the kabuliyat as hajat. The Courts below gave a decree to the plaintiff for arrears of rent and also for enhancement under S. 52 but refused the plaintiff's claim for an enhancement under S. 30 and also his claim for rent including the amount of hajat. The two points which have been urged before us by the plaintiff-appellant are first, that the plaintiff was entitled to claim rent including the amount of hajat inasmuch as he had the right to withdraw the hajat portion of the rent; and secondly, that the plaintiff was entitled to an enhancement under S. 30, inasmuch as the defendants are occupancy raiyats and not tenureholders as found by the Courts below.

As regards the hajat point, we are of opinion that the plaintiff landlord was, in the circumstances of the case, entitled to withdraw the remission. The hajat in the kabuliyat was described as hal hajat indicating that the intention of the parties to the document was that the defendants should have the remission for the time being or, in other words, under the circumstances existing at the time the tenancy was created and that this remission or hajat arrangement was not to continue for ever under all circumstances. It appears that at the time the tenancy was created there were some lands which were not quite fit for cultivation and it appears also that at present all the lands within the jama have become fit for cul-



tivation and are under cultivation. The intention of the parties evidently being that the hajat was allowed for the time being and only under the circumstances obtaining at the time the tenancy was created, the tenant defendant could not resist the plaintiffs' claim for withdrawal of the hajat unless he could show that there had been no change whatsoever in the circumstances that obtained at that time. As there had been a change in the circumstances, the landlord, in our opinion, was justified in withdrawing that remission or hajat.

As regards the second point which depends on the question whether the defendants were tenure-holders or occupancy raiyats, we are unable to disagree with the lower Courts in the view which they have taken of the matter. Our attention has been drawn by the learned advocate for the plaintiff-appellant to one or two passages in the kabuliyat which, according to him, indicated that the tenancy was an agricultural holding. But there was the Record-of-Rights which was clearly against the plaintiff-appellant. In the Record-of-Rights the defendants were shown as tenure-holders and the lower appellate Court has come to a finding that the defendants actually settled the land comprised in the jama with a large number of sub-tenants who again, have been recorded in the Record-of-Rights as occupancy raiyats. There was nothing in the case which, in our opinion, could be said to rebut the presumption arising in favour of the defendants from the finally published Record-of-Rights, remembering especially the finding arrived at by the lower appellate Court to the effect that the defendants had actually settled the land with a number of a sub-tenants. We agree with the lower appellate Court that the defendants are tenure-holders and not occupancy raiyats and that being so, the plaintiff was not entitled to an enhancement of rent under S. 30, Ben. Ten. Act.

The result, therefore, is that the appeal is allowed in part. The plaintiff will have a decree for the arrears of rent at the rate of Rs. 40 odd including the hajat portion and he will also get an enhancement under S. 52, Ben. Ten. Act, his claim for enhancement under S. 30 being refused. We make no order as to costs.

The cross-objection which was not passed before us is dismissed.

**Page, J.**—I agree.

**M.N./R.K.** *Appeal partly allowed.*

### A. I. R. 1929 Calcutta 399

PEARSON, J.

*Umedmull Mangalchand*—Plaintiff.

v.

*Mani Ram Agarwalla and another*—Defendants.

Civil Suit No. 2211 of 1927, Decided on 26th April 1928.

**Limitation Act, Art. 75**—Instalment bond—Period of limitation depends on construction of contract—Contract conferring option to sue on default—Art. 75 does not apply.

In an instalment bond with a condition of exigibility on one default the question as to when time begins to run really depends upon the construction of the document and the contract between the parties. When the contract confers on the creditor an option to treat or not to treat the default as enabling him to sue for the whole amount, Art. 75 has no application; (*Case Law Considered*).

[P 400 C 1]

*Sudhir Das*—for Plaintiff.

*S. K. Basu and J. K. Ghosh*—for Defendants.

**Judgment.**—The only question is that of limitation. The suit is on an adjustment of accounts on a commission agency which took place on 15th April 1921. The effect of the adjustment was that Rs. 4,000 was found due by the defendant firm to the plaintiff firm. The document signed by the defendant firm embodied an undertaking to pay the amount by instalments of Rs. 500 and Rs. 200 alternatively, eleven in all, running from 13th Aswin Sudhi 1978 until 13th Aswin Sudhi 1983. The first named date corresponds with 14th October 1921. There was also a provision in the document which, as translated, is as follows:

"If we fail to pay the instalments we shall pay interest on all the instalments at 12 annas (twelve annas) per cent per month. If we fail to pay one instalment you will be competent to realize all the instalments in a lump sum by filing a suit."

In these circumstances it is argued on behalf of the first defendant that the suit is barred by limitation on the ground that the very first instalment of all payable on 14th October 1921 was never



paid and that there was therefore a breach of the agreement enabling the plaintiff then and there to bring his suit for the recovery of the full amount and the period of limitation commenced to run from that date. It is admitted that at the time of the filing of this suit the first six instalments were in fact barred by limitation and the suit only covers the amount of the last five which are within the period of three years before the institution of the suit.

The difficulty upon the point which is raised arises mainly from the conflict of authorities in this Court and from the fact that the trend of the later authorities in this Court differs from that of some of the other High Courts. The most recent case to which I have been referred is *Basanta Kumar v. Nabin Chandra* (1) which proceeds on the same lines as two previous *Jadav Chandra v. Bhairab Chandra* (2) and *Hurry Pershad v. Nasib Singh* (3). The effect of that decision is that no distinction can be drawn between a case where the proviso is that on non-payment of an instalment the whole amount shall become due and one in which it is provided that on non-payment of an instalment the whole amount may be sued for. The cases to which I have been referred which take the opposite view, favouring the plaintiff in this case, are *Rupnarain v. Gopinath* (4) and *Chunder Komal Das v. Bisassurree Dassia* (5), the decisions in *Ajudhia v. Kunjal* (6); *Mohanlal v. Tika Ram* (7) and *Karunakaran v. Krishna Menon* (8), which take the same line.

The question is I think really dependent upon the construction of the document and the contract between the parties. Upon the language which has been employed in the present case it appears to me to be clear that what is conferred upon the plaintiff is an option which he may or may not exercise upon default in

payment of one instalment. I do not think it can be said as has been argued that the only evidence of definite election not to treat the default as enabling the plaintiff to sue for the whole amount is to be found in a subsequent acceptance of payment of the instalment in default. The plaintiff has this option conferred upon him by the contract between the parties, and by that agreement payment of the instalments has been postponed to certain dates. I do not think it is open to the defendant to force upon the plaintiff an acceleration of his remedy in respect of those subsequent instalments by committing a breach in respect of one of the earlier instalments. In the present case what has happened is that, as I read the facts the plaintiff has elected not to proceed upon his remedy for the recovery of the full amount immediately upon the breach. When he filed his plaint in this suit he had a subsisting right of action upon the agreement to pay by instalments and was entitled to sue for such instalments as were at that time within the period of three years. I think a point relevant to the consideration of this matter is that pointed out by Mr. Das that if Art. 75, Lim. Act applies to the present case, then it is material to notice that the language in Cl. 3 has been altered from "when the first default is made" to "when the default is made;" and I think also the language in the first column may be material when it refers to a provision that if default be made in payment of one or more instalments the whole shall be due. In my view the option which the plaintiff had in this case was on default to say whether the whole shall be due or whether only the instalment shall be due. If he likes to treat the instalment as being due and not the whole that is his concern.

I think, therefore, there should be a decree for the amount claimed viz., Rs. 2136-2-0 with costs of the suit on scale No. 2 against defendant 1 and on scale No. 1 against defendant 2. Interest on decree at 6 per cent.

M N./R.K.

Claim decreed.

*S. N. Das*

Advocate High Court

Jammu & Kashmir

Srinagar.

(1) A. I. R. 1926 Cal. 789=58 Cal. 277.

(2) [1904] 31 Cal. 297.

(3) [1894] 21 Cal. 542.

(4) [1907] 11 O. W. N. 903.

(5) [1882] 13 C. L. R. 248.

(6) [1908] 30 All 123=5 A. L. J. 72=(1908) A. W. N. 36.

(7) [1919] 41 All. 104=47 I. C. 926=16 A. L. J. 929.

(8) [1919] 36 Mad. 66=12 I. O. 57=10 M. L. T. 258.



**A. I. R. 1929 Calcutta 401**

BUCKLAND, J.

on difference between

MUKERJI AND GRAHAM, JJ.

*Radha Krishna Gupta*—Petitioner.

v.

*Jamunadas Fatehpuria* — Opposite Party.

Criminal Revn. No. 975 of 1928, Decided on 8th February 1929.

**(a) Calcutta Police Act, S. 54-A—S. 54-A is revolutionary in its provision of casting the entire burden of proof on the accused.**

The provision contained in S. 54-A is revolutionary in its character, as it relieves the prosecution of its ordinary burden of proof in a criminal case, beyond what is necessary to create a reasonable suspicion, and throw the entire onus on the accused of removing that suspicion. A penal provision of this character should be strictly construed. [P 402 C2]

**(b) Calcutta Police Act, S. 54—To uphold conviction actual physical and not potential possession of the 'thing' in some shape or form is necessary—Meaning of the terms, 'possession' and 'thing' explained.**

*Per Mukerji, J.*—The word 'possession' should be understood in a sense ejusdem generis with the words 'conveys' and 'offers and etc.' and in the sense of actual physical possession. The word 'thing' appears in the section, in sub-S. (1) as "anything" and in sub-S. (2) as "the thing" and must necessarily mean tangible moveable property having a corporeal existence and capable of being handled. It is the suspected thing itself in some shape or form that can form the subject-matter of a case under S. 54. If a man was in possession of stolen gold ornaments and had got it melted or converted into gold, the gold is still the thing itself in a different shape or form. If instead of having the gold in his hand he keeps it in his house or with a friend or a goldsmith the gold is still in his possession. To such a case the section will apply. If a man deposits money in a bank, or purchases a cash certificate with it, the money loses all its identity and it cannot be said that he is still in actual physical possession of the money as a tangible piece of moveable property. The cash certificate or the fixed deposit receipt may represent the money for certain purposes but it is not the money itself as a 'thing' in another shape or form of such thing. (*Graham, J. Contra.*) [P 403 C 1]

**(c) Criminal P. C., S. 242—Charge—Calcutta Police Act, S. 54-A.**

When an accused has been tried under Ss. 381 and 411, I. P. C. he may be convicted of an offence under S. 54-A, Calcutta Police Act, though not separately charged with it. *A. I. R. 1923 Cal. 596, Foll. but not Appr. 29 Cal. 481, Ref.* [P 402 C 2]

*Probodh Chatterjee* and *Bireswar Chatterjee*—for Petitioner.*B. C. Chatterjee, Satindranath Mukerji* and *Amarendra Narayan Bagchi*—for Opposite Party.*A. S. M. Akram*—for the Crown.

**Mukerji, J.**—The petitioner *Radha Krishna Gupta* alias *Radha Krishna Byas* was tried by the 3rd Presidency Magistrate of Calcutta along with another person for offences under Ss. 381 and 411, I. P. C. The learned Magistrate acquitted him of the said offences but convicted him under S. 54-A, Calcutta Police Act 4 (B. C.) of 1866 and sentenced him to undergo rigorous imprisonment for three months. He has also made an order that a fixed deposit receipt and a cash certificate which were found in the possession of the petitioner be made over to the complainant. The prosecution case was that the petitioner was a writer of accounts in the complainant's firm, that the petitioner had abstracted a blank but signed cheque form from the cheque book of the firm, filled it up for Rs. 9,500 and cashed it and misappropriated the money. The charges framed against the petitioner were the following:

First, a charge under S. 381, I. P. C., in respect of a blank signed cheque form No. Cx 350718, and 2nd, a charge under S. 411, I. P. C., in respect of Rs. 800 and Rs. 4,000 covered respectively by a postal certificate and a fixed deposit receipt. The learned Magistrate held as regards the first charge that all that had been proved was that the petitioner had an opportunity to abstract the cheque form but that there was no legal evidence on which it could be held that he did so, and that although there was a confession made by the petitioner, it could not be taken into consideration as it had not been voluntarily made. The first charge, therefore, in the opinion of the learned Magistrate failed.

As regards the second charge the learned Magistrate was of opinion that it had not been established that the moneys covered by the postal cash certificate and the fixed deposit receipt were the proceeds of the cheque. He held therefore that the second charge was not proved. Being of opinion however, that the purchase of a cash certificate for Rs. 800 and the deposit of Rs. 4,000 in the bank on 6th February 1928, "the eventful day" was highly suspicious the learned Magistrate proceeded to convict the petitioner under S. 54-A, Calcutta Police Act, and sentenced him and made the order of disposal in complainant's favour as above-mentioned.



For one thing, the judgment of the learned Magistrate is highly inconsistent. If he was unable to convict the petitioner under S. 411, I. P. C. on the ground that no connexion had been established between the moneys covered by the postal certificate and the fixed deposit receipt it is difficult to see on what footing the said documents were to be made over to the complainant. In the view of the case can this order of the learned Magistrate be supported?

As regards the conviction under S. 54-A the learned Magistrate was not satisfied with the explanation which the petitioner had given as to how he came by such a large sum of money as he had put into the bank and for which he had purchased the cash certificate. But the question is, is S. 54-A, Calcutta Police Act, applicable to a case of this nature and is the conviction a proper one?

In challenging the validity of the conviction it has been urged on behalf of the petitioner that inasmuch as there had been no charge framed for an offence under S. 54-A, the conviction is bad in law. Now it is true that S. 54-A is an offence triable as a summons case and for a trial of this offence no charge is necessary: vide S. 242, Criminal P. C., but if it was intended that the petitioner was to stand his trial for this offence along with offence under Ss. 381 and 411, I. P. C., which are triable as a warrant case it was necessary to give the petitioner notice of that fact, and consequently a charge was also necessary to be framed for the offence under S. 54-A: *Hossein Sardar v. Kalu Sardar* (1). It is true that the petitioner has, in fact, adduced some evidence in support of the explanation that he gave for transactions of the day, but it cannot be said that he was not misled or that it may be assumed that he had no further defence to make. Omission to frame the charge was in my opinion, a serious irregularity which must be held to have vitiated the trial much more serious than a mere omission to frame a charge in a warrant case in which the petitioner knows what he is being tried for. But it has been held by this Court in the case of *Tulsi Tolini v. Emperor* (2) that when an accused has been tried on a charge under S. 379, I. P. C., he may be convicted of an offence

under S. 54-A, Calcutta Police Act, though not separately charged with it. Whether I agree with the principle of that decision or not I feel bound by it and I must hold that this contention should be overruled.

But a more serious illegality in this conviction in my opinion is the application of S. 54-A to the case. The judgment of the learned Magistrate is not very clear on the question as to what it was that formed the subject matter of this charge. Learned advocate appearing on behalf of the Crown seemed to argue that it was the two sums of Rs. 800 and Rs. 4,000 which was the subject-matter while learned advocate for the complainant while not disapproving of that contention urged that it was the postal cash certificate and the fixed deposit receipt which were the subject-matter. In my opinion neither of these two acts could possibly form the subject-matter of a case under S. 54-A.

As regards the postal cash certificate and the fixed deposit receipt they are property belonging to the petitioner himself and standing in his own name, and the contention that they were fraudulently obtained from the Post Office and the bank by the fraudulent concealment of the fact that the money was not the accused's money need not be seriously considered.

The sums of money Rs. 800 and Rs. 4,000 had already been parted with by the petitioner, even if at one time they were in his possession. The first part of S. 54-A is drawn almost word per word from the Metropolitan Police Courts Act 2 and 3 Vic. Ch. 71, S. 24. The limited meaning which the words of that section of the statute have been held to bear, has not been adopted in this country. It is noticeable nevertheless that the provision contained in S. 54-A is revolutionary in its character, relieving as it does the prosecution of its ordinary burden of proof in a criminal case, beyond what is necessary to create a reasonable suspicion, and throwing the entire onus on the accused of removing that suspicion. A penal provision of this character should, in my opinion, be strictly construed.

The section is divided into two subsections. In sub-S. (1) the word used is "has" contradistinguished from the word "had" in sub-S. (2) and the said

(1) [1902] 29 Cal. 481=6 C. W. N. 599.

(2) A. I. R. 1923 Cal. 596=50 Cal. 564.



word used with reference to "had" in sub-S. (2) and the said word used with reference to "possession" implies present possession. While therefore a person may be proceeded against under sub-S. (1) if he is in possession at the time when the proceedings are taken, proceedings may be taken under sub-S. (2) against a person who had possession in the past and from whom the former may have received the thing. The word "possession" should be understood in a sense ejusdem generis with the words "conveys" and "offers, etc." and in the sense of actual physical possession; the object of the sub-S. (1) being to oblige a person to explain how he came by some articles which he has with him. There is a difference between the two subsections in this way that under sub-S. (1) it is the failure to explain which attracts that subsection, while for a conviction under sub-S. (2) it must be shown that the person had reasonable cause to believe that the thing was stolen or fraudulently obtained; but this is a matter which need not be considered here.

The word 'thing' appears in the section, in sub-S. (1), as 'anything' and in sub-S. (2) as "the thing" and must necessarily mean tangible moveable property having a corporeal existence and capable of being handled. In my opinion it is the suspected thing itself in some shape or form that can form the subject-matter of a case under this section. If a man was in possession of stolen gold ornaments and had got it melted or converted into gold, the gold is still the thing itself in a different shape or form. If instead of having the gold in his hand he keeps it in his house or with a friend or a goldsmith the gold is still in his possession. To such a case the section will apply, as was the case in *Tulsi Tolini v. Emperor* (2). If a man deposits money in a bank, or purchases a cash certificate with it, the money loses all its identity and I cannot conceive how it can be said that he is still in actual physical possession of the money as a tangible piece of moveable property. The cash certificate or the fixed deposit receipt may represent the money for certain purposes but it is not the money itself as a "thing" in another shape or form of such thing. I am therefore of opinion

that this conviction is entirely misconceived. S. 54-A has already been extended to cases to which in my opinion, it was never intended to apply, but to extend it to a case like this and to authorize a Magistrate to call upon a person to explain his wealth or prosperity would be far too dangerous.

I would accordingly make the rule absolute and set aside the conviction of the petitioner under S. 54-A, Calcutta Police Act and the sentences passed on him under that section. The order of delivery of the postal cash certificate and the fixed deposit receipt cannot stand and must also be set aside. If the above orders are passed it will be necessary to pass some order for the disposal of the said two documents. I may say without hesitation that I am somewhat doubtful about the correctness of the acquittal of the petitioner on the charge under S. 411, I. P. C. I would therefore order that the said documents should be detained in Court for a period of three months from today within which time the complainant may, if he be so advised, take measures to get his rights declared to the documents or obtain such other or further orders in his favour which would entitle him to them or would justify their further detention, and in the event of his failing to do so within that time the said documents should be returned to the petitioner from whose possession they were taken.

**Graham, J.**—I have the misfortune to differ from my learned brother in this case. The facts out of which this rule has arisen are shortly as follows :

The petitioner Radha Krishna Gupta alias Radha Kissen Byas was put on his trial along with another person before the 3rd Presidency Magistrate, Calcutta, the charges framed against the petitioner being :

First, that on or about 15th February 1928 he committed theft of a blank cheque on the Central Bank of India from a cheque book belonging to the complainant Jamuna Das Fatepuria already signed by him, and thereby committed an offence under S. 381, I. P. C. and secondly, that on or about 6th February 1928 he dishonestly received or retained stolen property to wit Rs. 800 covered by a postal cash certificate and Rs. 4,000 covered by a fixed deposit receipt of the P. and O. Banking Corporation knowing



or having reason to believe the same to be stolen property being a portion of the money obtained by cashing a cheque filled up for Rs. 9,500 and that he thereby committed an offence under S. 411, I. P. C.

The Magistrate found that the charge under S. 381, I. P. C., failed as the evidence fell short of actual proof that the accused stole the cheque form, though there was evidence that he had the opportunity to do so. It was further held that the charge under S. 411, I. P. C., also failed inasmuch as there was nothing to show that the moneys found with the accused were the actual proceeds of the cheque in question.

Having recorded these findings the Magistrate then went on to hold that the accused was guilty of an offence under S. 54-A, Calcutta Police Act, in respect of the said moneys, and sentenced him to three months rigorous imprisonment, directing at the same time that the fixed deposit receipt for Rs. 4,000 and the cash certificate of Rs. 1,000 found with the accused should be made over to the complainant.

The legality of the conviction has been assailed mainly on two grounds :

Firstly, that the elements necessary to constitute an offence under S. 54-A Calcutta Police Act, were not made out against the accused and that that section has no application in a case like the present, and secondly that no charge having been framed against the accused under S. 54-A, Calcutta Police Act, the conviction is bad in law and cannot be sustained. The first of these seems to be a point of some importance. S. 54-A, Calcutta Police Act, reads as follows :

"Whoever has in his possession or conveys in any manner anything which there is reason to believe to have been stolen or fraudulently obtained shall, if he fails to account for such possession, or act to the satisfaction of the Magistrate, be liable to fine, which may extend to one hundred rupees, or with imprisonment, with or without hard labour, for a term which may extend to three months."

The language of the section is in the widest terms and the question, so far as this case is concerned, is whether on 6th February the accused had in his possession the sums of Rs. 800 and Rs. 4,000 which there was reason to believe to have been stolen or fraudulently obtained.

It has been argued on behalf of the petitioner that the section applies only in the case of a person who is in posses-

sion of properties actually stolen, or reasonably believed to be stolen, and has no application where an accused is found in possession merely of documents entitling him to possession of sums of money as in this case. The argument appears to be that in such circumstance it cannot be definitely concluded that the money so deposited is the money stolen, or suspected to be stolen or fraudulently obtained. This contention seems to me to be without any real substance. The word "possession" in the section cannot, I think, be limited or restricted to actual physical possession but must include what may be termed potential possession such as arises when money is deposited in a bank or post office. In this instance the accused, though not in actual physical possession of the cash, was to all intents and purposes in possession within the ordinary meaning of the word by reason of the fact that he had in his possession the cash certificate and deposit receipt entitling him to the moneys. Such possession it seems to me is just as much possession as if the money were in the person of the accused or in his house.

It has been urged that S. 54-A was never meant to apply to a case of this description and that it is applicable only in the case of persons found in the streets, or at the jetties or such places in possession of properties suspected to be stolen. It may be that the Act was not designed to meet cases of this description. But I can find nothing in the language of the section which as I have said is as wide as it can be, to limit or restrict its operation to cases of actual physical possession, nor does there seem to be any reason why it should not apply in a case like the present where it is alleged that the accused was found in possession, albeit potential possession of considerable sums of money suspected to be stolen for which he was unable to give any satisfactory explanation.

The prosecution relied upon the circumstances taken as a whole for the purpose of establishing that the accused was in possession of these stolen moneys, or a part thereof and those circumstances are without doubt very strong. The blank signed cheque was found to be missing on 6th February and is said to have been stolen either on that day or the previous day. On the same date 6th February, the accused deposited



Rs. 4,000 at the P. and O. Bank and brought the cash certificate for Rs. 800. It was not disputed at the trial that these deposits were made by the accused and the onus being under S. 54-A upon him to account for his possession, he adduced evidence to prove that they were made with a sum of Rs. 5,000 received by him on 6th February from a firm styled Nayasook Das Gopi Kissen. A witness named Ganga Das said to be cashier of the firm in question was examined for the defence. But the Magistrate rejected his testimony for reasons which he has given. The Magistrate finally held that the circumstances as a whole established that the accused who was a servant of the complainant on a small salary was guilty of being in possession of the moneys in question and convicted him as already stated.

We have not been referred to any decided case in which it has been held that the section is applicable only in the case of actual physical possession of property as distinguished from potential possession derived from the possession of documents entitling the holder to possession. To my mind the distinction sought to be drawn is a distinction without any real difference, for a person may surely be just as much in possession by holding a deposit receipt on a cash certificate, as if he had the money deposited in his safe in his house. He merely keeps it in a bank for greater security, and, it seems to me that it would be adopting a dangerous principle to hold that moneys suspected or proved to be stolen cease to be in possession of the thief so soon as he has been able to deposit them in a bank or post office.

As regards the second contention that the conviction is illegal because no charge was framed under S. 54-A, Calcutta Police Act, it may be observed that the offence under S. 54, Calcutta Police Act, being summarily triable the framing of a formal charge is not necessary: vide 242, Criminal P. C. Apart from this under S. 362 (4), Criminal P. C., the case not being one in which an appeal lies the Magistrate was not bound to frame a charge. The point also seems to be covered by S. 237, Criminal P. C. *Tulsi Teloni v. Emperor* (2).

For the reasons stated I am of opinion that the rule in this case should be discharged. (On difference of the two

Judges the case was put before Buckland, J.)

**Buckland, J.**—The facts of the case sufficiently appear from the judgments of my learned brothers Mukerji and Graham, JJ., who have had the misfortune to differ so that the case has been laid before me under S. 429, Criminal P. C.

The learned advocate who has appeared for the complainant whose argument has been adopted by the learned advocate for the Crown, has informed me that his case is that the property the subject matter of the conviction is the sum of Rs. 4,000 deposited in the bank and the sum of Rs. 800 paid by the accused for the postal cash certificate. I will take that to be correct though the judgment of the Magistrate is anything but clear as to this. The point to be decided is whether these sums of money are in the possession of the petitioner within the meaning of S. 54-A, Calcutta Police Act.

The cash postal certificate and the fixed deposit receipt were found on 7th February 1928 in the possession of the petitioner. If he is to be held as being in possession of the money which those documents represent and is now in the bank and with the Postal Department such possession must have begun at the time when he paid in the money and received the documents in exchange. Whatever may have since become of the documents there must have been a period of time long or short, it makes no difference, when if the view urged is correct he must have been in possession of both the documents and the money. Such a result to my mind proves the fallacy of the argument advanced, which appears to involve a confusion between actual possession and such right to possession as these documents may confer. Such right may, I conceive be or become qualified, and, in the case of the bank, must depend upon the terms of the contract under which the deposit was made. These cannot be matters to be considered under S. 54-A, Calcutta Police Act, in determining the meaning of possession. Substantially the same considerations apply to the money represented by the cash postal certificate.

Without attempting to lay down any general rule as to the meaning of the word possession in the section, it is suffi-



cient to say that in my judgment the petitioner cannot be held to be in possession of the money represented by the documents in question and the rule must be made absolute.

As regards the cash postal certificate and fixed deposit receipt, I set aside the order of the Magistrate directing that they be made over to the complainant and direct that they be detained in Court for three months from to-day and held meantime subject to any order that may be made by this Court in its original civil jurisdiction. If no such order shall have been made within the period stated they may be returned to the petitioner.

P.R./R.K. Conviction set aside.

### A. I. R. 1929 Calcutta 406

MUKERJI, J.

*Sadagar Chaudhuri* — Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1234 of 1928, Decided on 5th February 1929.

**Criminal P. C., S. 370(F)—Entry "denies" made in column provided for making record of plea and examination of accused in form prescribed under S. 370, is sufficient if accused simply denied having committed offence.**

While the column provided for making a record of the plea and examination of the accused in the form prescribed under S. 370 must be filled, there is no rule as to how that should be done. So the entry "denies" made in that column is sufficient if when the plea was taken and when the accused was examined he merely denied having committed the offence.

[P 406 C 2 P 407 C 1]

*Mritunjoy Chattopadhyaya and Sachindra Nath Banerjee*—for Petitioner.

*Debendra Narain Bhattacharjee*—for the Crown.

**Judgment.**—The petitioner has been convicted under S. 65, Port Rules framed under the Calcutta Port Act 3 (B. C.) of 1890 and sentenced to pay a fine of Rs. 5 or in default to undergo simple imprisonment for 7 days.

The grounds on which this Rule has been pressed are that the petitioner was not examined by the Magistrate after the examination of the prosecution witnesses and no memorandum of the examination of the petitioner was kept by the Magis-

trate. The records have been destroyed, but the learned Magistrate has stated in his explanation that he did examine the petitioner under S. 342, Criminal P. C. This explanation must be accepted and the only question is whether the failure to keep a memorandum of the statement of the petitioner can be held to have vitiated the trial. The entry in the column of the form provided for making a record of the plea and the examination of the accused is "Denies."

Now S. 370, Criminal P. C., itself does not say how the particulars are to be recorded, but there are two other sections in the Code from which light has to be gathered on this matter, namely Ss. 362 and 364. The last words of Sub-S (4), S. 364.

"Or in the course of a trial held by a Presidency Magistrate"

were inserted by the Amending Act 1923, thus making the other subsections of that section inapplicable to a record made by a Presidency Magistrate of an examination of an accused person in the course of a trial held by him. The same amending Act introduced two subsections in S. 362, namely 2-A and 4. Sub-S. 4 dispensed with the recording of evidence and the framing of a charge in non-appealable cases in trials held by Presidency Magistrate, but said nothing about the record of the accused's examination. Sub-S. 2-A expressly provided for a memorandum of the substance of the examination of an accused being kept by the Presidency Magistrate, signed by the Magistrate with his own hand, in appealable cases only. The result is that non-appealable cases are now left severely alone, confined to the protection that S. 370 by its own terms would afford. It is idle to imagine that the legislature while expressly taking away the necessity to record the evidence and to frame a charge, as it has done by enacting sub-S. (4), S. 362 in non-appealable cases, thought of a record in full or of the substance of the examination of the accused in such cases. The result in my opinion, is that it should be held that while the column provided for this purpose in the form prescribed by S. 370 must be filled up, no hard and fast rule was contemplated as to how that should be done. In the present case the word "denies" has been written in the column. It may be that when the plea was taken and again when the peti-



tioner was examined as I must hold that he was examined—he merely denied having committed the offence. If that was the fact the entry was sufficient. The rule should therefore be discharged and I order accordingly.

S.N./R.K.

*Rule discharged.***A. I. R. 1929 Calcutta 407 (1)**

PAGE AND MALLIK, JJ.

*Banshidhar Durga Das Dutta*—Plaintiff—Appellant.

v.

*Ishan Chandra Chatterji*—Defendant—Respondent.

Appeal No. 1832 of 1926, Decided on 10th August 1928, against appellate Decree of Sub-Judge, 2nd Court, Alipur, D/- 25th May 1926.

**Landlord and Tenant—Lease providing “on expiration of term written in patta you will take new settlement”—Tenant not exercising his option when term expired or within reasonable time—He cannot resist landlord’s suit for ejectment—Lease—Construction.**

A lease provided that “on the expiration of the term written in this patta you will take a new settlement.” The tenant, however, did not exercise his option of taking a new settlement when the term expired nor did he exercise that option within a reasonable time.

**Held:** that the tenant was not entitled to resist the suit for ejectment by landlord.

[P 407 C 2]

*D. N. Chuckerbutty, Ajendra Nath Dutt and Rabindra Nath Ghose*—for Appellant.

*Panna Lal Chatterjea*—for Respondent.

**Mallik, J.**—This appeal arises out of a suit for ejectment on the ground of expiration of the term of a written lease. The plaintiff’s claim was resisted on the allegation that in the lease under which the defendant held the land, there was a covenant for renewal on the old terms. This defence found favour with the Courts below and the Courts below dismissed the plaintiff’s suit. The plaintiff has appealed to this Court.

The passage in the lease on the strength of which the defendant wanted to resist the plaintiff’s claim runs thus:

“On the expiration of the term written in this patta you will take a new settlement; but if for any reason a new settlement be not possible, you shall at your own expense remove the rooms etc. etc.”

This clause in the document may show that if the defendant had any right to

take a new settlement of the land, he was to take a new settlement on the expiration of the term written in the patta which term expired on 16th January 1922. The defendant, however, did not exercise his option of taking a new settlement when this term expired nor did he exercise that option within a reasonable time because it appears that he did not offer to take a new settlement for ten long months after the lease had expired and until the action for ejectment had actually begun. The defendant not having exercised his option to take a new settlement of the land either on the expiration of the term of the lease or within a reasonable time after expiration thereof was not, in our judgment, entitled to resist the plaintiff’s claim for khas possession. In that view of the matter, the appeal must be allowed with costs.

**Page, J.**—I agree. It must not be taken, however, that we should hold, in the circumstances obtaining in this case, that the clause in dispute would create an option for the defendant to renew the lease for two years or seven years or ten years or twelve years or any term. It is, however, unnecessary to construe the clause, having regard to what has fallen from my learned brother. The case will be returned to the trial Court for the issues as to the amount of mesne profits and of the compensation (if any) for fixtures to be determined according to law. The defendant-respondent must vacate the premises within three weeks from to-day, subject to such further extension (if any) as may be granted in the discretion of the trial Court on application duly made to such Court within the three weeks.

S.N./R.K.

*Appeal allowed.***\* A. I. R. 1929 Calcutta 407 (2)**

MUKERJI AND MITTER, JJ.

*Ansarali*—Petitioner.

v.

*Bhim Sankar Dutta Tewari and others*—Opposite Parties.

Civil Rule No. 1056 of 1928, Decided on 14th January 1929, against order of 2nd Addl. Sub-Judge, Noakhali, D/- 8th May 1928.

**\* Civil P. C., O. 21, R. 90—Application dismissed in default of both parties—Order confirming sale not passed—Order of dismissal is appealable under O. 43, R. 1 (j).**

When no formal order has been recorded confirming the sale and the application under O. 21, R. 90 has been dismissed for default for



non-appearance of both parties to the proceeding, the order of dismissal passed under those circumstances is open to appeal. There is no distinction in principle between an order passed on an application under O. 21, R. 90, dismissing it for default either for non-appearance of one or for non-appearance of both the parties. It is the disallowing of the application made under O. 21, R. 90 which corresponds to the order refusing to set aside a sale within the meaning of O. 43, R. 1, Cl. (j). The fact that a distinct order has not been recorded confirming the sale does not alter the character of the order disallowing an application under O. 21, R. 90 which is appealable by reason of the provisions of O. 43, R. 1, Cl. (j) : *A. I. R. 1926 Cal. 773, not Foll.* ; *A. I. R. 1925 Cal. 510 Rel. on.* [P 409 C 2]

*Jotindra Nath Sanyal* for *Jitendra Kumar Sen Gupta*—for Petitioner.

**Mukerji, J.**—This Rule has been issued to show cause why the order of the Subordinate Judge of Noakhali, dated 8th May 1928, refusing to entertain an appeal should not be set aside, or why such other or further order should not be made as to this Court may seem fit and proper.

The facts necessary to be stated are these. There was an application under O. 21, R. 90, Civil P. C., filed by the petitioner in the Court of Munsif at Sudhara. On the day fixed for the hearing of this application neither of the parties appeared before the Court with the result that the said application was dismissed for default. Against that order the petitioner preferred an appeal which came up before the Subordinate Judge of Noakhali, and he on 8th May 1928 dismissed the appeal holding that from the order passed by the Munsif no appeal lay under the law. It is against this order of the learned Subordinate Judge that the present rule is directed.

The question as to whether an order dismissing an application under O. 21, R. 90 for default is appealable or not has come up for consideration before this Court in a very large number of cases and it has been held that such an order falls under O. 21, R. 92, Civil P. C., and as such an appeal lies from it under O. 43, R. 1 (j) of the Code : see e. g. *Brojo Sundar Roy v. Moti Lal* (1), *Kumud Kumar v. Hari Mohan Samaddar* (2), and *Kali Kanta v. Shyam Lal* (3). In

one of the more recent decisions of this Court a doubt was expressed by my learned brother Page, J., as regards the correctness of these decisions. This was the case of *Basaratulla Mian v. Reazuddin Khan* (4). In that case none of the parties to the proceedings appeared and upon that the application under O. 21, R. 90 was dismissed by the Court. On an application for revision being preferred to this Court. Page, J., was of opinion that the order of dismissal for default passed on an application under O. 21, R. 90 of the Code is not an order which is appealable unless it also confirms the sale within the meaning of O. 21, R. 92 of the Code. He, however, distinguished the earlier decisions of this Court to some of which I have already referred upon the ground that in those cases the application had been dismissed for default of the applicant and they were not cases in which both parties were absent. He was able to distinguish those cases upon the ground aforesaid and he held that when both parties are absent and the application under O. 21, R. 90 is dismissed under circumstances which would correspond to O. 9, R. 4, Civil P. C., an appeal can under no circumstances lie from such an order of dismissal. The learned Subordinate Judge appears to have followed this decision of Page, J.

The petitioner's contention is that even in a case when the order of dismissal was passed on account of default of appearance on the part of both the parties to the proceeding, an appeal is maintainable under O. 43, R. 1 (j), in view of the fact that such an order comes within the per-view of O. 21, R. 92 of the Code. There is a decision of this Court, though not reported, passed in appeal from order No. 285 of 1922 and rule No. 659-M of 1922 in which it appears that it was held that an appeal does lie from such an order. There is also another decision of this Court in the case of *Narendra Nath v. Rakhal Das* (5), which was a case in which the Court disallowed the prayer of an application in a proceeding under O. 21, R. 90 for time and when neither of the parties to the proceeding was present dismissed the application and confirmed the sale, and it was held that such an order was appealable under O. 43, R. 1 (j) of the Code. The last mentioned

(1) [1910] 14 C. W. N. 573=5 I. C. 493=13 C. L. J. 153.

(2) [1915] 21 C. L. J. 628=30 I. C. 45.

(3) [1917] 25 C. L. J. 163=38 I. C. 598.

(4) *A. I. R. 1926 Cal. 773=53 Cal. 679.*

(5) *A. I. R. 1925 Cal. 510.*



case no doubt is distinguishable from the case now before us, because here it does not appear that although the application was dismissed for default there was any formal order recorded confirming the sale.

The question therefore is whether when no such formal order has been recorded confirming the sale and the application under O. 21, R. 90 has been dismissed for default for non-appearance of both the parties to the proceeding, the order of dismissal passed under those circumstances is open to appeal. It appears that in the Code of 1882, S. 312 which corresponds to O. 21, R. 92 of the Code of 1908 ran in these words:

"If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser."

Section 588 of that Code which corresponds to O. 43 of the present Code and provided for appeals from orders in its Cl. (16) enacted that:

"orders under S. 294 and orders under S. 312 and orders under S. 313 for confirming or setting aside or refusing to set aside a sale or immovable property etc."

In the present Code O. 43, R. 1 (j) speaks of an order under R. 72 (with which we are not concerned) or R. 92, O. 21, setting aside or refusing to set aside a sale. It appears therefore that the words "for confirming" which were to be found in S. 588, Cl. 16 have been dropped out. The obvious intention of the legislature was not to treat an order confirming a sale as one distinct in its essence from an order disallowing an application under O. 21, R. 90. This intention appears to be further clear from the fact that O. 21, R. 92 says that where no application is made under R. 89, R. 90 or R. 91 or where such an application is made and disallowed the Court shall make an order confirming the sale and thereupon the sale shall become absolute. It is the disallowing of the application made under O. 21, R. 90 which corresponds to the order refusing to set aside a sale within the meaning of O. 43, R. 1 Cl. (j). The fact that a distinct order has not been recorded confirming the sale does not alter the character of the order disallowing an application under O. 21, R. 90 and it is this last mentioned order that is appealable by reason of the provisions of

O. 43, R. 1, Cl. (j). My learned brother Page, J., was prepared to make a distinction between orders passed for default of appearance on the part of both the parties and orders passed for default of appearance of one of the parties only, and he observed that in dismissing an application for default when neither party appears on the case being called on for hearing the Court does not refuse to set aside the sale, but in the absence of the parties refuses to consider whether the sale should be set aside or not. With all respect I should say that this distinction, in my judgment, really makes no difference in the result because the statutory consequence of the disallowing of the application is the confirmation of the sale at least to the extent covered by the application. In my opinion it is not correct to draw any conclusion from the analogy furnished by the provisions of O. 9, R. 4 and O. 9, R. 9 because the provisions of O. 9 have got no application to a case under O. 21, R. 90, Civil P. C. I am of opinion that there is no distinction in principle between an order passed on an application under O. 21, R. 90 dismissing it for default either for non-appearance of one of for non-appearance of both the parties, and the principle upon which the other decisions to which I have referred above proceed, is in my opinion, equally applicable to a case of the present nature.

For these reasons I am of opinion that this Rule should be made absolute. The order against which it is directed is accordingly set aside and it is ordered that the learned Subordinate Judge should proceed to entertain the appeal and deal with it in accordance with law.

As there is no appearance for the opposite party in this rule there will be no order for costs.

**Mitter, J.**—I agree.

M.N./R.K.

*Rule made absolute.*

#### **A. I. R. 1929 Calcutta 409**

C. C. GHOSE AND SUHRAWARDY, JJ.

*Ananda Chandra Nandy and another*  
—Plaintiffs—Appellants.

v.

*Jhulon Singh and others*—Defendants  
—Respondents.

Appeal No. 2654 of 1926, Decided on 17th December 1928, from appellate decree of 2nd Sub-Judge, Dacca, D/- 14th July 1926.



(a) **Bengal Public Demands Recovery Act (3 of 1913), S. 34—Certificate debtor cannot challenge sale by way of defence in suit for possession.**

It is not open to a certificate debtor to challenge a certificate sale by way of defence in a suit for possession brought by the purchaser, his remedy being limited to the procedure indicated in the Act itself : *A. I. R. 1925 Cal. 81, Rel. on.* [P 411 C 2]

(b) **Bengal Public Demands Recovery Act (3 of 1913), Ss. 35 and 37—Limitation to jurisdiction of civil Courts.**

The right of interference by the civil Court in a certificate sale is limited to cases where there were no arrears due or non-service of notice under S. 7 or the whole proceedings were vitiated by fraud : *A. I. R. 1922 Cal. 101, Dist.* [P 412 C 1]

(c) **Bengal Public Demands Recovery Act (3 of 1913), S. 23 — Sale by certificate officer authorized to sell—Security of purchaser should not be impaired though there was irregularity in sale.**

A certificate sale is a sale held by the certificate officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act by reason of some irregularity in publishing or conducting the sale the security of purchasers at sales for public demands should not be impaired : *21 Cal. 70 (P. C.), Appl.* [P 412 C 1]

(d) **Civil P. C., O. 21, R. 66—Misdescription of property which can be identified, does not prevent passing of title to purchaser—Bengal Public Demands Recovery Act (3 of 1913), S. 23.**

A misdescription in the sale proclamation cannot be a ground for holding that a property did not pass under it to the purchaser if it can be gathered from the surrounding facts and circumstances there could not be any doubt as to what was actually sold. [P 412 C 2]

*Sasadhar Roy (Sr.)—for Appellants.*

*Krishna Kamal Moitra—for Respondents.*

**Suhrawardy, J.**—This appeal arises out of a suit for declaration of title to and recovery of khas possession of 4.66 acres of land described in the plaint. The plaintiffs are the purchasers at a sale held on 11th April 1921 under the Public Demands Recovery Act for arrears of rent, due to the Bhowal Raj Estate under the Court of Wards. The sale was confirmed on 14th June 1921, and it is alleged that delivery of possession of the land sold was given to the plaintiffs by the Collector on 26th July of the same year. The plaintiffs' case was that the defendants had not parted with possession of the land and hence they instituted the present suit on 19th September 1923.

Both the Courts below have given effect to the defendants' plea that the processes under the Public Demands Recovery Act had not been regularly served. They have held that it has not been proved that the notice or a copy of the certificate was served on defendant 1, the tenant as required by S. 7 of the said Act. There are also findings to the effect that the processes relating to the sale of the property were not served on the defendant and the story of the delivery of possession to the plaintiffs in pursuance of the sale is false. On these grounds the lower Courts have dismissed the plaintiffs' suit. The plaintiffs have thereupon preferred this appeal.

It has been contended before us on behalf of the plaintiffs-appellants that the Courts below are not right in allowing the defendant to raise the plea as regards the non-service and the invalidity of the processes under the Public Demands Recovery Act. Both the Courts below have considered this point and are of opinion that the defendant is entitled to challenge the validity of the sale under the Public Demands Recovery Act. The learned Subordinate Judge in the lower appellate Court has held that, inasmuch as the present suit was brought within the period within which the defendant was entitled to bring a suit under the Public Demands Recovery Act to have the sale set aside, he is entitled to urge by way of defence all the objections that he could have raised had he brought a suit under the said Act. This view, in our opinion, cannot be maintained. The Public Demands Recovery Act may generally be regarded as a Code in itself and it has laid down the procedure to be observed in effecting a sale under it. It is not contended in this case by the defendant that there were no arrears due from him or that the certificate prepared under S. 4 of the Act was not duly filed. All the objections that the defendant has taken in the present case relate to the subsequent conduct of the person responsible for the service of the notice and the sale processes. It may be noted here that the plaintiffs are strangers and had nothing to do with the proceedings taken under the Public Demands Recovery Act.

After a certificate is issued, it has to be filed under S. 6 of the Act and thereafter notice of the certificate in the prescribed form is issued under S. 7. When the



notice is served, there are several remedies provided for in the Act which may be availed of by the debtor to have the certificate set aside. It is necessary to refer only to a few of the sections of the Act to show what remedies are open to the debtor against a sale under a certificate under the Act and where those remedies stop. For our present purpose, we will consider the remedies which come into existence after the sale of the property. Under S. 22, the sale may be set aside on deposit of the amount due. Under S. 23, the person whose property is sold may within a certain time apply by the certificate officer to set aside the sale on the ground of non-service of notice or on the ground of a material irregularity in the certificate proceedings or in publishing or conducting the sale. S. 24 gives the debtor the right to bring a suit in the civil Court to have only the certificate cancelled or modified and for any further consequential relief under certain limitations. S. 35 debars a civil Court from setting aside a certificate sale except on the ground that the amount stated in the certificate was actually paid or discharged, that no part of the amount stated in the certificate was due by the certificate-debtor and that in cases of non-payment of fines imposed or costs, etc. or fees adjudged by a Collector or a public officer under any law, the proceedings of such Collector or public officer were not in substantial conformity with the provisions of such law. S. 36 is an important section to be considered in this connexion. It provides that if the debtor has not applied to the Collector under Ss. 22 or 23 he may bring a suit in the civil Court within one year of delivery of possession to the purchaser to set aside the sale on the ground of non-service of notice under S. 7. But it is expressly laid down there that a sale of immovable property in execution of a certificate shall not be held to be void on the ground that the notice required by S. 7 has not been served.

Reading all these sections together, one cannot but come to the conclusion that a certificate sale can only be set aside by the civil Court on the grounds that there were no arrears of rent due for which the certificate was taken or that notice under S. 7 was not served if the suit is brought within the time fixed. It becomes further clear that

all the remedies that have been provided for by the Public Demands Recovery Act must be sought after. The jurisdiction of the civil Court to take cognizance of cases for setting aside certificates or certificate sales has been limited by several provisions in the Act itself. Lastly comes S. 37 which says that every question arising between the certificate holder and the certificate debtor or their representatives relating to execution etc., of a certificate duly filed under this Act or relating to the confirmation or setting aside of a sale held in execution of such certificate shall be determined not by suit but by order of the certificate officer. There is a proviso attached to the section that a suit may be brought in a civil Court in respect of any such question on the ground of fraud. This limits the jurisdiction of the civil Court as between parties to the certificate in a suit for setting aside a certificate and virtually reduces it to a suit based upon fraud only.

Now, the position in the present case is this: The defendant when he came to know of the certificate and the sale thereunder had to seek remedies provided for by the Public Demands Recovery Act. It is found by the Subordinate Judge that the defendants' right to take proceedings under the said Act had not been extinguished by virtue of the application of S. 18, Limitation Act. But that does not seem to be a valid ground for holding that, because the defendants' right to sue subsisted on the date the present suit was brought, he had the right, without bringing such a suit, to raise objections against a certificate sale by way of defence. There is no authority either in the Statute law or in the case law in support of the view that it is open to the defendant to challenge the certificate sale by way of defence in a suit for possession brought by the purchaser. As already stated, the remedy of the certificated debtor is limited to the procedure indicated in the Act itself. We are not called upon in this case to consider whether a defence could be raised with regard to the invalidity of the sale on the ground that there was no money due from the certificate debtor at the time when the certificate was issued; nor are we called upon to consider whether it is competent to the defendant to raise the objections under S. 47, Civil P. C., in a civil Court sale or any similar enactment. The



Public Demands Recovery Act seems to us to vest the certificate officer with an exclusive jurisdiction to deal with questions relating to the publication of the certificate and the processes thereunder. The right of interference by the civil Court is limited to cases where there were no arrears due or non-service of notice under S. 7 or the whole proceedings are vitiated by fraud. It is not denied in this case that arrears were due nor has it been contended that the certificate had not been duly filed. In these circumstances, to hold that it is open to the defendant to take by way of defence objections to the validity of the sale in a suit in the civil Court and that Court is competent to give effect to it, would be virtually to vest the civil Court with powers which are expressly denied to the civil Court.

The observations of the Judicial Committee in *Govind Lal Roy v. Ramjanam* (1), with reference to a sale for arrears of revenue oppositely apply to sale under the Public Demands Recovery Act. Their Lordships say that it is a sale held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act by reason of some irregularity in publishing or conducting the sale and that security of purchasers at sales for public demands should not be impaired.

Reference has been made in this connexion to some cases which have very little bearing on the point before us except an unreported case of this Court, *Reajuddin Dalal v. Secretary of State* (2). In that case, it appears to have been held that a sale held under a certificate without notifying the date, time and place is liable to be set aside by a civil Court as the sale was in substance a colourable exercise of the powers conferred on the certificate officer by the Statute. There the certificate debtor was the plaintiff and it may be that the learned Judges who decided those cases thought that it was a case of fraud which came within the ambit of S. 37, Public Demands Recovery Act. It is not further clear that that was not a suit under S. 36 or any other section of the Act. Without admitting the correctness of the

view expressed therein, we do not think that that decision is of any help to us for the determination of the question raised in this appeal, namely, whether the defendant can in a suit against him object in his defence to the certificate sale in the civil Court. The next case referred to is the case of *Protap Chandra v. Secretary of State* (3). In that case, it was held that the certificate itself was bad as S. 4, Public Demands Recovery Act, did not authorize the issue of more than one certificate in the prescribed form given in the appendix. In that case too, the certificate-debtor was the plaintiff. Some support to the view which has been taken by us in this case is to be found from the ratio of the decision given in the case of *Jogneswar Sikhdar v. Kailash Mandal* (4). It is therein expressed that the defendant cannot in his defence be allowed to challenge a sale held by the civil Court inasmuch as he did not seek the remedy offered to him by O. 21, R. 90, Civil P. C. It may possibly be argued that where the sale is a nullity or void, the objection can be taken by a defendant by way of defence. But in the present case, no such question arises. The sale here is not void but is voidable at the worst. It was open to the debtor to have proper proceedings taken before the proper tribunal. The defendant has not been able to show that the sale under which the plaintiffs claim did not confer any right on them by virtue of any defect.

There is a finding by the trial Court that the sale certificate does not cover the entire property in suit. The Subordinate Judge has laid down the law correctly when he says that a misdescription in the sale proclamation cannot be a ground for holding that a property did not pass under it if it can be gathered from the surrounding facts and circumstances that there could not be any doubt as to what was actually sold. But the learned Subordinate Judge has not considered the evidence upon this point and the fact relating to it in full, inasmuch as he is of opinion that the view he has taken with regard to the invalidity of the sale is enough to dispose of the suit. As we are of opinion that the defendant is not entitled to resist the plaintiffs' claim on the grounds urged by him in his de-

(1) [1894] 21 Cal. 70=20 I. A. 165 (P.C.).

(2) Second Appeals Nos. 1718 and 2294 of 1918 and 14 of 1919, decided on 30th June 1920.

(3) A. I. R. 1922 Cal. 101=49 Cal. 1026.

(4) A. I. R. 1925 Cal. 81.



fence, the plaintiffs' suit must succeed. But we should like to see a definite finding by the Subordinate Judge on the point dealt with by the Munsif namely, whether the sale certificate covers the property in suit and, if it does, whether the whole of it or a part only.

The result, therefore, is that the appeal is allowed, the decree of the lower appellate Court is set aside and case is remitted to that Court for disposal after a clear finding as to whether the sale certificate Ex. 4 covers the land in suit or any portion thereof. The plaintiffs' suit will be decreed according to the finding arrived at upon this issue. If any portion of the land in suit is not found to be covered by the sale certificate, the plaintiffs' suit will be dismissed to that extent. The plaintiffs are entitled to their costs in this Court. Costs of the Courts below will abide the result.

M.N./R.K. *Appeal allowed.*

### A. I. R. 1929 Calcutta 413

C. C GHOSE AND MALLIK, JJ.

*Bireswar Bandopadhyaya and others—Appellants.*

v.

*Jogendra Nath Chakrabarty and others—Respondents.*

Appeals Nos. 31 to 35 of 1927, Decided on 15th January 1929, against appellate decrees of Sub-Judge, 1st Court, Backarganj, D/- 22nd May 1926.

**Bengal Tenancy Act, S. 52—Tenant proving deficiency in area is entitled to abatement of rent unless landlord shows express stipulation or other circumstances precluding tenant from claiming relief.**

When the tenant has shown that there is a deficiency in area proved by measurement in respect of the tenures or holdings in his possession he is entitled to an abatement of rent even though the tenant has not shown what the area was, at the time of the inception of the tenancy or what the state of things was when the rent was assessed or adjusted, unless the landlord shows that either the tenant has no right to abatement by some express stipulation contained in any document governing the tenancy or that there are circumstances which would disentitle the tenant to obtain relief: 22 C. L. J. 569, *Rel. on.* [P 414 C 2, P 415 C 1]

*Brojendra Nath Chatterjee and Satindra Nath Roy Chowdhury—for Applts.*

*Abinash Chandra Guha and Nerode Chandra Roy—for Respondents.*

**Judgment.**—The suits out of which appeals Nos. 31, 33, 34, and 35 have

arisen were commenced by the tenants praying for abatement of rent on the ground of decrease in area of the tenures covered by the suits on account of diluvion. The first Court held that the plaintiffs tenants had been able to prove that the area in each case, for which rent had been previously paid by them was larger than the area in their possession at the time of the commencement of the suits and that the deficiency in the area was due to diluvion. The learned Munsiff stated that there was no document forthcoming from which the original area, that is, the area at the time of the inception of the tenancy could be found out and that there were no materials whatsoever, on the record by which the extent of the original area of the tenures could be traced. He also stated that the plaintiffs had been able to produce before him the Record-of-Rights which showed that the recorded area in the possession of the plaintiffs at the time of such Record-of-Rights, namely, in 1907 was larger than the area found, by the commissioner who had been appointed to measure the land, in the possession of the plaintiffs. The question then arose as to whether the fact that the tenants had been unable to show what the area was at the time of the inception of the tenancy would have the effect of barring relief to the tenants in the circumstances referred to above. The first Court observed as follows :

“Abatement on the ground of decrease in area due to diluvion is an ordinary incident of a tenure and my opinion is that the tenant is entitled to some relief on this score only if it can be shown that at some date prior to the institution of the suit the tenant paid rents for a larger area than in existence at present. This does not injure the landlord at all and it is he who profits by the tenant's failure due to ignorance to establish the original area. The original area which was surely greater than the area taken as the starting basis for calculation being not taken into account the proportion to which the tenant is entitled is increased to the advantage of the landlord. For the purposes of the suits, I am thus inclined to take the areas noted in the settlement records as the basis of my calculations. The records were prepared long ago and it can be presumed that the tenants are paying the recorded rentals for the recorded area.”

The first Court then went into an elaborate calculation showing what the recorded area in the possession of the plaintiffs was as tenants in the Record-of-Rights and what the area found by



the Commissioner in their possession was and gave them the appropriate relief on the basis of the difference of the two areas referred to above. The lower appellate Court to which appeals had been carried by the defendant landlord in the above circumstances held that the tenants having failed to prove the area for which rent had been previously paid by them and the Munsiff having failed to find out whether the rent was a consolidated rent for the entire tenure disallowed the abatement granted by the Munsiff. Against this decision of the lower appellate Court the plaintiffs tenants have preferred appeals Nos. 31, 33, 34 and 35.

In appeal No. 32 which arises out of Suit No. 151 of 1925, the plaintiff was the landlord and the tenants were the defendants. In that suit which was a suit for rent, the lower appellate Court granted a decree to the landlord for the amount of the rent claimed and refused to grant any abatement whatsoever. Against this decree, the defendants the tenants have appealed to this Court.

It appears, as indicated above, that there is no document forthcoming showing the inception of the tenancy but that the tenants have been able to show that the rent previously paid by them at any rate at the time of the Record-of-Rights was in respect of a larger area than the area found by the commissioner to be in their possession. Now, it cannot be disputed that rent is paid by a tenant for the use of the land settled with him or found to be in his possession and if, for no fault of the tenant, any portion of the land so settled is washed away he cannot on general principles of justice and equity be held liable to pay rent for the portion which has been washed away. This is elementary and has been referred to in a very early case decided in 1864 *Sheikh Enayetoollh v. Sheik Elaheebuksh* (1). In that case, Sir Barnes Peacock, C.J. stated that it was settled doctrine that the tenant was entitled to abatement for the lands washed away in all cases and even in the case where there was a kabuliati if the terms of the kabuliati were not such as to preclude him from claiming that abatement. One modern statement of what was stated by Sir Barnes Peacock in 1864 is to be found in the case of *Salimullah v. Kali-*

*prosonno* (2). The rule being one founded on principles of natural justice and equity, we have to examine for ourselves whether there is anything in the section itself which precludes us from giving relief to the tenants in circumstances such as have been disclosed on the record.

To start with, it has been laid down in several cases that S. 52, Bengal Tenancy Act, is not exhaustive. But be that as it may, the terms of the section itself show conclusively that in the present instance the tenants have brought their cases within the purview thereof. They have shown in each case that the area for which rent had been previously paid by them, that is for the period between the date of the settlement record and the date of the commencement of the suits was larger than the area found to be in their possession as would appear from the result of the local investigation held by a commissioner duly appointed in that behalf. In other words, they have shown that there is a deficiency in area proved by measurement in respect of the tenures or holdings in their possession. That being so *ex facie* the tenants have brought their cases within the four corners of the sections. It is said, however, that the tenants have not shown what the area was at the time of the inception of the tenancy nor have they shown what the state of things was when the rent was assessed or adjusted. There is no doubt that the tenants have not shown what the area was at the inception of the tenancy nor have they shown what the state of things was when the rent was assessed or adjusted. But the real question is whether in the circumstances such as have arisen here the tenants are to be held disentitled to relief because of failure on their part to prove the matters referred to above. To hold that the tenants would be disentitled to relief would be to hold something not in accordance with the principles of natural justice and equity on which reliance was placed by Sir Barnes Peacock, C. J., in the case of *Sheikh Enayetoollah v. Sheikh Elaheebuksh* (1) but to go merely by expressions used here and there in cases where the landlord was seeking to increase the rent payable by the tenant on the ground of increase in area. No case has been shown to us where in a suit by a tenant for abatement of rent on

(1) [1864] W. R. Act X Rul. 42.

(2) [1915] 22 C. L. J. 569=33 I. C. 319.



the ground of diluvion it has been laid down that the tenant is disentitled to relief because he has not been able to prove what the rent was at the time of the inception of the tenancy, or what the area was at the time when the rent was assessed or adjusted. In the absence of any such case, where the facts are that certain lands are proved to have been washed away and yet the claim for abatement is resisted by the landlord it must lie on the landlord to show that there are circumstances which do not entitle the tenant to claim relief. It is, in the first place, for the tenant to show that there is a deficiency in area. The onus of proof is then shifted on to the landlord to show that either the tenant has no right to abatement by some express stipulation contained in any document governing the tenancy or that there are circumstances which would disentitle the tenant to obtain relief. The landlord having failed to show any such circumstance and the onus of proof having been discharged by the tenants, it follows, in our opinion, that the tenants in these cases are entitled to the relief claimed. What the actual measure of such relief would be has been found by the learned Munsif and we have not enough materials on the record furnished by the landlord to show that the calculation made by the Munsif in measuring the amount of relief to be granted to the tenants was in any way wrong. That being so, we allow appeals Nos. 31, 33, 34 and 35.

Appeal No. 32 must also be allowed. It is clear from what has been indicated above that in the suit out of which that appeal has arisen, the lower appellate Court has granted a decree for rent for the full amount claimed whereas the decree should have been for the amount of rent claimed by the plaintiff less the amount allowed on account of abatement of rent that is to say, the decree should have been for the amount allowed by the Munsif. The result, therefore, is that all these five appeals are allowed, the decrees of the lower appellate Court are set aside and those of the Court of first instance are restored and affirmed with costs in this Court as well as in the Court of appeal below.

M.N./R.K.

*Appeals allowed.***A. I. R. 1929 Calcutta 415**

RANKIN, C. J., AND BUCKLAND, J.

*Ebrahim Molla—Appellant.*

v.

*Emperor—Opposite Party.*

Criminal Appeal No. 658 of 1928, Decided on 14th December 1928.

**Criminal P. C., S. 307—Judge disagreeing with verdict but not thinking to refer the case should not express his inconclusive opinion.**

Sessions Judges are under no obligation to have or express their individual opinion upon really disputable questions of fact which are for the jury. If the Judge really disagrees with the verdict, that is, as a settled and considerate opinion then it is necessary for the ends of justice to refer the case; if he does not think it necessary his "disagreement," is not a reality and then he should not expose his inconclusive state of mind: (1871) 15 W. R. Cr. 46 held, no longer good law.

[P 416 C 1, 2]

*Asaduzzman—for Appellant.**D. N. Bhattacharjee—for the Crown.*

**Rankin, C. J.**—This is an appeal by one Ibrahim Molla who has been sentenced to five years' rigorous imprisonment being convicted by the unanimous verdict of the jury for setting fire to a certain building on 17th March 1928. It appears that it occurred in the course of Ramjan days of this year. There is a good deal of evidence and if that is believed it clearly justifies the finding of the jury. The learned Judge points out that no witness actually states that he saw the accused setting fire to the place. The evidence, if it is believed, is to the effect that the complainant got up in the middle of the night, went outside and saw the accused and his brother Mobarak standing near the hut and was about to run away and he also saw the flames coming up. He then cried for help and number of people came up. These people have given evidence in the case and they say that they saw Ebrahim and his brother Mobarak there. In addition to that there is evidence which has been carefully laid before the jury evidence as to enmity and evidence of threat to burn down the house of Nefajuddin, the father of the complainant. This is a question entirely of fact. The learned Judge in his charge has gone through the evidence most minutely. He has put before the jury all the circumstances which he has analysed from every point of view and the only thing that can be said with



regard to this charge is that it is full. It is so full and careful that it may be doubted if any ordinary juror could appreciate it in a short space of time. There is one point on which it is said that the learned Judge should have given fuller direction to the jury viz., with regard to the passage where he says "there is no eyewitness to prove that the accused set fire to the place." On that it is said that he should have gone and delivered a lecture to them on circumstantial evidence making it clear that circumstantial evidence must not only be consistent with the guilt of the accused but must be consistent with no other view. It is much more useful to tell the jury that they should not convict the accused until guilt is proved and that the evidence which is consistent with his innocence does not prove his guilt. In this case, I am unable to say that there is any important fact which has been misrepresented or overlooked. The learned Judge says:

"there is room for doubt as to whether the accused is really guilty. I see no reason to differ from the unanimous verdict of the jury, however, on what are after all, questions of fact. Not agreeing with but accepting the unanimous verdict of the jury I convict the accused."

This is a method of expression which I have noticed before and I cannot notice it again without deploring it. Sessions Judges are under no obligation whatsoever to have or to express their individual opinion upon really disputable questions of fact which are for the jury. If a Judge agrees or disagrees, it is a matter *prima facie* for himself but if he disagrees with the verdict of the jury and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he is obliged to do so. If he is not clearly of opinion that the conviction is wrong so as to make it necessary for the ends of justice to submit the case to the High Court then the position is that described in S. 306 "the Judge does not think it necessary to express disagreement" and his opinion being on that view irrelevant he will be well advised to keep it to himself. Learned Judges do not seem to appreciate that they are given an overriding power not that they may pose as critics but in order that miscarriage of justice may not take place. In this case there is no reference made under S. 307, Criminal P. C., and

it does not seem to me that the charge can be attacked as defective or insufficient. In such a matter as a conviction for arson to intimate a doubt upon which one is not prepared to act is to cover the proceedings with all the appearance of injustice and indeed of despair for justice. If the Judge really disagrees with the verdict, i. e., has a settled and considered opinion that the crime has not been proved against the accused, it seems to be clear enough that it is necessary for the ends of justice to refer the case. If he does not think this necessary his "disagreement" cannot be a reality at all, and the less his inconclusive state of mind is exposed the better, as the law does not require him to interfere. In the case of verdicts of acquittal cases are fairly common in which the Judge thinks that the jury has taken a more favourable view for the prisoner than he would have taken himself and yet is not clearly of opinion that it is necessary for the ends of justice to refer the case. Here too, however, there is a certain indecency in acquitting the prisoner while publishing belief in his guilt. To administer properly Ss. 306, and 307, Criminal P. C., practical good sense is required not only as regards what is to be done but also as regards what is to be said and as a matter of practical good sense acquittals and convictions raise, for the present purpose, considerations which, while covered equally by the phrase "the ends of justice" are never quite the same.

As I find a dictum in the case of *Queen v. Bahar Ali Kahar* (1), still repeated in some text books saying that the Judge should always say whether he agrees with the jury. I would here add that under the Code of 1861 there were no provisions comparable to the present Ss. 306 and 307 the former of which in particular is an express enactment upon this subject. The case of *Queen v. Bahar Ali Kahar* (1), was one in which it was held that there was no evidence at all to go to the jury and the observation which has for so long been preserved appears to me to have been inapt and insufficiently considered.

The verdict of the jury must in this case stand and this appeal is dismissed.

**Buckland, J.**—I agree.

S.N./R.K.

*Appeal dismissed*



**A. I. R. 1929 Calcutta 417**

CUMING AND PEARSON, JJ.

*Profulla Chandra Basu and another—Appellants.*

v.

*Kshetra Lal Sinha Roy and others—Respondents.*

Appeals Nos. 2684 to 2686 of 1926, Decided on 19th February 1929, against appellate decrees of Sub-Judge, Burdwan, D/- 15th September 1926.

**Limitation Act, Art. 120—Suit for declaration by tenants that their lands are rent-free—Addition of unnecessary or premature reliefs does not bar application of Art. 120—Correction of entry in Record-of-Rights not prayed for—Time begins to run from date of filing of rent suits.**

Where the tenants brought a suit seeking for a declaration that certain lands were held by them rent free under the defendant as the defendant landlord had wrongly got these lands recorded in the Record-of-Rights as liable to pay rent and then fraudulently got rent assessed for them under S. 105, Ben. Ten. Act, and also for confirmation of their possession and for an injunction restraining the defendant from executing any decree for rent which he might obtain in certain rent suits which he had brought against them.

*Held:* that the latter two reliefs being unnecessary and premature respectively the suit was governed by Art. 120. [P 418 C 1]

*Held further:* that as the plaintiffs did not specifically ask for the correction of any entry in the Record-of-Rights the time began to run against them from the date of the institution of the rent suits, by the landlord: 23 C. L. J. 561, *Foll.*; 23 C. W. N. 883, *Dist.* [P 418 C 2]

*Sarat Chandra Bose, Santosh Kumar Bose and Sisir Kumar Banerjee—for Appellants.*

*Sitaram Banerji and Bejoy Prosad Sinha Ray—for Respondents.*

**Cuming, J.**—These three appeals arise out of three suits in which the plaintiffs sought for a declaration that certain lands were held by them rent free under the defendant as the defendant landlord had wrongly got these lands recorded in the Record-of-Rights as liable to pay rent and then fraudulently got rent assessed for them under S. 105, Ben. Ten. Act. The plaintiffs also asked for confirmation of their possession and also for an injunction restraining the defendant from executing any decree for rent which he might obtain in certain rent suits which he had brought against them.

The first Court decreed the suits holding that the plaintiffs were entitled to a declaration that the lands were lakhiraj

lands. That Court also confirmed their possession and issued permanent injunction on defendant 1 restraining him from realizing in execution the amounts of the decrees which he had obtained for rents for these lands. The defendant appealed to the District Court. The learned Subordinate Judge held that the suits were barred by limitation and further that they were barred by S. 109, Ben. Ten. Act. With regard to the question of limitation he held that the suits were governed by Art. 120, Lim. Act, which provides a period of six years. He held that time ran against the plaintiffs from the date of the final publication of the Record-of-Rights and hence the suits were barred by limitation. He further found that S. 109, Ben. Ten. Act, was a bar to the present suits. The defendant had made an application under S. 105, Ben. Ten. Act, for a declaration that these lands were not rentfree lands but rent paying lands and to have a fair rent assessed upon them. These proceedings were decided ex parte against the present plaintiffs.

The learned Subordinate Judge held that these questions were res judicata and the present suits were barred. As regards the question of limitation the first question decided by the learned Subordinate Judge was whether Art. 120 or Art. 142 or 144, Lim. Act applied to the present cases. In other words whether 6 years or 12 years rule of limitation applied to the cases. The plaintiffs had added to their declaratory suits prayers for confirmation of possession and an injunction that the defendants might be restrained from realizing rents in execution of any decrees that he might obtain in certain rent suits. With regard to the prayer for confirmation of possession the learned Subordinate Judge has held, and I agree with him, that there was no cause of action which would justify the plaintiffs in asking for confirmation of their possession, that no attempt has been made by the landlord defendant to dispossess the plaintiffs or in any way to disturb their possession. Mere bringing of suits for rent against a party, is not an attempt to disturb his possession of the property in question. I agree therefore with the learned Subordinate Judge that the prayer for confirmation of possession is entirely unnecessary. Therefore on that account the



plaintiffs cannot have the period of limitation for 12 years. The next question is whether the application for an injunction was necessary or not or indeed whether it was a prayer which the plaintiffs could ask for. What they asked for, as far as we can see, was an injunction restraining the defendant from realizing rents in execution of any decrees that he might obtain. I do not think that it was open to the Court to grant any such injunction. The injunction which they asked for was an injunction restraining the defendant from executing any rent decrees which he might or might not obtain. He had not obtained any decree for rent. The prayer for the injunction was clearly premature and it could not be asked for or granted in the present suits. It is, therefore, clear that the period of limitation applicable to the present suits is six years as held by the learned Subordinate Judge.

The next point to be considered is from what point of time does time run against the plaintiffs. The respondent contends that the time runs against the plaintiffs from the date of the final publication of the Record-of-Rights in which case admittedly the plaintiffs' suits are barred. In support of this contention he relies on the case of *Rajani Nath Pramanik v. Monaram Mandal* (1). The appellants contend on the contrary that time runs from the date when the defendant made an actual claim against them on the strength of the entry in the Record-of-Rights which claim they contend was made when the defendant sued them for rent on the basis of rent assessed in S. 105 proceedings and of the entry in the Record-of-Rights that the lands are liable to pay rent, and they rely upon the decision in the case of *Dina Nath Das v. Rama Nath Das* (2). The question as to which decision is applicable to the present cases would depend upon the relief that the plaintiffs sought for in the plaint. I have carefully considered the plaint. There it does not appear that the plaintiffs asked for the correction of any entry in the Record-of-Rights. Their prayer would seem to be for a declaration that they had rent free title to the properties in question. Incidentally, no doubt, they referred to the entry in the Record-of-Rights as showing that

their title was not rent free. But they did not specifically ask for the correction of any entry in the Record-of-Rights. Therefore it seems to me quite clear that the decision which applies to the present cases is not the decision in the case of *Rajani Nath Pramanik v. Monaram Mandal* (1) but the decision in the case of *Dina Nath Das v. Rama Nath Das* (2). That being so, I think it is quite clear that the time began to run against the plaintiffs from the date of the institution of the rent suits. Therefore so far as the question of the limitation is concerned it must be decided in favour of the appellants.

There remains now to be decided the second point raised by the appellants which was decided against them in the lower appellate Court, namely, that the suit was barred by the principle of res judicata. The appellants allege that the decision in the proceedings under S. 105, Ben. Ten. Act, was obtained by fraud. The trial Court held that there was nothing to show that the decision in the proceedings under S. 105, which defendant 1 had obtained was obtained by fraud. This finding as far as can be seen, has gone unchallenged in the Court of appeal below. We must, therefore, take it that this decision in proceedings under S. 105 was not obtained by fraud as alleged by the plaintiffs. If that is so then clearly the plaintiffs' suits are barred by the principle of res judicata. The result, therefore, must be that the appeals must fail and are dismissed with costs.

**Pearson, J.**—I agree.

M.N./R.K. *Appeals dismissed.*

### A. I. R. 1929 Calcutta 418

RANKIN, C. J. AND MUKERJI, J.

*Nalini Kumar Chakrabartty* — Appellant.

v.

*Gadadhar Choudhury and others*—Respondents.

Appeal No. 1449 of 1925, Decided on 11th September 1928, against appellate decree of Dist. Judge, Faridpur, D/- 29th April 1925.

(a) Contract Act, S. 213—Defendant must be liable to account—Mere convenience cannot make party liable to account—Civil P. C., O. 20, R. 16.

The whole basis of a decree for accounts is a liability on the part of the defendant to

(1) [1919] 23 C.W.N. 893=53 I. C. 968.

(2) [1915] 23 C. L. J. 551=34 I. C. 702.



account. A finding that it would be convenient to have the accounts examined in the presence of the defendant will hardly suffice to make the defendant a party liable to account and on that consideration only he cannot be made a party to any investigation that is to be held by commissioner. [P 421 C 1, 2]

**(b) Contract Act, S. 213—All accounts in principal's possession—Machinery of Court to examine the accounts cannot be employed—Civil P. C., O. 20, R. 16.**

It is not open to any principal, who has got all the accounts of his agent in his possession to employ the machinery of the Court for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him: *A.I.R. 1925 Cal. 1069, Foll.* [P 421 C 2]

**(c) Civil P. C., O. 20, R. 16—Onus of proof—Principal must allege liability of agent—Commissioner cannot determine liability but only its extent—Civil P. C., O. 26, R. 11.**

In a suit for accounts it is for the principal at least to allege that the agent had received the money or any part of it, and then the Court will be called upon to decide the question upon such evidence as was brought before it whether a liability is established; and only in the event of the liability being established a preliminary decree can be passed directing an investigation by the commissioner to determine the extent of that liability. A decree passed in anticipation of determination of the liability and leaving to the commissioner the determination of the liability itself—a function which legitimately appertains to the Court—and not merely the extent of the liability, is one that the law never contemplates: *A. I. R. 1925 Cal. 1069, Rel. on.* [P 422 C 1]

*Jogesh Chandra Roy, Apurba Chandra Mukerji and Suresh Chandra Talukdar*—for Appellant.

*N. C. Sen Gupta, Ramani Mohan Chatterjee, Nirmal Chandra Chakrabartty, Bhupendra Kumar Basu, and Priya Nath Dutta*—for Respondents.

**Mukerji, J.** — The plaintiffs are zemindars of Kanchanpur, and are proprietors of certain properties mentioned in the plaint. With the consent of all the cosharer proprietors, one Rash Behari Roy was appointed common manager under the provisions of the Bengal Tenancy Act in respect of the said properties in the year 1912. Rash Behari Roy having resigned, one Rai Sahib Monomohan Guha, who was defendant 3, in the suit was appointed common manager by an order passed by the District Judge on 8th May 1916. Defendant 4 Nalini Kumar Chakrabartty was working in the estate from sometime before as a sub-manager. Prior to his resignation, Rai

Sahib Monomohan Guha took leave on 16th January 1920 when he was allowed to leave the station on making over charge of his office to defendant 4. In February 1920 notices were issued inviting applications for filling up the vacancy. Defendant 4 carried on the duties of a common manager. On 1st April 1920 the District Judge passed a further order empowering defendant 4 to perform the duties of common manager until further orders. In the meantime Rai Sahib Monomohan Guha tendered his resignation, and on the other hand the proprietors or some of them applied to have the estate released. On 31st May 1920 an order was passed by the District Judge accepting the resignation of Rai Sahib Monomohan Guha with effect from 17th April 1920, and declaring that the estate was thereby released to the proprietors. Defendant 4 was thus in charge of the office of common manager from 16th January 1920 till 31st May 1920. During the period, on 1st April 1920 the District Judge called upon defendant 4, as common manager, to submit accounts for the years 1325 and 1326. Defendant 4 submitted the accounts of 1325 while he was yet in office. After the estate was released he submitted some further accounts down to the date of the release.

Defendant 1 was a Naib appointed by defendant 3 while the latter was common manager, and defendant 2 was an assistant to defendant 1. In the accounts submitted by defendant 4 after the release, as aforesaid, two sums of money i. e., as Rs. 6,379-2-5½g and Rs. 3,021-10-2g were shown as being with defendant 1 the former as howlat taken by him and the latter as cash in hand. The accounts were audited and were passed by the District Judge in the usual way. On 30th May 1923 the present suit was instituted against defendants 1 and 2 as principal defendants and defendants 3 and 4 as pro-forma defendants. It is necessary to set out the scope and character of the suit as originally framed in order to appreciate the nature of the controversy with which we are concerned and which is to all intents and purposes a more recent development.

The plaint, as originally laid, was in its essence, a suit for accounts against, and for recovery of money not accounted for or taken as loan, by defendants 1 and 2. The claim was valued at Rs. 2,100



The gravamen of the charge was against defendants 1 and 2. It was, however, alleged that the appointment of defendants 3 and 4 as common manager was illegal and ultra vires, and that it was not known to the plaintiffs whether defendants 1 and 2 had rendered any accounts to defendants 3 and 4, that defendants 3 and 4 had not rendered accounts nor explained the books of the period during which they had acted as common manager to the plaintiffs after the estate had been released, and in the return of the accounts which defendant 4 had filed for the period down to the date of the release of the estate the items of Rs. 6,379 and odd and Rs. 3,021 and odd had been shown as already stated above. The reliefs asked for in the plaint are quoted below in extenso :

(a) For a decree that defendants 1 and 2 be ordered to file correct accounts in Court and to render those accounts.

(b) For the appointment of a commissioner to examine the accounts filed by the defendants and for a decree in favour of the plaintiffs after taking proper Court-fees for the amount for which they are held liable and for ordering the amount to be recovered out of the properties secured by defendant 1 by his indemnity bond also out of the sum kept in deposit by defendant 2 and also from the other properties of defendants 1 and 2.

(c) For a decree that defendants 1 and 2 be ordered to file all the papers during the period of their services as Naib if they did not file them to defendants 3 and 4 or that defendants 3 and 4 be ordered to file the papers in Court if defendants 1 and 2 gave them those papers.

(d) If defendants 3 and 4 state or if it be proved that defendants 1 and 2 have rendered nikash and made over the amounts due from them to defendants 3 and 4 from defendants 1 and 2 then for a decree in favour of plaintiffs and against defendants 3 and 4 for such amount as may be recoverable under the nikash.

And (e) For costs with future interest and for any other reliefs to plaintiffs such as they may be found entitled according to law and equity.

The plaint is anything but clear and it is not without considerable difficulty that any foundation of the liability of defendants 3 and 4 can be made out. Putting the construction most favourable to the plaintiffs, all that can be

gathered is that it is defendants 1 and 2 who are primarily liable; but that defendants 3 and 4 are to be held liable only if they have received any money or papers from defendants 1 and 2, and have withheld the same.

Written statements were then filed on behalf of the defendants. In the written statement which defendant 4 filed he stated that the returns which defendant 1 had submitted of the period of his work were incorrect and incomplete and explanations that he had given of his accounts were unsatisfactory, and that for this reason defendant 4 was obliged to show in the accounts that he submitted to the District Judge the said two items as being with defendant 1, one as howlat and the other as cash in his hands.

The plaintiffs thereafter applied for amendment of the plaint, and as a result of the amendment that was allowed, the following two prayers were added :

(f) If the principal defendants be not found liable for rendering accounts or if there be any bar to plaintiffs getting a decree for accounts then for a decree in favour of the plaintiffs and against the principal defendants for the amount that may be found due after deducting reasonable costs from Rs. 6079-6-5½ pies marked as loan and Rs. 3021-10-2 pies marked as deposit in the hands of defendant 1 after taking from plaintiffs the proper Court-fees for the same ;

and (g) for passing a decree in favour of plaintiffs and against the pro-forma defendants for the amount claimed by plaintiffs or for the amount that the plaintiffs be held entitled to get from the pro-forma defendants as damages. How the question of damages could at all come in the suit upon the facts alleged in the plaint, I confess I have not been able to appreciate. It would of course arise on the supposition that defendants 3 and 4 had failed to take the money from defendants 1 and 2 as they were bound to do, but no such case appears to have been made anywhere.

The suit was tried by the Subordinate Judge who dismissed it holding that the plaintiffs had no cause of action. The District Judge on appeal by the plaintiffs, decreed the suit against defendants 1 and 4. He dismissed the suit in so far as it was against defendants 2 and 3, holding that defendant 2 had no liability to render accounts to the plaintiffs and



that the suit as against defendant 3 was barred

Defendant 4 has then preferred this appeal. The contentions urged on his behalf are mainly three:—In the first place it is contended that as he was a common manager appointed by the District Judge the suit as against him was not maintainable without a notice under S. 80, Civil P. C. Next, it is urged that as the accounts submitted by him were passed by the District Judge, there was no further liability on his part to render any accounts. Lastly, it is said that there is no proper basis for the decree that has been passed as against him.

I propose to deal with the last contention first, because in the view that I take of it, it is not necessary to go into the other two contentions and the answer that has been given to them on behalf of the plaintiffs-respondents. In the appeal before the District Judge the plaintiffs confined their claim to accounts as against all the defendants to the two particular sums mentioned above. The District Judge has expressly said so in his judgment. All that the District Judge has said in his judgment as the basis for the decree against defendant 4 is this:

"I do not consider that the District Judge had any authority to investigate these accounts (meaning—the accounts submitted by defendant 4) and the fact remains that the position with regard to the two sums of money entered in the nikash as outstanding against Saroda Charan Sirkar (i. e. defendant 1) remains unexplained. Each page is signed by Nalini Kumar Chakrabarty, (i. e., defendant 4) and I consider it essential that he should be a party to any further investigation which may take place with regard to these items. My finding with regard to defendant 4 is therefore that he is liable to render proper accounts to the plaintiffs. . . . As regards defendants 1 and 4, I set aside the order and decree of the lower Court and order that a preliminary decree be passed against defendants 1 and 4 to the effect that an account be taken regarding the two sums of money, namely, Rs. 6,379-2as-5½g and Rs. 3,021-10as-2g mentioned in para. 4 of the plaint and a commissioner be appointed for making the necessary investigation into the matter. It is further ordered that for the purpose of the investigation the parties concerned produce before the commissioner all papers in their possession with regard to the two sums in question."

The whole basis of a decree for accounts is a liability on the part of the defendant to account. A finding that it would be convenient to have the accounts examined in the presence of the defendant will

hardly suffice to make the defendant a party liable to account and on that consideration only he cannot be made a party to any investigation that is to be held by commissioner. In the present case I am unable to find that there is any other reason why defendant 4 should be a party to any further proceedings that have been ordered to be held by the commissioner. The plaintiffs' suit has proceeded so far on the footing of defendant 4 having been a common manager and having submitted accounts showing the two specified sums as being in the hands of defendant 1. Learned advocate for the plaintiffs-respondents has conceded before us that his clients are not proceeding in the present suit against defendant 4 on the footing of his position as sub-manager. Nothing has been established, nor indeed has anything been alleged, which may indicate that there was any liability on the part of defendant 4 to account for these two sums. It has never been alleged, far less attempted to be proved, that the two sums or any portions thereof ever came into the hands of defendant 4. It has been argued that defendant 1 may, in the course of the investigation that is to be held by the commissioner, be able to show that he paid amounts or parts of them to defendant 4. Such, however, is not the defence of defendant 1. It has also been argued that the commissioner may find in the course of his investigation that that was the position. But, as pointed out in the case of *Bharat Chandra v. Kiran Chandra* (1), where the principles governing suits for accounts and the authorities bearing on them have been discussed.

"It is not open to any principal, who has got all the accounts of his agent in his possession, to employ the machinery of the Court for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him."

It has not been suggested anywhere in the present suit that defendant 4 was withholding any papers to render which there was a liability on his part, and in view of the defence of defendant 1 as contained in his written statement beyond which that defendant will not be permitted to travel, it is impossible to see how the plaintiffs can expect to fasten to defendant 4 with any liability so far as the two sums of money are concerned.

(1) A.I.R. 1925 Cal. 1069=52 Cal. 766.



It has been also urged that the onus is on defendant 4 to show that the said amounts have not been received by him. This argument in my opinion is entirely untenable. As observed in the case *Bharat v. Kiran* (1) it was for the plaintiffs at least to allege that defendant 4 had received the money or any part of it, and then the Court would have been called upon to decide the question upon such evidence as was brought before it whether a liability had been established; and only in the event of the liability having been established a preliminary decree could have been passed directing an investigation by the commissioner to determine the extent of that liability. A decree of the present character passed in anticipation of determination of the liability and leaving to the commissioner the determination of the liability itself—a function which legitimately appertains to the Court—and not merely the extent of the liability, is one that the law never contemplates. I am clearly of opinion that the decree in so far as it is against defendant 4 is entirely unsupportable and the suit in so far as it was against him was wholly misconceived.

The appeal will consequently be allowed and the decree of the District Judge as against defendant 4 being reversed the suit in so far as it was against him will be dismissed with costs in all the Courts. Defendant 1 as respondent in this appeal has invited us to make an order in his favour under O. 41, R. 4, Civil P. C., but I see no ground whatever to entertain this prayer. The decree which plaintiffs have obtained against defendant 1 will accordingly stand.

**Rankin, C. J.**—I agree.

M.N./R.K.      *Appeal allowed.*

### A. I. R. 1929 Calcutta 422

MUKERJI, AND MULLICK, JJ.

*Sailendra Nath Bose and others*—Appellants.

v.

*Charu Chandra Bannerji and others*—Respondents.

Appeal No. 564 of 1927, Decided on 6th March 1929, against appellate decree of Sub-Judge, Khulna, D/- 30th September 1926.

**Specific Relief Act, S. 42** — Although Court can grant a declaration that a person is entitled to any legal character or to any right to any property, Court will not grant declaration likely to be infructuous.

A held three separate jamas under three sets of landlords. He mortgaged them to B along with other lands by a registered deed for Rs. 5,000. The landlords ignoring the existence of separate jamas instituted two suits against A for rent, treating all lands as constituting one jama. Having obtained decrees in those suits, they put up lands to sale alleging that they were lands in arrears. Thereupon B instituted a suit for a declaration that the two aforesaid decrees were really money decrees and that the mahal in arrears could not be sold with power to annul incumbrances under Ch. 14, Ben. Ten. Act.

*Held* : that the declaration asked for was in substance merely a declaration as to the legal effect of two decrees passed by the Court. Such a declaration could not be granted under S. 42 which does not sanction every form of declaration but only a declaration that the plaintiff is entitled to any legal character or to any property. Moreover such a declaration could not be granted as it would be simply infructuous without a relief in the shape of a permanent injunction for, the Court in which the decrees are executed would in no way be bound by a declaration made by a different Court as to the character of the decree under execution before it. It is well established that a Court will never make a declaration likely to be infructuous : 39 Cal. 704, *Ref.*

[P 423 C 1, 2]

*Norendra Chandra Bose and Satyendra Nath Mitter*—for Appellants.

*Kshitish Chandra Chakravarty and Panchanan Ghoshal*—for Respondents.

**Judgment.**—The suit out of which this appeal has arisen has been decreed by both the Courts below.

The plaintiff's case was as follows :—There is a ganti jama comprised of about 900 bighas of land of which the holders were defendants 1 to 23, 24 to 29 and one Kedar Ghosh, and No. 30, owning respectively 5/6th, 1/12th and 1/12th shares therein. Defendant 31 for himself and also on behalf of his brother defendant 32 obtained a maurashi mokarari lease of a 5/6th share of the said jama from defendants 1 to 23 in 1308 B. S. at a rental of Rs. 303 and odd. Subsequently defendant 31 obtained settlements of a 1/12th share from defendants 24 to 29 and the said Kedar Ghosh at a rental of Rs. 30 and odd, and also a settlement of the remaining 1/12th share from defendant 30 at the same rental. Thereafter the interest of Kedar Ghosh passed to defendants 19 to 23 and defendant 32 sold his interest to defendant 31.



Thus there were three separate jamas held by defendant 31 under three sets of landlords. Defendant 31 mortgaged these three jamas to the plaintiff along with other lands by a registered deed executed in 1326 B. S. for Rs. 5,000. The landlords, however, ignoring the existence of the separate jamas instituted two suits for rent treating all the lands as constituting one jama and as bearing a total rental of Rs. 364 and odd. One of these suits was No. 829 of 1923 in which defendants 31 and 32 were both impleaded as defendants. The other suit was No. 2308 of 1923 which was by all the landlords with the exception of defendant 21, and against defendant 31 only. Having obtained decrees in the aforesaid suits the said defendants 1 to 30 put up the lands to sale alleging that they were the lands in arrears. The plaintiff then instituted the suit asking for the following reliefs : (Ka) that a declaration may be made to the effect that the two decrees aforesaid are really money decrees and the mahal in arrear cannot be sold with power to annul incumbrances under Ch. 14, Ben. Ten. Act ; (kha) that it may be declared that the lands attached form a maurasi mokarari intermediate ganti jama and not a non-transferable ryoti jama ; and (ga) that a temporary injunction may be granted restraining defendants 1 to 30 from selling the attached properties by auction till the final disposal of the suit. Prayer (kha) appears to have been subsequently withdrawn and prayer (ga) was rejected by the trial Court inasmuch as there was no prayer for permanent injunction to the same effect. The Courts below have decreed the suit in plaintiff's favour in terms of prayer (ka).

Apart from the objection that in instituting the suit the plaintiff was crying before he was hurt for it may just as well be that the mortgage would never be annulled even though the properties are sold with power to the purchaser to annul all encumbrances the suit for the declaratory relief which the plaintiff asked for in prayer ka in our opinion was not maintainable in law. The declaration asked for is in substance merely a declaration as to the legal effect of two decrees passed by the Courts. If this declaration was asked for as auxiliary or introductory to some other relief or reliefs also asked for, S. 42, Specific Relief Act, would have had nothing to do with the matter

and such a declaration would have rested on long established practice ; but as the relief for this declaration stands alone it is one which must be authorised by that section, which does not sanction every form of declaration but only a declaration that the plaintiff is entitled to any legal character or to any right to any property : see *Deokali Koer v. Kedar Nath* (1). The declaration asked for does not go anywhere near what S. 42, Specific Relief Act, contemplates. Indeed it is not even alleged that the plaintiff's status or right as mortgagee has ever been denied. Again if it be assumed that such a declaration is permissible, it will be simply infructuous, without a relief in the shape of a permanent injunction, for, the Court in which the decrees are executed will in no way be bound by a declaration made by a different Court as to the character of the decrees under execution before it. It is well established that a Court will never make a declaration that is likely to be infructuous.

It has been brought to our notice that respondents 29 to 29a have died during the pendency of this appeal and their heirs have not been brought on the record. The appeal in so far as those respondents are concerned must be taken to have abated and to have proceeded without them. This, however, does not affect the appeal as against the other respondents which in our opinion, must succeed, and it is accordingly allowed, the decrees of the Courts below being set aside and the suit dismissed with costs in all the Courts.

K.N./R.K.

*Appeal allowed.*

(1) [1912] 39 Cal. 704=15 I.C. 427=16 C.W. N. 838.

### A. I. R. 1929 Calcutta 423

B. B. GHOSE AND PANTON, JJ.

*Radha Ballab Das*—Appellant.

v.

*Krishna Priyashi Dasya* and another—Respondents.

Appeals Nos. 447 to 449 of 1926, Decided on 1st February 1929, against original orders of Sub-Judge, 1st Court, Dacca, D/- 29th June 1926.

**Hindu Law — Maintenance — Decree not creating charge—Death of judgment-debtor—Decree cannot be executed against subsequent holders of property — Civil P. C., S. 50.**

Where upon a true construction of the decree for maintenance no charge was created



on the estate but only a personal decree was passed against the judgment-debtor.

*Held* : that after the death of the judgment-debtor the decree-holder would not be entitled to any maintenance by execution of the decree against the holders of property after the judgment-debtor. [P 424 C 2 ; P 425 C 1]

*D. L. Khastgir and Susil Chandra Dutta*—for Appellant.

*Surendra Nath Guha and Ramendra Mohan Majumdar*—for Respondents.

**Judgment.**—These three appeals arise out of three execution petitions made of a decree passed by this Court in Appeal from original decree No. 374 of 1908 dated 5th July 1910. The question in controversy depends upon the true interpretation of the decree. Although the learned Subordinate Judge has stated many things in his judgment disallowing the claim of the decree-holder, it is not necessary to go into all these matters. The real question is whether the decree-holder who was the plaintiff in the suit is entitled to execute the decree against the property in the hands of the respondents in these appeals. The plaintiff lived in the family of Radhika Mohan Das, the original owner of the property, as a domesticated son-in-law. After the death of his father-in-law he had disputes with his mother-in-law and it seems that he was obliged to leave the house of his deceased father-in-law. Thereupon, he brought a suit for maintenance against his mother-in-law which was decreed by this Court. The relevant terms of the decree with which we are now concerned are these :

"That it is hereby declared that the plaintiff is entitled out of the estate left by Radhika Mohan Das to maintenance at the rate of Rs. 25 a month."

It was further decreed that "the plaintiff would be entitled to realize the sums due as maintenance in execution of the decree without a fresh suit."

The defendant in the above suit, the widow of Radhika Mohan, is now dead and the decree-holder seeks to realize the maintenance allowed to him by the decree from the estate of Radhika Mohan now inherited by his wife and his sister-in-law. The question is, whether the decree-holder appellant is entitled to realize the money out of the property in their hands. The Subordinate Judge has held that he is not. The real question in this case is whether the maintenance allowance given under the decree was made a charge on the estate. If it was

made a charge on the estate, no doubt the wife and the sister-in-law of the appellant would be bound to pay the maintenance out of the property and the decree-holder need not bring a fresh suit. But if it was not made a charge on the estate, then the decree was passed against the widow of Radhika Mohan only and so long as she was alive, she was bound to pay the sum of Rs. 25 a month out of the estate left by her husband.

It is contended by the learned advocate for the appellant that upon a true and proper construction of the decree it should be held that a charge was effected on the estate by the decree. There is no word expressive of 'charge' on the estate. We have endeavoured to find in the original plaint if any charge was claimed by the decree-holder. The plaint could not be got, but the report of the case in which the decree was made is to be found in *Gobind Rani v. Radha Ballabh* (1). From the statement of facts in the judgment at p. 207 of the report it appears that the decree-holder only asked for a declaration that he was entitled to a certain sum of money from the defendant who was his mother-in-law out of the estate left by Radhika Mohan and the claim was for the maintenance of himself, his wife and children. Now, no charge could have been declared by this Court for the maintenance of his wife and children on the estate left by Radhika Mohan, having regard to the fact that, after the death of the widow, the wife of the then plaintiff would be entitled to one-half of the estate by right of inheritance. In the decree provision is made for the maintenance of the wife and children of the decree-holder, in case the mother-in-law drove them out of the house and refused to maintain them. So it is evident that no charge could have been declared for the maintenance of the wife and children on the estate of Radhika Mohan for the very good reason, as I have stated, that the wife would be entitled to one-half share of the estate after the death of the widow and the male children would be the next reversioners. Therefore upon a true construction of the decree it seems to us that no charge was created on the estate and the decree was in the same terms as regards maintenance of all and so only a personal decree

(1) [1911] 15 C.W.N. 205=7 I.C. 118=12 C.L.J. 173.



against the widow. It, consequently, follows that after the death of the widow the decree-holder would not be entitled to any maintenance by execution of the decree referred to above. An argument was addressed to us that a part of the claim made in one of the applications was for arrears of maintenance due during the lifetime of Gobinda Rani, the widow of Radhika Mohan. Nothing was said with regard to that in the Court below and from the application it is difficult to understand that any such claim was made. These appeals must, accordingly, stand dismissed with costs. Hearing fee, one gold mohur in each case.

M.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 425

PAGE, J.

*Pyari Lal Mullick*—Plaintiff.

v.

*Jugal Kishore Mullick and others*—Defendants.Original Civil Suit No. 800 of 1927,  
Decided on 20th June 1928.

#### Will—Construction.

A Hindu governed by the Dayabhaga School executed a will in the following terms:—

"But in case none of such adopted sons survive my said wife I desire and direct my executors, after the death of my said wife to make over and divide the whole of my estate both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter her surviving, then in such case the surviving daughter or in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike."

The wife of the testator died without leaving any adopted son. There were two daughters to the testator A and B who got the estate in equal shares after the widow's death. A had four sons C, D, E and F and B adopted a son J after the testator's death. B survived her sister A. C, D had predeceased B.

*Held*: that as J was not adopted in testator's lifetime, there was intestacy at the time of B's death so far as her share was concerned and so her share would pass to the testator's heirs existing at the time of her death; i. e., J, E and F would take one-third each: 12 I.A. 137; 30 C.W.N. 357, *Rel. on*; 27 Cal. 996 (P.C.); 35 Cal. 896 (P.C.) and 38 Cal. 188 (P.C.), *Ref.* [P 428 C 1]

N. N. Sircar, B. K. Ghose and R. N. Sircar—for Plaintiff.

B. L. Mitter, S. C. Bose and S. N. Banerjee, (Junior), H. D. Bose, M. N. Mitter, B. C. Ghose, Sudhis Roy, S. M. Bose, J. C. Hazra—for Defendants.

**Judgment.**—This suit is brought to determine the construction of the will of Haridass Dutt, a Hindu governed by the Dayabhaga law, who died on 30th September 1875. Haridas Dutt duly executed his will on the day upon which he died, and the clause in the will that the Court is now invited to interpret has already on three occasions been construed by the Judicial Committee of the Privy Council. I am informed that the parties are determined once more to obtain the opinion of the Privy Council as to the meaning and effect of these provisions. It may be so, but to my mind this is a very plain case, and I have no doubt as to the interpretation that ought to be put upon the clause under consideration.

The following genealogical table shows how the parties are related to each other:

(For genealogical table see p. 426)

The Official Assignee is defendant 7, as representing the estates of Ram Prosad, Khetter Prosad, and Syam Prosad, who have been adjudicated insolvents. The provisions of the will which are material for the purposes of this case are as follows:

"But in case none of such adopted sons survive my said wife, or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors, after the death of my said wife, or the death of such a son after her, but under the age of 18 years without leaving a son or sons, to make over and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike."

At the trial an issue was raised as to whether the adoption of defendant 1 Jugal Kishore by Ranimani and Ramakanta Sen, which was alleged to have taken place on 2nd November 1900, was valid in law. All the parties to the suit, except defendant 5 admitted the validity



of the adoption, and after Jugal Kishore had adduced evidence to prove his adoption, defendant 5 also expressly admitted through his learned counsel, and I hold that, on 2nd November 1900, Jugal Kishore duly and validly was adopted by Ramakanta and Ranimani as their son.

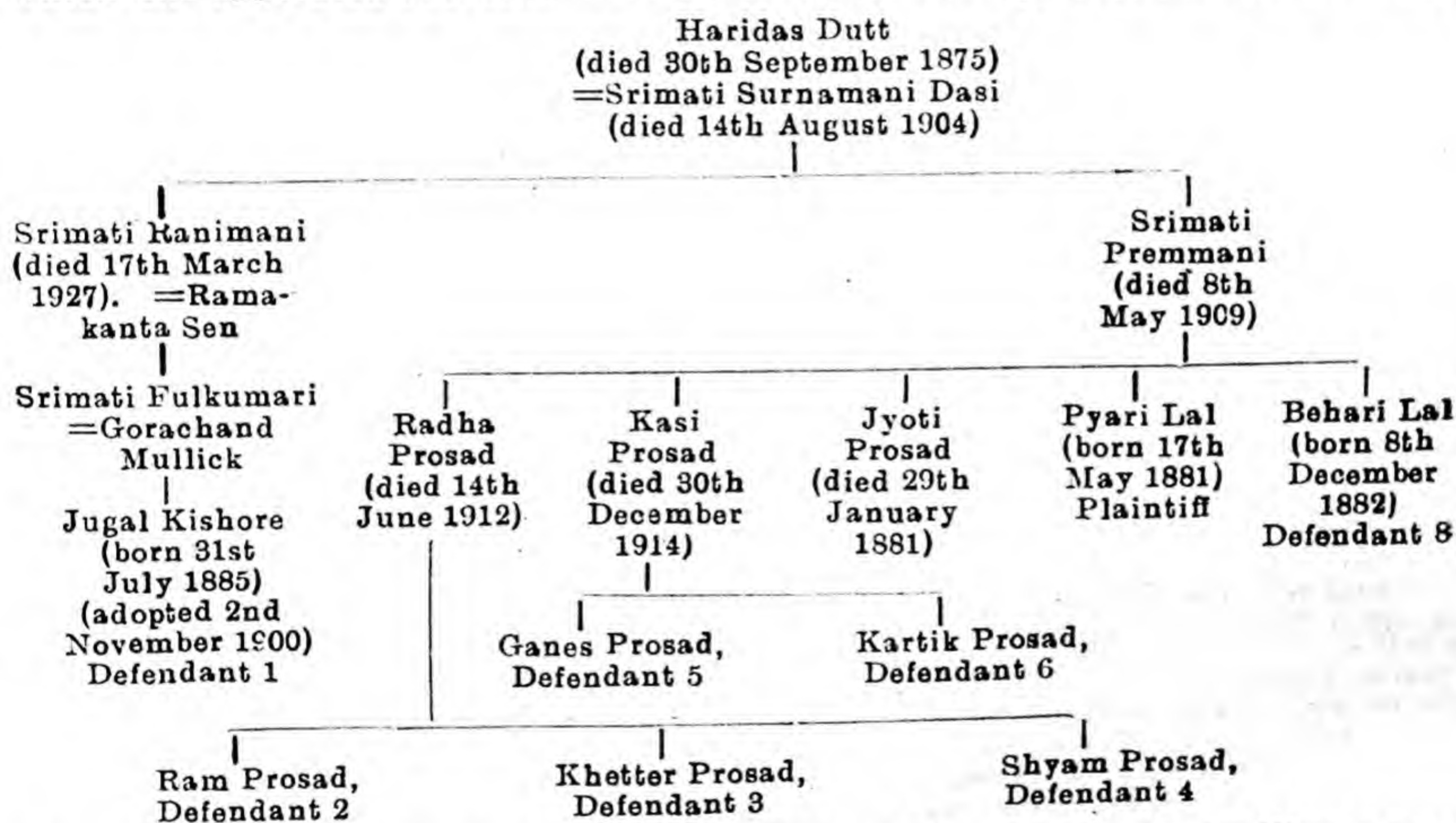
On 14th August 1904, Srimati Surnamani died, having previously duly adopted Jyoti Prasad, who died without issue on 29th January 1881, and after his death having purported to adopt one Amrita Lal Dutt, whose adoption was declared invalid by the Privy Council on 2nd May 1900. *Amrita Lal Dutt v. Surnomoye Dasi* (1). On 31st January 1903, Srimati Surnamani had executed a will of which she appointed the Administrator-

"as to the nature of the estate which, in the events which have happened, the testator's daughters took under the terms of the will."

The Judicial Committee held that "according to the true construction of the will the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and the learned Judges of the High Court ought to have held that, in the events that have happened, the daughters of the testator, Ranimani Dasi and Premmani Dasi, are entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves." *Radha Prosad Mullick v. Rani Moni Dassee* (2).

On 8th May 1909, Premmani died intestate, leaving her four sons surviving her.

On 4th March 1910, Radha Prosad made an application to the Court (Flet-



General of Bengal the executor and trustee. After the death of Srimati Surnamani, Ranimani on 19th December 1904, filed a suit (912 of 1904) against her sister Premmani, her sister's four surviving sons, Radha Prosad, Kasi Prosad, Pyari Lal and Behari Lal (the two younger sons having been born after the death of Haridas), and Jugal Kishore, the adopted son of Ranimani and Ramakanta Sen, for the construction of the will of Haridas, the administration and partition of his estate, and incidental relief. This suit eventually was heard on appeal by the Privy Council, and the only question raised in the appeal was

cher, J.), pursuant to the liberty reserved in that behalf in suit 912 of 1904, in which he

"claimed to be entitled with his brother Kasi Prosad to their mother's share in the estate."

His claims were resisted by his brothers Pyari Lal and Behari Lal, and by Ranimani Dasi and her adopted son Jugal Kishore.

The High Court, (Jenkins, C. J., and Woodroffe, J.), reversing the decision of Fletcher, J., held that inasmuch as they were not born at the date of the death of Haridas:

"Pyari Lal and Behari Lal cannot take, so that those now entitled to participate are Radha Prosad, Kasi Prosad and the represen-

(1) [1900] 27 Cal. 996=27 I.A. 128=4 C.W.N. 549=7 Sar. 623 (P.C.).

(2) [1908] 35 Cal. 896=35 I.A. 118=12 C.W.N. 729 (P.C.).



tatives of Jyoti Prosad and between them the property bequeathed (i. e. to Premmani) will be divided in three equal shares." *Radha Prosad Mullick v. Ranimoni Dasi* (3).

An appeal to the Privy Council was dismissed, their Lordships agreeing both with the decision of the High Court and the reasons upon which it was based. The Judicial Committee, however, added that:

"With regard to the contention of the appellants (i. e., Ranimani and her adopted son, Jugal Kishore) that the Court was wrong in holding that no grandchildren of the testator born, or adopted, after the death of the testator on 30th October 1875, could take under his will, their Lordships will not advise His Majesty to make any order except that the present advice is not to prejudice the position of appellant 2 if and when such question comes before a Court for decision," *Ranimoni Dasi v. Radha Prosad Mullick* (4).

On 17th March 1927, Ranimani died, and on 6th April 1927, the present suit was brought by Pyari Lal for the purpose of ascertaining who were the persons entitled under the will of Haridas to Ranimani's share of the estate.

Three rival constructions were urged upon the Court. It is common ground: (1) that, inasmuch as Jugal Kishore was neither born nor adopted during the lifetime of the testator, he is not entitled under the will to succeed to the estate as the son of Ranimani; *Bhubaneshwari Debi v. Niloomul Lahiri* (5); (2) that the sons of Radha Prosad and Kashi Prosad, neither of whom were alive at the death of Ranimani, were not entitled upon an intestacy to take any share of the estate as the heirs of Haridas. *Nepaldas Mukherji v. Probhas Chandra Mukherji* (6). The contention of Pyari Lal and Behari Lal is that as Ranimani died without leaving a son entitled to succeed to her share under the will, there was pro tanto an intestacy, and on Ranimani's death that Pyari Lal, Behari Lal and Jugal Kishore were entitled to succeed to Ranimani's moiety as the heirs of Haridas in equal shares. In my opinion, that is the correct view according to the true construction of the will. For Jugal Kishore it was contended that on the death of Srimati Surnamani, Ranimani and Premmani each took, not a life-

interest but an absolute interest in a moiety of Haridas' estate, and, therefore, on Ranimani's death that he was entitled on the whole of Ranimani's property, including her moiety of Haridas' estate, as her only son and heir. Were I to state the reasons that would induce me to hold that this construction is unsound it would avail nothing for the learned Advocate-General, who appeared for Jugal Kishore, conceded that this contention runs counter to the decision of the Judicial Committee in *Radha Prosad Mullick v. Rane Moni Dasse* (2), and the construction that has been placed upon this will by the Judicial Committee is binding on the Courts in India. In the alternative, Jugal Kishore claimed that he was entitled to a third share of Ranimani's moiety of the estate as co-heir with Pyari Lal and Behari Lal of the testator Haridas.

The sons of Radha Prosad and Kashi Prosad, defendants 2 to 6, contended that upon a true construction of Haridas' will whereby the testator directed that in the events that happened the executors were: "to make over and divide the whole of my estate, both real and personal unto and between my daughters in equal shares, to whom and their respective sons, I give, devise and bequath the same,"

the testator intended, provided, and effected that the whole estate should devolve upon those of his two daughters' sons who might be living at the time of his death, subject to a life interest in a moiety of the estate in favour of each of the daughters; and that upon the death of Hari Das, Radha Prosad, Kashi Prosad and Jyoti Prosad obtained an immediate vested interest in the estate to a moiety of which they or their representatives became entitled to possession upon the death of each of the daughters.

In my opinion this construction cannot be sustained. It appears to me that such a construction is not in consonance with the intention of the testator to be collected from the terms of the will for example, it gives no effect to the word "respective" as used in connexion with the gift to the daughters and their sons, and it is inconsistent with the provision: "in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike."

Further, the contention appears to be incompatible with the previous decisions

(3) [1910] 88 Cal. 188=13 C.L.J. 183=8 I.C. 1061=15 C.W.N. 113 (P.C.).

(4) A. I. R. 1914 P. C. 149=41 Cal. 1007=41 I. A. 176 (P.C.).

(5) [1885] 12 Cal. 18=12 I.A. 137=4 Sar. 651 (P.C.).

(6) A. I. R. 1926 Cal. 460.



of the Privy Council upon the construction of the will; for if the construction which these defendants urge the Court to put upon this clause is the correct one, and all the sons of the two daughters living at the death of Haridas possessed a vested interest in the whole estate, subject to the life-interest of the daughters, each of such sons would have been entitled to succeed on Premmani's death to a share of her moiety, and it would have been incumbent upon the Privy Council in *Ranimoni's* case (4) to decide whether or not Jugal Kishore was to be regarded as one of such sons, and in that capacity entitled to a share of Premmani's moiety of the estate. But that the Privy Council did not do; and to my mind it is clear that the reason why the Judicial Committee did not determine whether Jugal Kishore as the adopted son of Ranimani was entitled to take under Haridas' will in the appeal in which the succession to Premmani's moiety of the estate alone was in dispute was because their Lordships were of opinion that under the terms of the will Jugal Kishore was not entitled and could not succeed in any event, to a share in Premmani's moiety of the estate. Their Lordships, therefore, were not disposed to decide what rights (if any) Jugal Kishore possessed under Hari Das' will until the death of Ranimani, in which event alone (if at all) he would be entitled to a share of the estate of Hari Das. For these reasons, I am clearly of opinion that the will cannot bear the construction for which defendants 2-6 contend, and I hold and declare that with respect to Ranimani's moiety of Haridas estate there is an intestacy. and that Pyari Lal, Behari Lal, and Jugal Kishore as the heirs of Haridas are entitled to possession thereof in equal shares, including the property moveable and immovable to which Ranimani was entitled on partition and under the consent decree and orders in suit No. 611 of 1907 as prayed. Pyari Lal, Behari Lal and Jugal Kishore are also jointly entitled to Ranimani's pala of worship. There will be a decree for partition of Ranimani's share. The costs of all parties as between attorney and client including the cost of the inventory that has been made and all reserved costs will be paid out of the estate by the receiver.

S.N./R.K.

*Suit decreed.***A. I. R. 1929 Calcutta 428**

SUHRAWARDY AND GRAHAM, JJ.

*Mahendra Nath Das and others*—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1210 of 1928, Decided on 20th February 1929, against order of the Deputy Magistrate, Contai, D/- 22nd September 1928.

(a) Criminal P.C., S. 476-B—Under S. 476-B appellate Court, as it is governed by O. 41, Civil P. C., can remand case.

In dealing with an appeal under S. 476-B, the appellate Court is governed not by S. 424, Criminal P. C., but by O. 41, Civil P. C., and so it has power to remand a case if it acts in accordance with the rules of O. 41: *A. I. R. 1927 Cal. 284 (Per Duval, J.), Foll. [P 429 C 2]*

(b) Criminal Trial—Complaint by Munsiff under S. 476, Criminal P. C.—On appeal District Judge remanding case directing complaint to be properly worded—No objection taken to remand order by way of civil revision nor objection to complaint raised at commitment—Order became final and complaint could not be challenged now in High Court.

A complaint was made by a Munsif under S. 476, Criminal P. C., and on appeal from his order the District Judge holding that the order was otherwise good remanded the case directing the complaint to be properly worded. No objection was taken to this order by way of revision nor was any objection raised before the Committing Magistrate on the ground that the complaint was not properly made.

*Held*: that as the order of the District Judge was not objected to by way of civil revision it became final and as the objection to the complaint was not raised at the time of commitment, it could not be raised now in the High Court: *A. I. R. 1927 Cal. 284; 22 Cal. 176, Dist.; A. I. R. 1929 Cal. 195, Expl. [P 429 C 2]*

(c) Criminal P. C., S. 537—Scope.

Where there is no contravention of any express provisions of the Criminal Procedure Code S. 537 cures if there is any error.

[P 430 C 1]

*B. N. Sasmal and Sukumar Hazra*—for Petitioners.

*Dines Chandra Ray*—for the Crown.

**Suhrawardy, J.**—This rule has been obtained for setting aside an order passed by the Magistrate committing the accused to the Sessions to take their trial for various offences mentioned in the order. The Magistrate took cognizance of the case of a complaint by the Munsiff of Contai under S. 476, Criminal P. C. It appears that on the application of the opposite party the Munsiff made an order under S. 476, Criminal P. C. Against that order



an appeal was taken by the petitioner to the District Judge under S. 476-B and the learned Judge by his order dated 28th May 1928, held that the order made by the Munsif under S. 476 was otherwise good except that it was vague inasmuch as it contained a few sections of the Penal Code and "any other section of that Code found applicable." He accordingly sent the case back to the Munsif and directed him to specify all the sections of the Penal Code in his complaint under S. 476, Criminal P. C. The Munsif accordingly made a complaint specifying the sections of the Penal Code. No objection was taken to the legality of the proceedings before the trial Magistrate but it is complained before us that the order of the District Judge remanding the case to the Munsif and asking him to make a complaint under S. 476 is bad in law and without jurisdiction and, therefore, the entire proceedings leading to the commitment of the accused must be set aside.

In the circumstances of this case I am of opinion that this contention ought not to prevail. The order of the District Judge passed under S. 476-B has now become final. No objection was taken against that order under S. 115, Civil P. C., or any other law. This objection moreover was not taken before the trial Court on the ground that the complaint upon which the case was started was not validly made before it. The learned counsel appearing for the petitioners has referred us to two decisions of this Court in which it has been held that under S. 476-B the appellate Court has no jurisdiction to remand a case but should make the complaint itself. These cases were decided upon different sets of facts. In these cases the original Court refused to make the complaint. There was an appeal and the appellate Court was of opinion that the complaint should have been made. It was held that it was the duty of the appellate Court to make the complaint and not to direct the trial Court to do it, in view of the wording of S. 476-B. Moreover those cases were decided by Civil Benches of this Court under the Civil Procedure Code. In *Hamid Ali v. Madhu Sudan Das* (1), the learned Judges held that the appellate Court should have itself made the complaint; but the learned Judges composing the

Benches differed in their opinion as to the procedure to be followed by the appellate Court in dealing with an appeal under S. 476-B, Criminal P. C. Chotzner, J., being of opinion that it should be governed by S. 424, Criminal P. C., and Duval, J., holding that it should be governed by O. 41, Civil P. C. If the latter view is correct—and it seems to me, it is—there is no reason why the District Judge should have no power to remand the case to the lower Court if he acts in accordance with the rules contained in O. 41, Civil P. C. In the present case the District Judge did not overrule the Munsif and take upon himself the responsibility of making a complaint against the accused. He affirmed the order of the Munsif and simply pointed out to him that the order passed by him should be properly worded. In my opinion the order passed by the District Judge in this case did not come within the scope of the decisions referred to. Even if it did, I think in the circumstances of this case that order cannot be challenged at this stage.

Under S. 215, Criminal P. C., we are entitled to quash the commitment only on point of law. But it has been argued on behalf of the petitioners that the District Judge has no jurisdiction to remand the case under S. 476-B to the Munsif and therefore the entire subsequent proceedings are illegal and should be set aside. As I have pointed out the order of the District Judge was not illegal and did not contravene the provisions of S. 476-B, and if it did, it was not an order without jurisdiction. In *Manir Ahmed v. Jogesh Chandra* (2), it has been held that the appellate Court has no jurisdiction to remand a case to the Court of first instance to file a complaint. The words "no jurisdiction" were used there in a wide sense to include an act against the law. There was no absence of jurisdiction but at the most an illegal exercise of jurisdiction. The petitioners have lost their remedy (if they had any) now, not having taken any action against the order of the District Judge passed under S. 476-B. They should not now be allowed to challenge that order which has become final between the parties, in collateral proceedings.

In this connexion it may be necessary to consider the case of *Raj Chunder v.*

(1) A. I. R. 1927 Cal. 234.

(2) A. I. R. 1929 Cal. 195=55 Cal. 1277.



*Gour Chander* (3). Under the old Criminal Procedure Code sanction granted by a Court under S. 195 enured for a period of 6 months only within which complaint was to have been filed in a Criminal Court. In that case the complaint was filed after 6 months and it resulted in the commitment of the accused. The learned Judges quashed the commitment on the ground that the complaint was made against the express provisions of the law. With reference to the application of S. 537 it was observed that it did not save the proceedings because they contravened the express provisions of S. 195, Criminal P. C. In the present case I do not see why S. 537 should not cure the defect, if any. There is no contravention of any express provisions of the Code. If there is any error, it is one provided against by S. 537, Criminal P. C. In this view I would discharge this rule.

**Graham, J.**—I agree that the rule should be discharged. There can I think be no question as to the jurisdiction of the Magistrate to make the commitment—and that it was a valid commitment according to law. The contentions which have been raised as to the legality of the proceedings in the civil Courts are matters which ought to have been raised long ago by an appeal or by way of application in revision. It appears moreover that these objections were not even taken in the committing Court and that they are now raised at the eleventh hour after commitment.

S.N./R.K.

*Rule discharged.*

(3) [1894] 22 Cal. 176.

**A. I. R. 1929 Calcutta 430**

JACK AND MITTER, JJ.,

*Nazir Ahmmad and others*—Plaintiffs—Appellants.

v.

*Tamijaddi Ahamed and others*—Defendants—Respondents.

Appeal No. 603 of 1927, Decided on 22nd March 1929, against appellate decree of Sub-Judge, 1st Court, Barisal, D/- 9th September 1926.

Civil P. C., O. 22, R. 3 — Where the plaintiff in a mortgage suit dies after the preliminary and before the final decree, R. 3 does not apply.

On the death of one of two mortgagees, after they had obtained a preliminary decree

for sale of the mortgaged property, the suit does not abate if the heirs of the deceased mortgagee are not brought on record within the time limited by law: *A. I. R. 1928 Mad. 914 (F.B.)*; *A. I. R. 1927 All. 272, Foll.*; *A. I. R. 1924 P.C. 198, Rel. on. A. I. R. 1921 Cal. 591*; *A. I. R. 1926 Cal. 308, Held no longer good law.* [P 430 C 2]

*Ramendra Chandra Roy*—for Appellants.

*Gunada Charan Roy, Satindra Nath Roy Chaudhury* for *Probodh Chandra Kar*—for Respondents.

**Mitter, J.** — The question of law which arises for consideration in this appeal is as to whether on the death of one of two mortgagees after they had obtained a preliminary decree for sale of the mortgage property the suit abates if the heirs of the deceased mortgagee are not brought on record of the suit within the time limited by law. The appellants who are the surviving mortgagee and the heirs of the deceased mortgagee contend that the suit does not abate whereas the mortgagors, now respondents, contend that the suit has abated. The lower appellate Court has accepted the contention of the respondents and has dismissed the plaintiffs' suit.

The appellants contend that the view taken by the lower appellate Court is erroneous as O. 22, R. 3, Civil P. C. does not apply where a plaintiff in a mortgage suit dies after the preliminary and before the final decree; on the other hand the respondents contend that O. 22, R. 3 applies as under the Code of 1908 proceedings after the preliminary decree are not proceedings in execution and that the suit continues until the final decree is passed.

It seems to us that the contention of the appellants must prevail for as has been recently pointed out by their Lordships of the Judicial Committee of the Privy Council that after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. In the case of *Lachmi Narayan v. Balmukund* (1) Lord Phillimore in delivering the judgment of their Lordships said:

"The parties have on the making of the decree acquired rights or incurred liability which are fixed unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced."

(1) *A. I. R. 1924 P. C. 198=4 Pat. 61=51 I. A. 321, (P.C.).*



Although these observations were made in a case where after a preliminary decree for partition the plaintiff did not appear when the case came on for final decree and the case was struck off the same principle should apply to a case where as in the present, a man did not appear because he could not appear as he was then dead. The question which arises for decision in the present case arose directly for decision before a Full Bench of the Madras High Court in the case of *Perumal Pillai v. Perumall Chetti* (2). In that case Sir Murray Coutts-Trotter, C. J., held that O. 22, Rr. 3 and 4 did not apply to circumstances such as exist in the present case. We are in entire agreement with that decision and with the reasons on which the Full Bench rested their judgments.

The Allahabad High Court, we may observe, has also taken the same view as the Madras Full Bench: see *Ali Bahadur Beg v. Rafiulla* (3). It remains to notice two cases of our own Court which take the view that the provisions of O. 22, R. 4, apply both before and after, passing of the preliminary decree: see *Bhut Nath Jana v. Tara Chand* (4), and *Mounjendra Dutta v. Jnan Ranjan* (5). We do not think that these decisions can be held to be good law in view of the observations made by the Judicial Committee in *Luchmi Narain's* case to which reference has already been made. For the reasons given above we hold that the decision of the lower appellate Court dismissing plaintiff's suit must be set aside and the judgment of the Court of first instance restored with costs throughout. The Court of first instance granted a decree in favour of the plaintiffs except the heirs of Alam Oazi for 14-2/3 annas share of the mortgage money and as the plaintiffs did not appeal to the lower appellate Court and were content with the decree of the first Court they cannot have a decree for their whole claim.

**Jack, J.**—I agree.

K.N./R.K.

*Appeal allowed.*

## A. I. R. 1929 Calcutta 431

MUKERJI AND MALLIK, JJ.

*Isab*—Appellant.

v.

*Guru Charan Shaha*—Respondent.

Appeal No. 336 of 1927, Decided on 28th January 1929, against the appellate decree of Sub-Judge, 2nd Court, Sylhet, D/- 17th May 1926.

(a) **Landlord and Tenant**—Tenant's not paying rent under kabuliati does not show that kabuliati was not acted upon.

The mere fact that the tenant has not paid any rent after the execution of the kabuliati does not go to show that the kabuliati has not been acted upon nor would it absolve him from his liability to pay rent under it. [P 431 C 2]

(b) **Bengal Tenancy Act S. 60**—Court is not bound to consider objection under S. 60 if not raised in written statement.

Where objection under S. 60 as to the registration of the landlord's name is not raised in the written statement, the Court is not bound to consider it although a question or two might have been put to the landlord or his witnesses as to whether his name was registered.

[P 432 C 1]

*Birendra Kumar De*—for Appellant.

*Biswa Nath Ray*—for Respondent.

**Judgment.**—This appeal arises out of a suit for arrears of rent. The suit has been decreed by both the Courts below. The defendant has then preferred this second appeal. In support of the appeal two contentions have been urged. The first one is to the effect that the question as to whether the relationship of landlord and tenant exists between the plaintiff and the defendant has not been properly determined by the learned Subordinate Judge on appeal. It is said that although he has found that there was a kabuliati under which the rent in the present suit was claimed it has not been found whether the kabuliati was actually acted upon or not. Now this argument as far as I can understand it, really means that it was the defendant's case that the kabuliati although executed was not intended to be acted upon; because the mere fact that the defendant has not paid any rent after the execution of the kabuliati does not go to show that the kabuliati has not been acted upon or indeed would absolve the defendant from his liability to pay rent under the kabuliati. So far as this matter is concerned all that the defendant has been able to prove is that the rent has not been realised under the kabuliati since its execution. On the other hand the learned Subordinate Judge refers to certain facts as indicating plainly that the kabuliati

(2) A. I. R. 1928 Mad. 914=51 Mad. 701 (F.B.).

(3) A. I. R. 1927 All. 272=49 All. 310.

(4) A. I. R. 1921 Cal. 551.

(5) A. I. R. 1926 Cal. 308.



was intended to be acted upon; for instance he has said that there was a mortgage decree of the value of Rs. 1,500 in plaintiff's favour as against the predecessors of the defendant, that this decree was afterwards settled at the amount of Rs. 1,000 and that the mortgagors, not being able to pay up the decretal amount sold the land to the plaintiff, and after the sale they executed certain kabuliats out of which is the one in the present suit. The learned Subordinate Judge has found that the kobala and the kabuliat were all registered on one and the same date, that is to say, the 10th March 1917, and that after the execution of these documents—the execution proceedings were dismissed for non-prosecution and the mortgage decree was never executed by the plaintiff again. All these go to show that the transactions which were represented by the execution of the kabuliat as well as the execution of the kobala were bona fide transactions really intended to be acted upon. Under these circumstances we are unable to uphold the first contention that has been urged on behalf of the appellant.

It has been urged in the next place that S. 60, Rent Act, operates as a bar to the passing of the decree in the present suit. Now this objection does not appear to have been taken in the written statement and although a question or two may have been put to the plaintiff or his witnesses as to whether his name was registered or not, we are not prepared to hold that the Court below were bound to take cognizance of this objection, the more so because if it had been taken in the written statement it would have been open to the plaintiff to get his name registered before the decree was passed even if he had not done so before the suit. This contention also should be overruled. The appeal in our opinion fails and must be dismissed with costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1929 Calcutta 432**

B. B. GHOSE, J.

*Kali Kumar Poddar Banikya*—Petitioner.

v.

*Pranballav Banikya*—Opposite Party.  
Civil Revn. No. 1317 of 1928, Decided on 20th February 1929, against order of Munsif, 2nd Court, Dacca.

**Limitation Act, S. 20, Proviso—No stipulation for interest in hat-chitta—Payment made if not in handwriting of person making it, time cannot run from such payment.**

Where in the hatchitta no stipulation for interest is made, any payment made must be deemed to be towards part payment of the principal and if such payment does not appear in the handwriting of the person making it, time cannot run from the date of the payment.

[P 432 C 2]

*Nirmal Chandra Chakrabarty* for *Iswar Chandra Chakrabarty*—for Petitioner.

*Biswanath Ray*—for Opposite Party.

**Judgment.**—In this case, it seems that the rule was granted on the ground that the defendant himself in his deposition stated that he paid Rs. 25 in liquidation of his debt in 1332 B. S. If the period of limitation counts from that date, the suit would be within time. The learned Judge, however, stated in his judgment that the plaintiff's son's marriage took place in Jaistha 1331 when the sum of Rs. 25 was paid. There is nothing in the recorded evidence of the defendant to that effect. But it must have been stated by the defendant that the money was paid at the time of his son's marriage. In taking down the deposition, the learned Judge probably made a mistake in writing 1332 in place of 1331. But that does not appear to be material now. The principal point argued on behalf of the opposite party is that no stipulation for interest was made in the hatchitta. Therefore, the sum of Rs. 25 must have been paid in the part-payment of the principal. That being so, limitation cannot run from the date of payment even assuming that the payment was made in Jaistha 1332, under the provisions of S. 20, Lim. Act, as this fact of part-payment of the principal does not appear in the handwriting of the defendant who is said to have made it. There is, however, another point and it is this: It appears from the hatchitta that the date was altered from 1331 to 1332. This is a material alteration in the document and under no circumstances can the plaintiff claim any money on the basis of this document. The rule must, accordingly, be discharged with costs—two gold mohurs.

S.N./R.K.

*Rule discharged.*



## A. I. R. 1929 Calcutta 433

PAGE, J.

*Nawab of Murshidabad*—Plaintiff.

v.

*Bilas Roy Choudhuri*—Defendant.Original Civil Suit No. 1384 of 1927,  
Decided on 2nd July 1928.

(a) *Murshidabad Act (15 of 1891), Condition (1)*—Nawab of Murshidabad letting lands, to which Act 15 applied, for 21 years in consideration of 5 lacs of rupees to be paid in advance—Lease, as it contravened condition (1) was null and void and Nawab, being person under disability, was not estopped from denying validity of lease—Evidence Act, S. 115.

The Nawab of Murshidabad executed a lease to the defendants of certain lands and premises to which the Murshidabad Act 15 applied for a term of 21 years in consideration of the sum of rupees five lacs as advance of the total rent payable for during the said term of 21 years. The Nawab then sued to recover possession of the demised property and mesne profits, upon the ground that the lease was null and void by reason of the provisions of condition (1) of the Murshidabad Act.

*Held*: that the lease contravened condition (1) of the Act and was therefore null and void. [P 434 C 1]

*Held further*: that as the Nawab was a person under disability, he was not estopped from denying the validity of the lease: *Jeffries v. Alexander*, 8 H. L. C. 594; *Batiman (Lady) v. Faber*, (1898) 1 Ch. 144; *Leslie v. Sheill*, (1914) 3 K. B. 607; 36 Cal. 920; A. I. R. 1928 Cal. 537 and other cases discussed.

[P 436 C 1]

(b) *Interpretation of Statutes*—Where legislature has prohibited making of contract, if intention is clear that such contract is void, that contract is utterly null and void—But if language does not plainly indicate such intention and such contract is for benefit of some person, contract would be voidable at such person's option provided he is sui juris.

Where the legislature has prohibited the making of a contract, and has expressly provided or, having regard to the language in which the Act is couched, has manifested its intention, that the contract should be for all purposes void such contract is utterly null and void. [P 435 C 1]

Where the language that has been employed does not plainly and conclusively indicate the intention of the legislature that the contract should be void for all purposes, if the inhibition is merely for the benefit of a particular person, or persons the Court will lean to the construction that the contract is voidable at the election of the person or persons for whose benefit the inhibitory Act was enacted, provided that such persons are sui juris, and capable of managing their affairs in a reasonable and proper manner. [P 435 C 1]

Where, however, the person or persons for whose benefit the inhibition was created are not deemed to be capable of conducting their affairs in a sensible and normal way, and the Act was passed for their protection, or where the contract is prohibited not merely for the benefit or protection of individuals, but because the intention of the legislature was to forbid the making of the contract in the interest of the community generally, and as a matter of public policy, in either case, a contract that contravenes the provisions of the Act is null and void for all purposes: *Magdalen Hospital v. Knotts*, (1879) 4 A.C. 324; *Roe v. Archbishop of York*, (1805) 6 East 86 and other cases relied on. [P 435 C 2]

*B. L. Mitter and B. K. Chaudhury*—for Plaintiff.

*B. C. Mitter, N. N. Sircar and S. C. Bose*—for Defendant.

**Judgment.**—This case involves the construction of the Murshidabad Act (15 of 1891). On 25th July 1920, the Nawab Bahadur of Murshidabad and his eldest son, defendant 3, executed an indenture, whereby the Nawab let to defendants 1 and 2 certain lands and premises to which the Murshidabad Act applied for a term of 21 years in consideration of:

"the sum of rupees five lacs as advance of the total rent payable for and during the said term of 21 years, the annual rent being one equal 21 part of the said total rent, and the said lessees do hereby covenant with the said lessor in manner following (that is to say) that the said lessees shall pay to the said lessor at or immediately before the execution of these presents the said sum of rupees five lacs as advance of the total rent payable during the said term of 21 years."

In the same indenture defendant 3 covenanted with the lessees that in the event of his succeeding to the estate within the period of the term he would allow the lessees to continue in occupation of the demised property "without paying any rent therefor pursuant to the terms of this lease." An acknowledgment of the payment of the five lacs was endorsed upon the indenture by the Nawab. Thereafter defendants 1 and 2 went into, and at all material times have remained in, possession of the demised property. The present suit has been brought by the Nawab to recover possession of the demised property and mesne profits, upon the ground that the indenture of lease of 25th July 1920 is null and void by reason of the provisions of condition (1) of the Murshidabad Act. Condition (1) is to the following effect:

"The said Nawab Bahadur shall not nor shall any of his successors in the said titles sell mortgage devise or alienate the said pro-



perties respectively or any of them otherwise than by lease or demise for a term not exceeding 21 years, and under a rent without bonus or selami."

Three issues fall for determination :

(1) Is the lease in suit a "lease or demise for a term not exceeding 21 years and under a rent without bonus or selami" within condition (1) of the Murshidabad Act?

(2) If nay, is the lease void, or voidable only at the instance of the Secretary of State for India?

(3) If the lease is void, is the Nawab estopped from denying its validity?

In my opinion the terms of the lease in suit plainly contravene condition (1) of the Act. The intention of the legislature in passing the Murshidabad Act was to provide "for the maintenance of the position and dignity" of the Nawab Bahadur of Murshidabad for the time being, and the Act was enacted to prevent any Nawab in the future from squandering his possessions, and thereby becoming unable to meet the current expenditure necessary for his maintenance as "the premier noble of Bengal." The legislature, in order to give effect to its intention, provided that the rent reserved under any lease granted in future by the Nawab for the time being should be payable periodically, and, in my opinion, condition (1) was inserted for the very purpose of meeting such an evasion of the Act as that which has been attempted in the present case.

Under S. 105, T. P. Act (4 of 1882), a lease of immovable property is defined as :

"a transfer of a right to enjoy such property made for a certain time expressed, or implied, or in perpetuity in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferrer by the transferee, who accepts the transfer on such terms."

In the section :

"the price is called the premium, and the money, share, service, or other thing to be so rendered is called the rent."

I have no doubt that the five lacs which the lessees agreed to pay to the lessor under the indenture of 25th July 1920 was a premium or selami and not rent, notwithstanding that it is stated therein to be an "advance of the total rent payable." In my opinion, the terms of this lease clearly offended against the provisions of condition (1), for :

"The principle, as I understand it, is that whenever it can be shown that the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing

prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly, and endeavoured to conceal that they have done so" per Blackburn, J., in *Jeffries v. Alexander* (1).

Suppose a Nawab, having sold all the free property of which he was possessed and, having dissipated the purchase moneys, proceeded to grant leases for 21 years of the residue of his property that was subject to the Murshidabad Act, for a lump sum or sums to be paid as a present advance of future rent. Now, if the Nawab, having squandered the sums advanced, happened to die shortly after the leases had been executed, the very object which the legislature had in view when enacting the Murshidabad Act would be frustrated ; for the succeeding Nawab, so long as the leases subsisted, would be penniless, and the premier Noble of Bengal would have no means of livelihood, and would be unable to maintain himself in a manner befitting his position and dignity. The legislature, conceiving that it would be against public policy in a country like India that the premier Noble of the Province of Bengal should be reduced to a condition so parlous and undignified, by enacting the Murshidabad Act, endeavoured to prevent the creation of such a situation, and to protect the Nawabs against the risks of improvidence. The object and effect of the indenture in suit being to evade the provisions of the Act in my opinion, the lease of 25th July 1920 offends against both the spirit of the Act and the provisions of condition (1) and is prohibited.

As to the second issue that has been raised I am clearly of opinion that the provisions under which the Secretary of State for India in certain events becomes entitled to retake possession of the properties to which the Act applies do not, and do not purport to, invest the Secretary of State with the power to affirm or avoid any transaction that contravenes the terms of the Act, but were enacted to prevent a recurrence of such inhibited acts, or a course of wasteful extravagance by a Nawab which, if persisted in, would lead to the dissipation of the possessions of the House of Murshidabad. In my opinion, whether the lease in suit was merely voidable, or whether for all

(1) [1860] 8 H. L. C. 594=7 Jur. (n.s.) 221=31 L. J. Ch. 9=2 L. T. 768.



purposes it was null and void depends upon the intention of the legislature to be collected from the terms of the Act. The principles of construction which the Court must apply in order to ascertain whether this lease is void or voidable are, I think, as follows :

Where the legislature has prohibited the making of a contract, and has expressly provided or, having regard to the language in which the Act is couched, has manifested its intention, that the contract should be for all purposes void such contract is utterly null and void.

"Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that anything done is substantially that which is prohibited I think it is perfectly open to the Court to say that that is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute, it is the thing, or one of the things, actually prohibited ; per Lord Cranworth, L. C., in *Philpott v. St. George's Hospital* (2); *Jagad-bandhu Saha v. Radha Krishna Pal* (3), *Abdul Aziz v. Kanthu Mallik* (4); *Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti* (5)."

Where the language that has been employed does not plainly and conclusively indicate the intention of the legislature that the contract should be void for all purposes, it would seem that if the inhibition is merely for the benefit of a particular person or persons the Court will lean to the construction that the contract is voidable at the election of the person or persons for whose benefit the inhibitory Act was enacted, provided that such persons are sui juris, and capable of managing their affairs in a reasonable and proper manner.

Where, however, the person or persons for whose benefit the inhibition was created are not deemed to be capable of conducting their affairs in a sensible and normal way, and the Act was passed for their protection, or where the contract is prohibited not merely for the benefit or protection of individuals, but because the intention of the legislature was to forbid the making of the contract in the interest of the community generally, and as a matter of public policy, in either

case a contract that contravenes the provisions of the Act is null and void for all purposes.

"It is said that "void" is sometimes construed "voidable," and where the provision is introduced for the benefit of the parties only, such a construction may be right, but where it is introduced for public purposes, and to protect those who are incapable of protecting themselves, it should receive its full force and effect ; per Bayley, J. *The King v. Hipswell* (6)."

Take the case of eleemosynary and ecclesiastical corporations governed by 13 Eliz., c. 10 by way of illustration. If a bishop made a lease or grant which was not warranted by this statute, it was held at one time to be neither

"void nor voidable by the bishop himself who made it, but remains good against him during such time as he remains bishop. But as to the successors of the bishop, such leases or grants are void or voidable, as the case happens to be, as will appear hereafter. And the reason such leases or grants are good against the bishop himself who made them, is because they were so at the common law, and the statutes were made only for the benefit of the successors, that they should not be bound by those acts of their predecessors which might turn to their prejudice and disadvantage ; but not to give the bishop himself power to avoid or derogate from his own acts, which would be against all rules both of law and equity, and, therefore, was not within the meaning of the said statutes : Bacon's Abridgement, Vol. 4, p. 761, Coke Litt. 45-a, *Roe v. Archbishop of York* (7), per Lord Ellenborough."

In *Magdalen Hospital v. Knotts* (8), however, the House of Lords took a different view as to the validity of such leases, and it was held that leases which contravened 13 Eliz. c. 10 were ab initio null and void as being against public policy.

"As to the character of the evil which it is sought by the statute to prevent it is clear that in the case of an eleemosynary corporation, the whole property of which is devoted to charity, and where the office bearers and other members of the corporation have no personal interest whatever, the object must be to make the property of the corporation absolutely inalienable, in any way other than by the particular form of lease which is authorized . . . . . The intention is to condemn the lease as a wrong and a void thing, even though every member of the corporation should have committed himself to it, and should be anxious to maintain it : per Lord Cairns, L. C., *ibid* at p. 332 ; see also *Bishop of Bangor v. Parry* (9).

(2) [1857] 6 H. L. C. 338=3 Jur. (n. s.) 1269.

(3) [1909] 36 Cal. 920=4 I. C. 414.

(4) [1910] 38 Cal. 512=10 I. C. 437=13 C. L. J. 693.

(5) [1895] 19 Mad. 200.

(6) [1828] 8 B. & C. 466.

(7) [1805] 6 East. 86.

(8) [1879] 4 A. C. 341=27 W. R. 602=48 L. J. Ch. 579=40 L. T. 266

(9) [1891] 2 Q. B. 277

*Srinagar High Court*  
*Jammu & Kashmir*



Now, it is obvious that the legislature thought that the Nawabs of Murshidabad were not likely to manage their affairs in a reasonable and provident way, and by enacting the Murshidabad Act was minded to protect successive Nawabs against themselves, and as a matter of public policy and concern to make provision to prevent any Nawab in future from squandering the possessions of the distinguished house of which he was the head. For these reasons it appears to me plain that the lease in suit by means of which the parties intentionally sought to evade the provisions of the Act is null and void for all purposes.

But it is urged that even so the Nawab is not entitled to maintain the suit, for, "If a man has made a solemn deed covenanting that another shall enjoy the premises and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken": per Lord Mansfield in *Goodtitle v. Bailey* (10), and on behalf of the first and second defendants it is contended that the Nawab is estopped from denying the validity of the lease for he cannot derogate from his own grant. No doubt, apart from the Act that contention would be sound. But by reason of the Act the Nawab has become pro tanto a person under disability, and both because the Act was passed on grounds of public policy and not merely for the personal benefit and protection of the Nawabs and because the Nawab is incapacitated from executing such an indenture, in my opinion, this contention cannot be sustained.

The claim of the Nawab to recover possession of the demised premises in no sense depends upon the void indenture of lease, for the lease, being null and void for all purposes, may be disregarded by the Nawab and every one else; and it is not pretended that the first and second defendants were induced to take the lease by any fraud or misrepresentation on the part of the Nawab; indeed to my mind it is clear that the lessees were content to risk the chance of the lease being held to be void in order to obtain the very substantial benefits which they thought would accrue to them through being put into possession of the demised premises. Further, in my opinion, the Nawab is in consimili casu with other persons under disability such as minors and married women in England who are

(10) [1777] 2 Couper. 597.

restrained from anticipation: *Bateman (Lady) v. Faber* (11), *R. Leslie v. Sheill* (12), *Thurstan v. Nottingham Permanent Benefit Building Society* (13), *Jagadbandhu Saha v. Radha Krishna Pal* (3), *Mohori Bibee v. Dharamodas Ghose* (14), *Mahomed Syedol v. Yeoh* (15), *Fuli Bibi v. Khokai Mondal* (16), *Sadiq Ali Khan v. Jai Kishori* (17). In *R. Leslie v. Sheill* (12), Lord Sumner, as he then was, stated the reason for affording immunity to infants from contractual obligations to be that:

"It was thought necessary to safeguard the weakness in infants at large, even though here and there a juvenile knave slipped through, supra at p. 612."

and the ground upon which I hold that the Nawab is not estopped from denying the validity of the lease in suit was explained by Channell, J., in *Corporation of Canterbury v. Cooper* (18), where his Lordship observed that:

"The reason why there can be no such estoppel is, if you were to hold that the corporation were estopped by the fact of their having granted this lease you would be giving the go by to the statute which says they shall not grant the lease when the person to whom it is granted acts upon it. If you say that is estoppel, that estoppel is got rid of by the statute. There can be no estoppel merely by the granting of the lease or acting under it. There can be no estoppel preventing the corporation stating that the lease is not in fact valid."

The result is that there will be a decree for possession as prayed. The Nawab through his learned counsel has stated that he is prepared, upon obtaining possession of the demised property, to refund to the first and second defendants such a sum as the Court deems it equitable that he should repay to the first and second defendants in respect of this transaction.

In my opinion it is in consonance with equity and good sense that the Nawab should repay to the first and second defendants the money that he actually has received as consideration for

- (11) [1898] 1 Ch. 144=67 L. J. Ch. 130=14 T. L. R. 81=46 W. R. 215=77 L. T. 576.
- (12) [1914] 3 K. B. 607=111 L. T. 106=58 S. J. 453=30 T. L. R. 460=83 L. J. K. B. 1145.
- (13) [1902] 1 Ch. 1=18 T. L. R. 135=86 L. T. 35=50 W. R. 179=71 L. J. Ch. 83.
- (14) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=8 Sar. 374 (P. C.).
- (15) A. I. R. 1916 P. C. 242=43 I. A. 256 (P. C.).
- (16) A. I. R. 1928 Cal. 537=55 Cal. 712.
- (17) A. I. R. 1928 P. C. 152.
- (18) [1908] 99 L. T. 612.



the lease, and the Nawab consents to a personal decree being passed against him for five lacs of rupees. But I do not think that the Nawab should be awarded any sum for mesne profits, or that the lessees should receive interest on the moneys advanced. The parties to the lease deliberately attempted to evade the provisions of the Act, and while the Nawab was content to forgo the profits accruing from the demised property in consideration of a present advance of five lacs, the lessees on their part were prepared to pay five lacs and to give up the interest that would accrue therefrom in return for the opportunity of collecting the rents of the demised property. It may be that the lessees have incurred expenditure on the property but they must be content with the fruits that they have been able to garner from the demised property while it was in their possession. In the circumstances I make no order as to costs.

S.N./R.K.

*Suit decreed.*

### A. I. R. 1929 Calcutta 437

MITTER AND MALLIK, JJ.

*Lakshmi Charan Majumdar*—Appellant.

v.

*Nabadwip Chandra Pandit*—Respondent.

Appeal No. 2251 of 1926, Decided on 20th April 1928, against appellate decree of the Sub-Judge, Noakhali, D/- 23rd June 1926.

(a) Evidence Act, S. 92. (4)—Evidence of acts and conduct of parties showing that essential terms of registered instrument are varied is not admissible.

The evidence of the acts and conduct of parties for the purpose of showing that the main or essential terms of a registered instrument have been varied is not admissible, for an agreement is none the less oral, although it is to be inferred from the conduct of the parties: 6 C. W. N. 242, Dist.; 38 Cal. 892 (P.C.); 39 Cal. 284; 41 Cal. 493 (P.C.); 20 C. W. N. 347 and other cases discussed; 20 C.W.N. 847, not Appr. [P 438 C 1, P 439 C 1, 2]

(b) Civil P. C., S. 100—Scope.

The question of waiver, acquiescence or estoppel is a question which can be examined by the High Court in second appeal: 21 All. 496 (P.C.), Ref. [P 439 C 2]

(c) Landlord and Tenant—Mere non-realization of rent according to kabuliyat does not raise inference that there has been

waiver to receive rent fixed under kabuliyat.

In order to establish an abandonment of right which is created by a document which is explicit and unambiguous in its terms, something more than a mere non-enforcement of right over a number of years is necessary. So the mere fact of non-realization of rent for a number of years according to the terms of the kabuliyat, does not necessarily give rise to the legal inference that there has been a waiver of the right to receive rent fixed under the kabuliyat. [P 440 C 1]

*Pannalal Chatterjee*—for Appellant.

*Ramesh Chandra Sen* with *P. C. Sen*—for Respondent.

**Mitter, J.**—This is plaintiff's appeal against the decision of the Additional Subordinate Judge of Noakhali, dated 23rd June 1926, modifying a decision of the Munsif, Lakhimpur, dated 25th August 1923. The suit in which this appeal arises was commenced by the plaintiff for recovery of Rs. 57-8-9 as arrears of rent together with cesses and interest for the years 1325 to 1328 B. S. in respect of a holding which the principal defendants hold under the plaintiff. The case of the plaintiff is that the defendant was holding the disputed land at a jama of Rs. 7-15 a year. He states that the rights between the parties were created by a kabuliyat which was executed on 28th Chaitra 1293, and that the plaintiff did not realize through mistake the jama at the rate Rs. 7-15 a year but realized it at the rate of Rs. 5 a year. The defence of the defendant in substance was that the defendant was holding this jama at a fixed rental of Rs. 5 a year. This defence did not prevail with the Court of first instance and the Munsif decreed in part for the rents of the period in suit at the rate of Rs. 7-15 a year and only varied the amount of interest. An appeal was taken to the Court of the Subordinate Judge of Noakhali and the learned Subordinate Judge held that the plaintiff was entitled to get rent at the rate of Rs. 5 a year. Before the Subordinate Judge it was contended by the defendants, now respondents, that although in the kabuliyat of 28th Chaitra 1293, there was a stipulation that after the Bengali year 1296 rent was to be realized at the rate of Rs. 7-15 a year, rent had been realized at the lower rate of Rs. 5 ever since that date and, consequently, there has been a waiver of the stipulation in the kabuliyat that the fixed rental was to be at the rate of Rs. 7-15 a year. This contention



of the defendant prevailed with the lower appellate Court and the lower appellate Court came to the finding that the explanation given by the plaintiff that the rent at the rate of Rs. 7-15 was not realized through mistake was not an explanation which he would accept and from the fact of non-realization of rent at the rate of Rs. 7-15 the Court of appeal came to the conclusion that there has been a waiver of this stipulation to pay a higher rate and that consequently the plaintiff could not claim rent at that rate. The Court of appeal also held that on the construction of the kabuliyat the defendant was holding a permanent mokarrari lease under the plaintiff. In other words, the effect of the lower appellate Court's decision is that all the terms of the kabuliyat must be given effect to except the term which referred to the progressive increase of rent up to the limit of Rs. 7-15 which was to be the fixed rental for all times to come after the year 1296. In support of this decision, the lower appellate Court relied on three decisions of this Court in the cases of *Beni Madhub Gorani v. Lalmoti Dassi* (1) and *Kailash Chandra Saha v. Darbaria Sheikh* (2) and *Manindra Chandra Nandi v. Sm. Durga Sundari Dassya* (3).

A second appeal has been taken to this Court against this decision of the Subordinate Judge and it has been argued by the learned vakil for the appellant that the decision of the lower appellate Court in so far as it decreed the plaintiff's suit at the reduced rate of Rs. 5 is wrong; firstly, because it was not permissible to the lower appellate Court to rely on the evidence of the acts and conduct of parties for the purpose of varying the terms of the original kabuliyat, and secondly, because in any event the mere fact of non-realization of rent for a large number of years does not necessarily give rise to the legal inference that there has been a waiver of the right to receive a fixed rent of Rs. 7-15 a year after 1296. We think that both these contentions are well-founded and must prevail. The case of *Beni Madhub Gorani v. Lalmoti Dassi* (1) relied on by the lower appellate Court is obviously distinguishable. It will appear from the report of that

case that there the question was as to whether the kabuliyat was ever acted upon. The kabuliyat stipulated a rate of rent to be Rs. 27 at the inception and after a certain number of years to be Rs. 30 and the rent which was paid was neither Rs. 27 nor Rs. 30 and it was held that as the rent mentioned in the kabuliyat had not been paid for a large number of years, an inference might be drawn that the kabuliyat was not intended to be acted upon. In the present case, it is common ground that the kabuliyat was acted upon, so far as the realization of rent at the rate of Rs. 5 up to the year 1296 was concerned. It is not the case of the defendant that there was any contemporaneous agreement at the inception of the tenancy which was created by the kabuliyat that although it was stipulated that after 1296 the rent to be paid was Rs. 7-15, yet it was agreed that that stipulation was not to be given effect to. The case of the defendant is that by reason of non-realization of rent from 1296, there has been a variation of that particular stipulation in the kabuliyat and as the kabuliyat was created by a registered instrument, such a variation or reduction of rent could only be made by another registered instrument. In this connexion, reference may be made to the provisions of S. 92, Cl. (4), Evidence Act, and to two decisions, one of a Full Bench of this Court in the case of *Lalit Mohan Ghosh v. Gopali Chuck Coal Co., Ltd.* (4) and to the case of *Durga Prasad Singh v. Rajendra Narayan Bagchi* (5), which went before the Judicial Committee of the Privy Council. The case of *Kailash Chandra Saha v. Darbaria Sheikh* (2) does undoubtedly lend some support to the contention raised by the learned vakil for the respondent and support the view taken by the Court of appeal below. To this case Nalini Ranjan Chatterjea, J. was a party and he considered the case of *Kailash Chandra Saha v. Darbaria Sheikh* (2) in a later case, namely, in the case of *Nagendra Lal Khan v. Bhola Nath Bhuya* (6). At p. 338 (of 27 C. W. N.) Chatterjea, J. in delivering the judgment of the Court observed as follows:

(4) [1911] 39 Cal. 284=14 C. L. J. 411=12 I. C. 728=16 C. W. N. 55 (F.B.).

(5) [1913] 41 Cal. 493=21 I. C. 750=40 I. A. 223 (P.C.).

(6) A. I. R. 1923 Cal. 417.

(1) [1898] 6 C. W. N. 242.

(2) [1915] 20 C. W. N. 347=32 I. C. 251.

(3) [1915] 20 C. W. N. 680=32 I. C. 185.



"It may be open to doubt, however, whether there can be a waiver of the essential terms of a registered lease except by a registered instrument having regard to the decision of the Full Bench in the case of *Lalit Mohan Ghosh v. Gopali Chuck Coal Co. Ltd.*, (4) where, however, the variation was sought to be effected by documents. But in the cases mentioned above, the Court held, upon the evidence of the subsequent acts and conducts of the parties, that certain terms of the contract were never intended to be acted upon. On the other hand, in the case of *Lakhatulla v. Bishwambhar Roy* (7), Jenkins, C. J., and Doss, J. held that an agreement is none the less oral because it is to be inferred from the conduct of the parties."

The learned Judge then referred to the fact that this question was raised before the Judicial Committee in the case of *Maung Kyin v. Ma Shwe La* (8) but was not decided and he held again at p. 339 that although the decisions of some of the other High Courts took a view contrary to that taken by the Full Bench of this Court in *Preonath v. Madhusudhan* (9), the question so far as this Court is concerned was not free from difficulty nor settled, although the weight of authority was in favour of the admissibility of evidence of the acts and conduct of parties and this Court has held in some cases upon the subsequent acts and conduct of parties that certain terms of a contract were never intended to be acted upon, i. e. from the very beginning. At the time of this decision in *Narendra Lal Khan v. Bhola Nath Bhuya* (6) the Judicial Committee, as the learned Judge points out, expressed no opinion on the question with regard to the admissibility of the evidence of the kind with which we have to deal. It appears, however, that the Judicial Committee did decide the question in 1917, as will appear from the report in the case of *Maung Kyin v. Ma Shwe La* (10). Apparently, the attention of the learned Judges who dealt with the case of *Narendra Lal Khan v. Bhola Nath Bhuya* (6) was not drawn to the case. Be that as it may, it seems to me from a reading of this decision that evidence of the kind with which we have to deal in the present case, namely, the acts and conduct of parties for the purpose of showing that the main or essen-

tial terms of an instrument has been varied is not admissible. Reference might be made in this connexion to the following observations of Lord Shaw in that case:

"Founding upon this section, the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the appellants maintain that notwithstanding the terms of the section, they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, etc., etc."

Their Lordships pointed out at p. 332 that the true rule seems to have been laid down in the case of *Dattoo Totaram v. Ramchandra Totaram* (11) decided by Sir Lawrence Jenkins. We think that, having regard to the observations which I have quoted, it is extremely doubtful if the decision in *Kailash Chandra Saha v. Darbaria Sheikh* (2) to which reference has already been made can be regarded as good law. Mr. Sen who has appeared for the respondent had to concede that in substance the effect of this relinquishment is really to vary the right of the plaintiff which was a right to receive the higher rate of rent. There has really been a subtraction from that right and that variation can only be made by a registered instrument. We think the decision of the lower appellate Court is wrong.

With regard to ground 2 taken by the learned vakil for the appellant, as I have already stated, that also is a substantial ground and should be given effect to. It lay on the defendant to establish that there has been a permanent relinquishment of the right by the plaintiff to receive the higher rent. The fact of non-realization of rent for a large number of years might be consistent with a temporary abatement although the temporary abatement might extend over a large number of years. The question of waiver or relinquishment is a question of legal inference from facts found. The question of waiver, acquiescence or estoppel is a question which can be examined by this Court in second appeal. In this connexion, reference may be made in the case of *Beni Ram v. Kundan Lal* (12).

(7) [1910] 12 C. L. J. 646=6 I. C. 577.

(8) [1911] 38 Cal. 892=12 I. C. 39=38 I. A. 146 (P.C.).

(9) [1898] 25 Cal. 603=2 C. W. N. 562.

(10) A. I. R. 1917 P. C. 207=45 Cal. 320=44 I. A. 236 (P.C.).

(11) [1905] 30 Bom. 119=7 Bom. L. R. 669.

(12) [1899] 21 All. 496=26 I. A. 58=7 Sar. 523 (P.C.).



We think that in order to establish an abandonment of right which is created by a document which is explicit and unambiguous in its terms, something more than a mere non-enforcement of right over a number of years is necessary. It is conceded that there is nothing more in this case than the fact of non-realization of rent for a number of years. That alone would not justify us in holding that there has been a permanent abandonment of the right to receive a higher rent. The result is that the decree of the lower appellate Court must be set aside and that of the Munsif restored but in the circumstances of the present case, there will be no order as to costs.

**Mallik, J.**, concurred.

S.N./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 440

PEARSON AND MALLIK, JJ.

*Purna Chandra Dutt*—Petitioner.

v.

*Corporation of Calcutta* — Opposite Party.

Criminal Revn. No. 357 of 1929, Decided on 18th April 1929, against order passed by the Municipal Magistrate and the Chief Executive Officer of Corporation of Calcutta.

Calcutta Municipal Act (1923), S. 299—Interpretation and scope of—Inapplicability of corresponding provisions of the Act of 1899.

According to S. 299 of the Act a person may be served with notice for any alleged unlawful encroachment. The words "fixture attached to a building" should be construed as they stand and the structure complained of whether constructed either before or after the "building" is within the section. The corresponding provision of the Act of 1899 which required the building to be erected before the fixture does not govern the interpretation of the present Act: 23 C. W. N. 752, *Ref.*

[P 441 C 1]

*Satindra Nath Mukherji*,—for Petitioner.

*D. N. Bagchi and Gopendra Krishna Banerjee*—for Opposite Party.

**Pearson, J.**—This is a rule which was issued upon the Municipal Magistrate and the Chief Executive Officer of the Corporation of Calcutta calling upon them to show cause why a certain order of demolition should not be set aside on the ground that the elements necessary to constitute an offence punishable under

S. 364, sub-S. (1), Calcutta Municipal Act of 1923, had not been shown to exist. The petitioner is the owner of certain premises No. 49, Doctor Lane, Calcutta. He was served with a notice under S. 299, Calcutta Municipal Act, alleging that he had unlawfully encroached over the extreme end of a blind passage by the side of his house by erecting an one-storied entrance with masonry walls and pucca roof and a ledge and calling upon him to remove the same. On his failure to do so, he was prosecuted before the Municipal Magistrate and order was passed directing that the structure complained of should be demolished. The finding of the Magistrate is that the passage belongs to the Corporation and that there has been an encroachment; and there is no denial of this fact. The defence gave evidence to the effect that this covered entrance had been in existence for some 40 years.

The language of S. 299, sub-S. (1) of the present Calcutta Municipal Act of 1923 is as follows:

"When any verandah, platform or other similar structure or any fixture attached to a building so as to form part of the building whether erected before or after the commencement of this Act causes a projection, encroachment or obstruction over or on any public street or any land vested in the Corporation, they may by written notice require the owner or the occupier of the building to remove or alter such structure or fixture."

Section 364 of the same Act provides for the demolition of such structure by an order of the Magistrate. The applicant before us relies upon the case of *Mohammad Raziuddin v. Corporation of Calcutta* (1). It was a case decided under the corresponding provisions of the former Calcutta Municipal Act of 1899. The corresponding section of that Act, namely, S. 341, sub-S. (1) provided as follows:

"When any fixture has, whether before or after the commencement of this Act, been attached to a building so as to form part of the building and the same causes a projection, encroachment or obstruction over or on any public street or any land vested in the Corporation, the General Committee may by written notice require the owner or occupier of the building to remove or alter such fixture."

The decision of this Court in the case cited was based on the wording of the old section, it is said in the course of the judgment:

(1) [1919] 23 C.W.N. 752=58 I.C. 352=29 C. L.J. 605.



"As we understand them, the word 'fixture' which has been attached to a building cannot be applied to a part of the building which was constructed at the same time as the main building itself. The word 'when a fixture has been attached' seem to us to mean that the building must first be in existence and the attachment of the fixture subsequent to the erection of the building."

Consequently, in that view, as it had not been proved that the platform in question was constructed after the building was erected, the Court in that case held that the Municipal Magistrate had no power to order for the demolition complained of. On the analogy of that case, it is argued before us that there is no evidence in the present case to show when the structure complained of was erected whether before or after the building to which it was attached, and, therefore, it is said that the same order should be made holding that the Magistrate had no power to pass such an order. The answer to that argument I think is this : As a matter of interpretation, the section as it now stands must be construed according to the ordinary plain meaning of the language used. The decision in the case cited obviously depended upon the construction which the Court sought ought to be put upon the language employed in the section of the old Act, particularly the words "when any fixture has been attached." If we looked at the present corresponding S. 299, those words are not to be found. The words now are :

"when any verandah, platform, or other similar structure or any fixture attached to a building so as to form part of the building and so on."

These words taken in their ordinary meaning are sufficient to cover the present case and it matters not that evidence is not forthcoming to show whether the structure complained of came into existence after the building to which it was attached or before. It is a question of plain meaning of the words of the section as they stand, and, in my opinion, no analogy can be evoked from the language of the previous Act nor can it be said that the present Act must be constructed to mean the same thing as to the previous Act though a different language has been employed. For these reasons, in my opinion, the rule should be discharged.

**Mallik, J.**—I agree.

P.R./R.K.

*Rule discharged.*

## A. I. R. 1929 Calcutta 441

JACK AND MITTER, JJ.

*Ayenati Shikdar*—Appellant.

v.

*Mohammad Esmail and others*—Respondents.

Appeal No. 459 of 1927, Decided on 28th February 1929, against appellate decree of Addl. Sub-Judge, Bakerganj, D/- 27th September 1926.

(a) Evidence Act, S. 71—(*Per Jack, J.*) One attesting witness produced but turning hostile—Other evidence becomes admissible and it is not necessary to produce another, though alive, if likely to be hostile. (*Mitter, J. Contra*).

*Jack, J.*—Where out of two attesting witnesses one is produced but turns hostile, other evidence becomes admissible under S. 71, and the plaintiff is not bound to produce the other, though alive, whom there are grounds for him to believe to be hostile : A. I. R. 1929 Cal. 188, *Rel. on.* [P 442 C 2]

*Mitter, J.*—(*Obiter*) :—It is not intended by enacting S. 71 to differ from the rule of English law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witness is satisfactorily explained in the case where one of the two attesting witnesses had been called and has denied execution : A. I. R. 1929 Cal. 188, *not Appr.*; *Coles v. Coles*, (1866) 1 P. 70; *Pilkington v. Gray*, (1899) A. C. 401; A. I. R. 1927 Cal. 102, *Ref.* [P 444 C 1]

(b) Evidence Act, S. 70—Suit on mortgage bond—Defendant admitting execution before Sub-Registrar but averring that he would not have done so had he known it to be mortgage is no admission of execution under S. 70.

(*Per Jack, J., Contra Mitter, J.*)—The defendant in a suit on a mortgage bond admitted the execution of the bond before the Sub-Registrar but averred that he did so understanding it to be a power of attorney in the name of the plaintiff to manage his properties, and that he would not have signed it, had he known it to be a mortgage bond ;

*Held* : *Per Jack, J.*—this was not an admission under S. 70 of the execution of the bond. (*Mitter, J. Contra.*) 29 Cal. 355, *Ref.* [P 442 C 2]

*Suresh Chandra Taluqdar and Surojit Chunder Lahiri*—for Appellant.

*Jatindra Nath Sanyal and Mahendra Coomar Ghose*—for Respondent

**Jack, J.**—The plaintiff in this suit seeks to recover from the defendants the amount due on a mortgage bond. In her written statement defendant 1 says that she executed the bond and admitted execution before the Sub-Registrar understanding it to be a power of attorney in the name of the plaintiff to manage her properties. She contends that the bond



was not legally attested and executed. Defendant 2 was a benamidar of the plaintiff. Defendant 3 files a written statement supporting that of defendant 1 and adding that he had purchased the properties to the knowledge of the plaintiff. The Court of first instance decreed the suit except for a deduction of a portion of the claim for interest. The appellate Court dismissed the appeal and, allowing the cross appeal on account of interest, decreed the suit in full. In this appeal it is urged that inasmuch as one of the attesting witnesses to the bond when examined, proved hostile, the remaining attesting witness who is alive should have been examined to prove the bond, and, not having examined him, the Court was not entitled to invoke the provisions of S. 71, Evidence Act, and prove the bond by other evidence.

Both the Courts below have held that it is only necessary to call one attesting witness before having recourse to other evidence under S. 71 of the Act. This view appears to be in accordance with the wording of Ss. 68 and 71 of the Act and was adopted in a recent decision of this Court: *Hason Ali v. Gurudas Kapali* (1). It is true that good authorities have held that it is not clear whether, under S. 71, Evidence Act, other evidence can be given to prove the document where the attesting witness called denies, or does not recollect, the execution of the document and there is another attesting witness alive, subject to the process of the Court, and capable of giving evidence: cf. Field, Edn. 6, p. 236. However, had the intention of the legislature been otherwise, one would have expected to find S. 71 of the Act differently worded as it cannot be supposed that when S. 68 and 71 of the Act were drafted cases in which one or more of the attesting witnesses would prove hostile were not anticipated. I therefore think that, in the present case, the Court was justified in taking other evidence as to the execution of the document. Of course S. 71 does not relieve the plaintiff from the necessity of producing the best evidence available. Here the remaining attesting witness was summoned, but did not appear, and the plaintiff has given reasons which the Court below has accepted for not taking further steps

to produce him. Had he been the only witness it would undoubtedly have been the duty of the plaintiff to exhaust all the processes of the Court in order to produce him, but since an attesting witness had been produced, other evidence became admissible under S. 71, Evidence Act and the plaintiff was not bound to produce another attesting witness whom there were grounds for him to believe hostile.

There was some doubt whether it was necessary to decide as to the applicability of S. 71, Evidence Act, in this case inasmuch as there is some ground for holding that the written statements of defendant 1 and defendant 3 amount to an admission of execution of the bond by defendant 1, so as to make S. 70, Evidence Act, applicable and avoid the necessity of proving execution as against them. However, the admission was certainly not clear and unqualified. Defendant 1 says that she executed the bond and admitted execution before the Sub-Registrar, but did so understanding it to be a power of attorney in the name of the plaintiff to manage her properties, and that she would not have signed it had she been aware of its contents. This is, I think, not such an admission as to make S. 70, Evidence Act, applicable, though it is an important piece of evidence in proof of execution, there being no specific allegation of fraud. In the circumstances the Courts below were justified in finding that execution of the mortgage bond by defendant 1 was proved. There seems to be also no ground for withholding interest at the bond rate. The appeal is accordingly dismissed with costs.

**Mitter, J.**—This is an appeal by defendant 2 and arises out of a suit brought by the plaintiff, now respondent, to enforce a mortgage bond which is said to have been executed by defendant 1 in the month of Magh 1324 B. S. Defendant 2 is a subsequent purchaser of the equity of redemption. Defendants 1 and 3 put in separate written statements. Their contention is that defendant 1 executed the bond knowing it to be a power of attorney and that she would not have executed the bond if she knew it to be a mortgage bond. They further raised the defence that the mortgage bond was not attested in accordance with law.

The Munsif held that the mortgage bond had been duly executed and attested

(1) A. I. R. 1929 Cal. 188.



and that consideration passed for the same, and that defendant 1 executed the mortgage bond knowing it to be a mortgage. Of the four attesting witnesses to the mortgage bond two were dead at the date of suit and the third attesting witness turned hostile and did not prove the execution or attestation and the fourth attesting witness Abdul Aziz was summoned by the plaintiff but as he told the plaintiff that he would not depose so, plaintiff took no further steps to examine him. The Munsif held in these circumstances that as the attesting witness who was examined did not prove attestation S. 71, Evidence Act, was attracted to the facts of the case and the execution of the mortgage could be proved by other evidence and the evidence of the other witnesses who were not the attesting witnesses was sufficient to prove execution. The Munsif granted the usual preliminary mortgage decree and directed that unless the decretal money was paid within a certain time the amount would be realized by the sale of the mortgaged property. The Munsif, however, held that the stipulation for compound interest was penal and allowed interest at 18 per cent. per annum up to the date of the decree. The defendant preferred an appeal to the Subordinate Judge and the plaintiff filed a cross-appeal on the question of interest with the result that plaintiff's suit has been decreed in full.

Against this decision an appeal has been taken to this Court by defendant 3. The appellant contends that S. 71, Evidence Act, does not apply as the remaining attesting witness who is alive has not been examined. The respondent on the other hand contends that as one attesting witness was called for the purpose of proving the execution of the mortgage bond as required by S. 68, Evidence Act, and the said witness has denied the execution of the document S. 71 applies and in support of this contention the respondent relies on a decision of this Court in the case of *Hasan Ali v. Gurudas Kapali* (1).

The case referred to undoubtedly supports the contention of the respondent, for, Mallik, J., with whom Cuming, J., concurred said this :

"As observed before the plaintiff did actually call one of the attesting witnesses then alive and it was only when that attesting witness resiled, the plaintiff proceeded to

prove the document by other evidence...This in my opinion, was a full compliance with the provisions of Ss. 68 and 71, Evidence Act."

In the case cited there were other attesting witnesses alive.

It does not seem to me clear that S. 71 can be applied unless the evidence of the attesting witness who is alive and is subject to the process of the Court be taken when one attesting witness has, after being called, denied execution. Field, J., who is regarded as a high authority on the law of evidence states in his commentary on the law of evidence as follows :

"If one of two or more attesting witnesses being called denied or does not recollect the execution of the document, it is not very clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence, who is not produced."

Woodroffe, J., another high authority on the law of evidence quotes this opinion of Field, J., without dissent in his well known commentary on the law of evidence. The rule of English law regarding attestation of wills is expressed in the case of *Coles v. Coles* (2), in the following words :

"A party propounding a will is bound to call one at least of the attesting witnesses, if he can be produced, to prove the due execution and if such witness fails to prove the due execution he is bound to call the other, although he may know him to be an adverse witness."

In the case of *Pilkington v. Gray*, (3), the Judicial Committee of the Privy Council held that where one of two attesting witnesses to a will retracted his evidence and in effect swore to the signatures of testator and the witnesses having been forged it was necessary to explain the absence of the other attesting witness before other evidence of the execution of the will could be let in. It is not sufficient to say that the other attesting witness will turn out hostile. In the case of *Gobinda Chandra Pal v. Pulin Behary Benerji* (4), Mukerji, J., with whom Greaves, J., concurred, observed that the mere fact that the only surviving attesting witness is considered hostile by the party taking his stand on the mortgage does not relieve him from the duty of examining him as a witness. It seems to me that it was not intended by

(2) [1866] 1 P. 70=35 L. J. P. 40=14 W. R. 290=13 L. T. 608.

(3) [1899] A. C. 401=68 L. J. P. O. 63.

(4) A. I. R. 1927 Cal. 102.



enacting S. 71 to depart from the rule of English Law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witness is satisfactorily explained in the case where one of the two attesting witnesses has been called and has denied execution. It is not necessary, however, to express a final opinion on the question as to whether the construction of S. 71 contended for by the appellant is the right one for the appeal can be decided on another ground.

It appears from the written statements that both defendants 1 and 3 admitted execution of the mortgage bond in the pleadings although they said that the execution was obtained by fraud i. e., by representing the same to be a power of attorney. In these circumstances S. 70, Evidence Act, is attracted to the facts of the present case and the admissions of defendants 1 and 3 are sufficient proof of the execution of the mortgage bond against them; see *Nund Kishore Lal v. Kanee Ram Tewary* (5).

The appeal, therefore, fails and must be dismissed with costs. I agree with my learned brother in dismissing the appeal although my reasons for so doing are not the same as his.

S.N./R.K. *Appeal dismissed.*

(5) [1902] 29 Cal. 355=6 C. W. N. 395.

## A. I. R. 1929 Calcutta 444

SUHRAWARDY AND JACK, JJ.

*Sasi Kanta Acharjee*—Plaintiff—Appellant.

v.

*Sonaulla Munshi*—Defendant — Respondent.

Appeal No. 921 of 1927, Decided on 18th April 1929, against appellate decree of Offg. Sub-Judge, 2nd Court, Mymensingh, D/- 14th January 1927.

**Contract Act, S. 25 (3)**—Mere implication of a promise to pay will not bring an acknowledgment of debt under S. 25 (3).

There is a difference between an acknowledgment as understood under the Limitation Act and a promise to pay as contemplated by the Contract Act. Mere implication of a promise to pay will not bring an acknowledgment of debt under S. 25, Contract Act, though it would imply a promise to pay under S. 19, Lim. Act. Mablagnandi is not a promise to pay under S. 25, Contract Act, so as to revive

a debt which was barred at the date of the mablagnandi: *A. I. R. 1921 Pat. 29*; *67 I. C. 298*; *A. I. R. 1925 Cal. 338*; *10 Cal. 284 (F.B.)*, *Ref.* [P 444 C 2, P 445 C 1]

The defendant was an agent of the plaintiff. The agency terminated in 1915. In August 1921 Defendant signed a mablagnandi in these words: "I remain liable to the Sarkar for the sum of Rs. 412-7-3." Plaintiff sued on this mablagnandi. Defendant pleaded that the suit was barred by limitation.

**Held:** that the words used in the mablagnandi did not support the contention that there was an express promise to pay. All that they meant was that the debtor admitted his liability for the amount and declared his indebtedness. They did not satisfy the requirements of S. 25, Contract Act, and the suit was time barred. [P 445 C 1]

*Jogesh Chandra Roy and Sachindra K. Roy*—for Appellant.

*Surjya Kumar Guha*—for Respondent.

**Judgment.**—The facts on which this appeal is based are that the defendant was a gomastha under the plaintiff. The agency terminated in April 1915. In August 1921 there was a mablagnandi signed by the defendant in these words: (in Bangali, the translation of which is as follows: I remain liable to the Sarkar for the sum of Rs. 412-7-3). The suit was brought on this mablagnandi and the only point that arises is whether it is barred by limitation. The defence was that the mablagnandi was obtained from the defendant by undue influence; but the plea was not accepted by the Courts below. Both the Courts below have agreed in holding that the plaintiff's suit is barred by limitation. It is argued on behalf of the appellant that though the debt of which the mablagnandi was made had become barred by limitation at that date, S. 19, Lim. Act, would not apply. There was a fresh start of time from the date of the mablagnandi under S. 25 (3), Contract Act.

It appears to be well-established by authority that there is a difference between an acknowledgment as understood under the Limitation Act and a promise to pay as contemplated by the Contract Act. The cases in settling the law on this point which was at one time in a nebulous state have laid down the distinction that mere implication of a promise to pay will not bring an acknowledgment of debt under S. 25, Contract Act, though it would imply a promise to pay under S. 19, Lim. Act. It has been pointed out that in this respect there is a difference between the English and the



Indian Laws. Under the English law an implied promise to pay will afford terminus quo for a suit on the debt but under the Indian law that promise must be an express promise. The law and the cases on this point have been discussed in the case of *Rambahadur Singh v. Damodar Prosad Singh* (1), where it was held that mere acknowledgment of debt without a promise to pay is insufficient to create a new contract to pay. This view is also supported by two decisions of this Court the judgments of which are to be found in *Panchanan Poddar v. Khitish Chandra* (2) and *Khitish Chandra v. Umed Mondal* (3). In the last case the learned Chief Justice has observed that a mablagbandi is a good acknowledgment under S. 19, Lim. Act, and, therefore, it preserves any debt due which was not at that time barred by limitation, but in dealing with this matter the Court must also proceed upon the view that mablagbandi is not a promise to pay under S. 25, Contract Act. so as to revive a debt which was barred at the date of the mablagbandi. This point does not require further elaboration.

But it has been argued by Mr. Roy appearing for the appellant that the words used in the mablagbandi mean a promise to pay the amount there stated. The words are (in Bengali) which have been correctly translated by the learned Subordinate Judge as "I remain liable to the Sarkar for the sum of Rs. 412-7-3." In our opinion, these words do not support the contention that there is an express promise to pay. The most that it can be said to mean is that the debtor admits his liability for the amount and declares his indebtedness. If it were an acknowledgment under S. 19, Lim. Act, it might probably have been successfully argued that it implies a promise to pay. It does not satisfy the requirements of S. 25, Contract Act. The law on this point will be found discussed in Pollock and Mulla's Contract Act, 5th Edn. p 197, et seq.

It has also been argued that the article of the Limitation Act, applicable to this case should be Art. 64, Lim. Act, which deals with money found to be due on accounts stated between the plaintiff and the defendant. As was pointed out in the Full Bench decision in the case of

*Dukhi Sahu v. Mahommad Bikan* (4) an account stated has a definite technical meaning where there are cross-demands which are settled between the parties. There is nothing in this case to show that there was any such mutual dealing between the parties the relation between them being that of principal and agent.

The view according to the facts of this case taken by the Courts below is correct and this appeal is dismissed with costs.

K N./R.K.

*Appeal dismissed.*

(4) [1884] 10 Cal. 284=13 C.L.R. 445 (F.B.).

### \* A. I. R. 1929 Calcutta 445

SUHWARADY AND JACK, JJ.

*Hriday Nath Roy*—Appellant.

v.

*Akhil Chandra Roy and others*—Respondents.

Appeal No. 2130 of 1925, Decided on 1st June 1928, against appellate decree of Addl. Sub-Judge, Howrah, D/- 26th May 1925.

(a) Civil P. C., O. 1, R. 8—In previous suit by Secretary of Samaj, defendant objecting to maintainability of suit under R. 8—Court overruling objection and holding suit maintainable without aid of R. 8—In subsequent suit defendant contending that R. 8 was bar to suit as Court's permission was not obtained—Executive Committee of Samaj authorizing Secretary to maintain suit—Questions raised in two suits were different and res judicata could not apply—Objection being technical, case will be covered by Civil P. C. S. 99, Civil P. C., S. 11.

In a previous suit by the Secretary of Religious Association the defendant objected that the suit was not maintainable under O. 1, R. 8 as the plaintiffs were not 'numerous.' But the Court overruled the objection and held that the suit was maintainable without the aid of that rule. In the subsequent suit the defendant contended that R. 8 was bar to the suit as permission of the Court was not obtained. It was clear from the proceedings of the Executive Committee of the Samaj that the Secretary was authorized to institute the suit and presumably the Executive Committee had authority to so authorize him.

*Held*: that as the questions raised in the previous and the subsequent suit were different ones, the subsequent suit was not barred by the principle of res judicata. [P 446 C 2]

*Held further*: that as the objection raised was technical and error did not affect the merits of the case or the jurisdiction of the Court the case would be covered by S. 99: *A. R. 1923 P.C. 128, Rel. on., 11 C. L. J. 461, Ref. [P 447 C 1]*

\* (b) Civil P. C., S. 11—Where causes of action in two suits are different, res judicata cannot be applied to pure questions of law.

*Per Jack, J.*—Where the cause of action in two suits are different the estoppel by res judicata should be restricted to questions of fact

(1) A. I. R. 1921 Pat. 29=6 Pat. L. J. 121.

(2) [1921] 67 I. C. 298.

(3) A. I. R. 1925 Cal. 338.



and mixed questions of fact and law and should not be extended to pure questions of law (*Suhramardy, J. Dubitante* :) 11 C. L. J. 461 Foll. [P 447 C 2]

(c) Civil P. C., S. 99—Scope.

*Per Suhrawardy, J.*—Question about the constitution of or the right to maintain a suit is not a question which arises in any proceeding in the suit and it is doubtful whether S. 99 applies to such a question. [P 447 C 1]

*Sarat Chandra Basak and Gopendra Nath Das*—for Appellant.

*Sarat Chandra Roy Chowdhury, Dharendra Lal Kastgir and Jitendra Mohan Banerjee*—for Respondents.

**Suhrawardy, J.**—In this case the respondent is the Secretary of a religious association called the Amraguri Nava-vidhan Brahma Samaj. Some years ago he brought a suit against the defendants as Secretary of the Association for recovery of possession of the land in suit on the allegation that it was owned by the Brahma Samaj. That suit was decreed on 26th November 1909. The defendants appealed; but before the appeal was finally heard the plaintiff took possession through Court on 12th September 1910. He was subsequently dispossessed by the defendants in November 1910 which dispossession gave rise to the present suit. The appeal in the previous case was finally decided by the lower appellate Court on 25th July 1911 and dismissed, the decree in favour of the plaintiff having been maintained. The present suit was instituted on December 1920. Both the Courts below have given a partial decree to the plaintiff.

The only point that has been argued before us is that the suit in its present form is not maintainable. It is contended that the association is not a corporation within the meaning of O. 29, Civil P. C. The only provision therefore under which the plaintiff is entitled to maintain the suit is prescribed by O. 1, R. 8. This question was raised in the Court below and decided against the defendant appellant. It should be noted here that the previous suit was brought under O. 1, R. 8 but the defendants objected that the suit was not maintainable as that rule did not apply in that case the plaintiffs not being 'numerous.' The objection in the previous suit was overruled by the trial Court but it was not argued in the lower appellate Court. It was attempted to be raised in second appeal in this Court but the learned Judges refused permission to

allow the defendants to raise the point at that stage of the litigation. The trial Court in that suit held that the plaintiff as Secretary of the association was competent to maintain the suit and that it was not necessary to have recourse to the provision of O. 1, R. 8. The defendant now turns round and takes the objection that the suit ought to have been brought under that rule. On behalf of the respondent it is argued that the question as to the competency of the plaintiff to maintain the suit was finally settled in the previous litigation and it cannot be re-agitated in this case. The appellant answers that the question raised in the previous suit as well as in this suit is a question of law and under some rulings of this Court the decision in a previous suit on a question of law does not operate as *res judicata*. If it were necessary to go into the question raised in this case, I would have felt great hesitation in accepting the observation made in some of the cases that the decision on a question of law does not operate as *res judicata* in a subsequent suit based on a different cause of action. This to my mind is totally inconsistent with the plain wording of S. 11, Civil P. C. and I am not prepared to express a definite opinion upon this point without further consideration. But on the facts it is not necessary to decide the point relating to *res judicata* raised in the appeal. In the previous suit the question raised by the appellant was that the suit was not maintainable under O. 1, R. 8, Civil P. C. The Court overruled that objection and held that the plaintiff could maintain the suit even without the aid of that rule. In the present case the appellant contends that O. 1, R. 8 is a bar to the present suit. The questions in the two suits do not seem to be the same and I do not think that the principle of *res judicata* should so extended as to be made applicable in this case. But there is another ground upon which it is easy to dispose of this matter. The plaintiff has brought the present suit not only as Secretary to the Brahma Samaj, but on the strength of the decree he had obtained in the previous suit which declared that he was entitled to the land in suit and was entitled to recover possession of it from the defendants. That decree is now final between the parties and the defendant should not be allowed to go behind it



and attack the right of the plaintiff to maintain the present suit on the strength of the decree.

But I agree with my learned brother that this case is governed by the provisions of S. 99, Civil P. C., as the error or irregularity complained of does not in any way affect the merits of the case or the jurisdiction of the Court, though I am not sure that that section applies to the constitution of a suit or the right to maintain a suit as that is not a question which arises in any proceeding in the suit. But as the Judicial Committee have observed in *Indrajit Pratap Sahi v. Amar Singh* (1) the procedure laid down by law is intended to further the cause of justice and not retard it. The appeal in my opinion fails and is dismissed with costs.

**Jack, J.**—The only ground of appeal argued is that the appeal is barred under the provisions of O. 1, R. 8 inasmuch as the Brahma Samaj is not a registered association and, therefore, without complying with the provisions of O. 1, R. 8, the Secretary could not maintain any suit for the recovery of lands belonging to it.

Now there can be no doubt that the circumstances of this case bring it under O. 1, R. 8. The Secretary of the Brahma Samaj is here suing on behalf of a number of persons having the same interest in the suit and under O. 1, R. 8, he can only do so with permission of the Court and the

“Court shall in such case give at the plaintiff's expense notice of the institution of the suit to all such persons.”

It is only where the society is a corporation registered under the Indian Companies Act or legally authorized to sue in the name of an officer that a suit can be brought by the Secretary on behalf of the society under O. 29, R. 1. It is clear, therefore, that in this case the Secretary was not entitled under the law to sue on behalf of the Samaj not having obtained permission of the Court to do so under O. 1, R. 8.

But it is contended in this case, as found by the Court below, that inasmuch as in a previous suit between the same parties it was held that the Secretary was entitled to sue on behalf of the Brahma Samaj he must be held by the principles of *res judicata* equally en-

titled to sue in this case. In that case the trial Court held that he was so entitled to sue and that though the provisions of O. 1, R. 8 had been observed in that case their observance was not necessary. This issue was not raised in the first appellate Court and the second appellate Court refused to go into this question inasmuch as it had not been raised in the first appellate Court and in the circumstances of that case. It may, therefore, be taken to have been decided in that suit that the Secretary of this society was entitled to sue the defendants on behalf of the other members of the society in that suit. But in my opinion this is not a case in which the rule of *res judicata* should be applied. In the case of *Aghore Nath v. Kamini Debi* (2) a number of cases on the point were discussed and it was held (following *Bigelow on Estoppel*) that where, as in this case, the causes of action in the two cases were different :

“the estoppel should be limited to matters distinctly put in issue and determined in the prior action and it should further be restricted to questions of fact or mixed questions of fact and law, for if it was extended to pure questions of law, a Court might find itself in the position that in so far as certain parties are concerned, it is irrevocably bound to adhere to a proposition of law erroneously laid down in a previous suit.”

In the present case the question is a pure question of law and it should further be taken into account that in the previous suit the procedure laid down by law had in fact been followed and it was in such circumstances and because the point was not raised in the first Court of appeal that the Court of second appeal refused to interfere. I think, therefore, that in this case the finding of the trial Court in the former suit that the Secretary was entitled to sue on behalf of the society independently of the provisions of O. 1, R. 8 should not be regarded as *res judicata* in the present suit.

It follows, therefore, that in the ordinary course we should have had to find that the suit was barred through non-observance of O. 1, R. 8. In the circumstances of the present case, however, the objection to the maintenance of the suit by the Secretary is purely technical. From the proceedings of the Executive Committee of the Samaj it is clear that the Secretary was authorized by the

(1) A. I. R. 1923 P. C. 128=2 Pat. 676=50 I. A. 183 (P.C.).

(2) [1909] 11 C. L. J. 461=6 I. C. 554.



Executive Committee to institute the suit and presumably the Executive Committee had authority to so authorize him. Taking this into account and in view of the finding in the previous suit, I think that this is a case in which the provisions of S. 99, Civil P. C., should be applied to prevent a technicality from overcoming the ends of justice, as clearly the irregularity in procedure has not affected the merits of the case or the jurisdiction of the Court. This being the only ground of appeal which was passed, the appeal is dismissed with costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1929 Calcutta 448**

C. C. GHOSE AND B. B. GHOSE, JJ.

*Fulbash Sheikh—Appellant.*

v.

*Emperor—Opposite Party.*

Criminal Appeal No 907 of 1928, Decided on 17th April 1929.

Criminal P. C., S. 162—List of stolen ornaments is a statement and its admission is misdirection—Criminal P. C. S. 297.

Where during a search ornaments were found on the person of the accused's wife, and it was alleged that they were the ornaments stolen during the dacoity and a list handed over to the investigating police officer during the course of investigation included the ornaments.

*Held:* that the list being a statement within the meaning of S. 162, Criminal P. C., was clearly inadmissible and its admission having caused misdirection the verdict of the jury and the sentence of the accused should be set aside. [P 448 C 2]

*Lalit Mohan Sanyal and Amrendra Narain Bagchi—for Appellant.*

*Khundkar—for the Crown.*

**Judgment.**—The accused in this case Fulbash Sheikh has been convicted under S. 395, I P. C., and sentenced to suffer rigorous imprisonment for a period of five years. There are two other accused but their appeals have been summarily rejected.

The short point that has been pressed upon our attention by Mr. Lalit Mohan Sanyal is that evidence which was clearly inadmissible has been admitted in this case and that, that being so there has been misdirection.

It is not necessary to set out the facts at length. It appears that at the time of the search it was found that the accused Fulbash's wife was wearing certain ornaments. The ornaments are not of much value and were very ordinary

ones. The prosecution alleged that these ornaments had been stolen during the progress of the dacoity. Fulbash and his wife on being questioned about these ornaments stated that they belonged to Fulbash's wife, that they had always been worn by Fulbash's wife, that they had not been stolen during the progress of the dacoity. It appears that these ornaments were included in a second list handed to the Investigating Police Officer during the course of investigation. Mr. Sanyal thereupon contends that the list which was supplied to the Investigating Police Officer during the course of investigation was a statement in writing made to a Police Officer within the meaning of S. 162, Criminal P. C., and that therefore the list in question was inadmissible in evidence. We have examined the record and there is no doubt whatsoever that on the facts Mr. Sanyal's contention appears to be well-founded. If that is so there is no escape from the conclusion that the list in question should not have been admitted in evidence but the learned Deputy Legal Remembrancer had contended that the list was in no way responsible for the purpose of establishing the identity of the ornaments which had been stolen. In our opinion we must give effect to Mr. Sanyal's contention, and hold that inadmissible evidence having been let in, there was clearly misdirection. The question then arises as to what we should do in this matter. As stated above, the ornaments in question were of not much value and were such as are ordinarily worn by this class of persons. There is also the circumstance that as soon as these ornaments were noticed during the search, Fulbash and his wife stated at once that they were the property of Fulbash's wife and had always belonged to her, in other words, it is clear that no endeavour was made to conceal these ornaments at the time of the search or at any other time. In these circumstances we are of opinion that no useful purpose would be served by our directing a re-trial. We accordingly set aside the verdict of the jury and with it the conviction and sentence and direct that accused Fulbash be discharged. If he is on bail his bail bond will be cancelled.

P.R./R.K.

*Conviction set aside.*



**A. I. R. 1929 Calcutta 449****MUKERJI AND MALLIK, JJ.***Murad Biswas*—Defendant — Appellant.

v.

*Basti Mandal* — Plaintiff — Respondent.

Appeal No. 859 of 1927, Decided on 18th March 1929, against appellate decree of Sub-Judge, Murshidabad, D-/ 4th December 1926.

**Civil P. C., S. 11**—Decisions arrived at in previous suit though dismissed operate as *res judicata*.

On a suit by the landlord for ejectment of his under-raiyat, it was contended by the defendant that he was a cosharer. The Courts held the plea to be unavailing that point having been already decided in a prior suit between them in spite of defendant's contention that the previous suit having been dismissed on the ground that notice had not been served to the defendant, that point was undecided.

*Held*: that even then the question of the status having been already decided in that suit, did operate as *res judicata*: 13 Cal. 17, Dist.; A. I. R. 1922 P. C. 241, Rel. on.

[P 449 C 2]

*Abinash Chandra Ghosh*—for Appellant.*Bankim Chandra Mukerji* and *Purna Chandra Chatterjee*—for Respondent.

**Judgment.**—This appeal has arisen out of a suit which was instituted by the plaintiff for ejecting the defendant from a plot of land on the allegation that the defendant was holding the same as under-raiyat and that notice had been served on the defendant determining his tenancy. The prayers in the plaint were for declaration of the plaintiff's raiyati and for recovery of khas possession. The defendant besides contending that no notice was served upon him asserted that he was a cosharer with the plaintiff in respect of the suit land. The suit has been decreed by both the Courts below. The defendant has then preferred the present appeal.

The contention that has been urged in the appeal relates to the question of *res judicata*. Both the Courts below have held that the question as to whether the defendant is a cosharer of the plaintiff or an under-raiyat under him is barred by *res judicata* by reason of a previous decision between the parties. The contention that has been urged in connexion

with this matter is that inasmuch as the previous suit which was a suit instituted by the plaintiff against the defendant for recovery of possession on declaration of title and in which the same question was raised was dismissed on the ground that notice had not been served on the defendant, the finding at which the Courts had arrived in that suit as regards the status of the defendant is not to be treated as *res judicata* in the present suit. Now on reference to the record it seems that the previous suit was one in which the plaintiff has asked for declaration of his title to the land and for khas possession thereof, and the defence of the defendant in that suit was that he was not a tenant holding under the plaintiff but was a cosharer of his. This defence was gone into and ultimately it was found that the plaintiff's title to the land was made out, but notice had not been served on the defendant and upon that the suit was not dismissed but a decree was made in the plaintiff's favour in the following terms:

"Ordered that the plaintiff's alleged title to the land in suit be declared, he cannot recover khas possession of the land but he may sue for settlement of fair rent and recovery of nazar if he likes."

From this decision the plaintiff preferred an appeal and the defendant a cross-objection, and the appellate Court, to which the said appeal and the cross-objection was preferred, upheld the decree which the trial Court had passed. The facts therefore are not that the suit was dismissed on a preliminary point making it unnecessary for the Court to go into the other questions that arose in the suit but that the questions were decided and made the foundation of a decree declaring the plaintiff's title, and one of the prayers in the suit, namely, that for khas possession was refused on the ground that notice had not been served on the defendant. Under circumstances such as these the case to which the learned advocate for the appellant has referred, namely, that of *Nundo Lal v. Bidhoomukhey Dehee* (1) has in our opinion no application. The real reason on which this doctrine of *res judicata* is founded in so far as a case of the present description is concerned has been given by the Judicial Committee in the case of the *Midnapur*

(1) [1886] 13 Cal. 17.



*Zamindary Co. Ltd. v. Naresh Narayan Roy* (2) at p. 467 (of 48 Cal.) where their Lordships say that they do not consider that a decision will found an actual plea of *res judicata* where the defendants having succeeded on the other plea, had no occasion to go further as to the finding against them. This cannot be said of the present case in view of the fact that the plaintiff's title was declared and it is only one of his prayers, namely, that for khas possession was refused on the ground that no notice was served. We are of opinion that the Courts below were right in the view that they took on the question of *res judicata*.

The appeal therefore fails and must be dismissed with costs.

P.R./R.K.

*Appeal dismissed.*

(2) A. I. R. 1922 P. C. 241=48 Cal. 460=48  
I. A. 49 (P.C.).

## A. I. R 1929 Calcutta 450

MITTER, J.

*Eakubali Pandit*—Appellant.

v.

*Muhammad Ali and others*—Respondents.

Appeal No. 131 of 1926, Decided on 7th December 1928, against the appellate decree of Addl. Sub-Judge, Noakhali, D/- 7th September 1925.

**Record-of-Rights**—Entry showing that under-raiyats had acquired occupancy rights—Entry based on kabuliyat which contained no clause entitling plaintiff to eject defendants, under-raiyats, but contained term that it was year to year tenancy—If kabuliyat be treated as permanent lease it offended against Bengal Tenancy Act S. 85—If treated as year to year lease, it could not protect defendant from ejectment—So entry based on it was void—Bengal Tenancy Act, Ss. 85 and 49.

There was an entry in the Record-of-Rights to the effect that under-raiyats defendants had acquired occupancy right. The kabuliyat did not contain any clause entitling the plaintiff to eject the defendants, but contained a term that it was a *san basen kabuliyat*, i. e., it was a tenancy from year to year;

**Held**: that if the kabuliyat was treated as creating a permanent lease, it must be regarded as void since it would offend against S. 85. On the other hand if it was treated as a year to year lease it did not protect the defendants from ejectment upon notice under S. 49. In either view of its terms, therefore, the kabuliyat could not create a right of occupancy in the under-raiyats; and hence the Record-of-Rights based on it was not correct: 27 C. L. J. 107 and 28 C. L. J. 91, *Foll.*

[P 451 C 2]

*Khetra Mohan Ghose and Mahendra Kumar Ghose*—for Appellant.

*S. C. Basak and Jitendra Kumar Sen Gupta*—for Respondents.

*Biraj Mohan Majumdar*—for Deputy Registrar.

**Judgment.**—The suit in which this appeal has arisen was brought by the plaintiff, now appellant, to eject the defendants on the allegation that defendants are under-raiyats on whom notice to quit had been served under S. 49 (b), Ben. Ten. Act and whose tenancy had been determined by such notice. The defence of the defendants, now respondents, is (i) that notice had not been properly served on the defendants; (ii) that they have acquired a right of occupancy by custom and are not liable to be ejected.

The Munsif held after a careful examination of the evidence that the service of notice to quit which was served on the defendants through Court in April 1920, had been satisfactorily established and points out that one of the defendants, Muhammad Ali does not come forward to depose that no notice was served on him. The Munsif refers to the entry in the Record-of-Rights in favour of the defendant to the effect that though under-raiyats the defendants have acquired a right of occupancy and states that the entry is proved to be wrong the moment it is shown that defendants are under-raiyats, and that the defendants have failed to establish that they have acquired a right of occupancy by custom and that on the other hand plaintiff has proved that there is no such custom.

The Munsif rested his decision on the further ground that plaintiffs brought a suit for ejectment against the defendants under S. 66, Ben. Ten. Act, and defendants, although appearing at the earlier stages of the suit, did not ultimately contest it with the result that an *ex parte* decree was passed. It is said that if the defendants were under-raiyats with rights of occupancy the decree for ejectment could not have been passed and the decree in the said suit (No. 1826 of 1919) operates as *res judicata* on the question of the status of the defendants. The Munsif accordingly decreed plaintiff's suit.

An appeal was taken to the Court of the Subordinate Judge of Noakhali who reversed the decision of the Munsif and



dismissed plaintiff's suit. The Subordinate Judge rested his decision on three grounds : (i) that the evidence of the service of notice to quit is meagre and unsatisfactory; (ii) that the presumption arising from the entry in the Record-of-rights has not been rebutted ; (iii) that it cannot be seriously contended that all the elements which go to constitute proof of custom have not been mentioned even by the few witnesses examined. It is argued for the plaintiff, now appellant in second appeal, that the judgment of the lower appellate Court is not a proper judgment and there had been a defect of procedure in the trial of the appeal which has affected the merits of the case so as to call for the interference of this Court in second appeal.

I think the contention of the appellant is well founded and must prevail. The lower appellate Court deals with the question of service of notice rather perfunctorily. He says "the proof of service of notice is admittedly not quite satisfactory." The Munsif discusses in detail the evidence to show that the notice was served through Court and points out that no reason is suggested why the Court peon with six witnesses to the service should sign a false report. In my opinion, there has not been a proper consideration of the evidence on the question of service of notice which must be considered again. The learned advocate for the respondents frankly concedes that the judgment of the Subordinate Judge on this point is not as satisfactory as it should be.

The lower appellate Court admitted at the appellate stage a certified copy of a kabuliyat, which does not contain any clause entitling the plaintiff to eject the defendant. It is a kabuliyat which also contains the term that it is a (san basan) kabuliyat, i. e., it is a tenancy from year to year. The Record-of-Rights was based on this kabuliyat. If it is a kabuliyat which creates a permanent under-raiyati tenancy it cannot be admitted in evidence as it contravenes the provisions of S. 85, Ben. Ten. Act and cannot create a valid contract between the parties and the presumption arising from the entry in the Record-of-Rights is rebutted as soon as it is shown that the entry was based solely on a document which did not create a valid contract between the parties: see *Bagha*

*v. Ram Laxhan* (1). The Subordinate Judge points out that under the kabuliyat the defendant had been given the right to alienate the land under certain conditions and there are no words conferring on the plaintiff the right to eject the defendant. If the lease is regarded as conferring permanent rights on the under-raiyat then it cannot be acted on as being in contravention of S. 85. If on the other hand the lease is taken as a lease from year to year (san basan) the under-raiyat is liable to be ejected upon notice under S. 49 : see *Chandi Charan v. Somla Bibi* (2).

The Record-of-Rights was based on this kabuliyat which (i) treating it as creating a permanent lease offends against S. 85 and must be regarded as void (ii) treating it as year to year lease does not protect the defendant from ejectment, *Chandi Charan v. Somla Bibi* (2) : (See observations of Mookerjee, J.). Whatever construction is put it does not justify the entry in the Record-of-Rights that defendants have acquired occupancy right. The Record-of-Rights based as it is on the kabuliyat is not correct for in either view of its terms the kabuliyat cannot create a right of occupancy in the under-raiyat. The Record-of-Rights does not state that the defendants have acquired a right of occupancy by custom.

In these circumstances with regard to this point also the appeal must be reheard and the lower appellate Court would consider the question whether the defendants have on the evidence established that there is a custom in the locality under which under-raiyats acquire a right of occupancy. If no such custom is established plaintiffs will be entitled to a decree in ejectment provided the Court holds in his favour on the question of service of notice to quit. The judgment and decree of the lower appellate Court is set aside and the case is sent back to it in order that it may rehear the appeal in the light of the observations I have made. The costs of the appeal will abide the result.

S.N./R.K.

*Case remanded.*

(1) [1917] 27 C. L. J. 107=41 I. C. 804.

(2) [1918] 28 C. L. J. 91=44 I. C. 254=22 C. W. N. 179.



**A. I. R. 1929 Calcutta 452 (1)**

RANKIN, C. J., AND PAGE, J.

*Faridpur Loan Office, Ltd.* — Appellant.

v.

*Nirode Krishna Ray*—Respondent.

Appeal No. 1368 of 1926, Decided on 23rd July 1928, against appellate decree of the Sub-Judge, Faridpur, D/- 23rd March 1926.

**Bengal Tenancy Act, S. 158 (B)**—Purchase by landlord in execution of decree against some co-tenants of tenure—Only interest of judgment-debtors passes unless they represent whole estate.

Where a landlord sues only the recorded co-tenants of a tenure, obtains a decree, and purchases the tenure in pursuance of the decree but omits to implead a purchaser from one of the co-tenants all that he obtains by the purchase is the interest of the defendant judgment-debtor. But the whole tenure including the interest of the purchase will pass under the auction-purchase pursuant to the decree if the facts warrant a finding that the tenants who were impleaded in the circumstances represented the whole estate. [P 452 C2]

*Bankim Chandra Mukherji and Bansari Lal Sarkar* for *Kamini Kumar Sarkar*—for Appellant.

*Saratkumar Mitra*—for Respondent.

**Page, J.**—The plaintiff purchased the interest of one of several co-tenants of a transferable tenure. The purchase was made in June 1912. In October 1912, there was an entry made in the Record-of-Rights, recording his vendor as one of the co-tenants. In December 1912, proceedings were taken by the landlord under S. 105, Ben. Ten. Act, for enhancement of rent, and to those proceedings the original tenants, including the vendor of the plaintiff, were made parties. Enhancement was granted, and, in 1917, a suit was brought by the landlord against the original co-tenants for arrears of rent from 1913 to 1916. He obtained an ex parte decree on 8th December 1917, and the decree-holder himself purchased the tenure at the auction-sale pursuant to the decree on 20th December 1918. On 19th June 1924, the plaintiff brought the present suit to establish his title to the share of the co-tenant from whom he purchased. The question which falls for determination is whether, in the circumstances obtaining in this case, the plaintiff is entitled to claim that the interest in the tenancy which he purchased did not pass by the sale.

Now, the ordinary law is that where a landlord sues some only of the co-tenants of a tenure, obtains a decree, and purchases the tenure in pursuance of the decree, all that he obtains by the purchase is the interest of the defendant-judgment-debtors. But the whole tenure will pass under the auction-purchase pursuant to the decree if the facts warrant a finding that the tenants who were impleaded in the circumstances represented the whole estate. The question in this case is whether the facts justify such a finding. Now, there is no evidence and no finding that the plaintiff expressly represented to the landlord that the co-tenants who were sued represented the tenure including the share therein that he had purchased, and there is no evidence and no finding that the plaintiff knew of the proceedings relating to the Record-of-Rights, or those taken under S. 105, Ben. Ten. Act. In the circumstances obtaining in this case it does not appear that there was any evidence to justify a finding that the tenants who were sued represented the whole estate. In these circumstances the ordinary rule of law will apply, and the plaintiff is entitled to claim the share of the tenure which he has purchased.

The result is that the decrees of the lower Courts cannot stand. There will be a declaration that the plaintiff is entitled to the share of the tenancy which belonged to defendant 2 in the suit. He is also entitled to joint possession of the said share with defendant 1, and to mesne profits in respect of that share from defendant 1. The suit must be remanded to the trial Court in order that the amount of the mesne profits may be ascertained. The plaintiff is entitled to his costs in all the Courts.

**Rankin, C. J.**—I agree.

M.N./R.K.

*Case remanded.*

**A. I. R. 1929 Calcutta 452 (2)**

MUKERJI AND MALLIK, JJ.

*Tarak Govinda Chowdhury and others*—Appellants.

v.

*Indu Jyoti Majumdar*—Respondent.

Appeal No. 2179 of 1926, Decided on 6th February 1926, against the appellate decree of Sub-Judge, 1st Court, Pabna, D/- 22nd July 1926.



(a) Civil P. C., S. 100 — Scope—Bengal Municipal Act (1884), S. 85.

The question of the validity of the imposition of the personal tax under S. 85, Municipal Act, cannot be raised for the first time in the argument in the High Court.

[P 453 C 1]

(b) Bengal Municipal Act (1884), S. 85 (a) —Amount deposited in Post Office Savings Bank and other savings banks in municipal area is "property within municipality."

Amount deposited in the Post Office Savings Bank and in other Savings Banks in the municipal area is "property within the municipality" within the meaning of the words as used in S. 85 (a).

[P 454 C 2]

(c) Bengal Municipal Act (1884), S. 85—Word "circumstances" is not intended to restrict but to widen scope of section—Although it is not easy to define circumstances, still amounts passing through municipal limits and available at any moment to persons taxed, and their being wealthy zamindars, cannot be altogether ignored—Words.

The introduction of the word "circumstances" in the section is not intended to restrict the term "property" but to widen the scope of the section. And although it is not easy to define what the "circumstances" are, still the amounts which pass through the limits of the municipality and are available to the persons taxed at any moment, and the fact that the persons are wealthy zamindars, cannot be altogether ignored while estimating the "circumstances and property": 35 Cal. 859, Rel. on.; Other cases referred.

[P 454 C 2]

*Bijan Kumar Mukerjee*—for Appellants.

*Surajit Chandra Lahiri*—for Respondent.

**Judgment.**—The appellants who are three brothers instituted a suit against the Chairman and Commissioners of the Pabna Municipality for, amongst others, a declaration that the assessment of a personal tax on them of Rs. 21 per quarter was illegal and ultra vires. The suit has been dismissed by both the Courts below. The appellants contend, in the first instance, that the imposition of a personal tax jointly against them is illegal as has been recently held to be so by this Court. We have considered the question whether we should allow the appellants to urge this contention now when it was not urged in any of the Courts below or even in their grounds of appeal to this Court. We think we shall not be justified in doing so.

They next urge that in assessing the tax the meaning of the expression "according to their circumstances and property within the municipality" appearing in S. 85 (a) has been misunderstood. Now

the Subordinate Judge appears to have proceeded upon the following findings:

1. The zemindari properties of the plaintiffs let out in patni are situated outside the municipality. The income on this head is Rs. 5,487 odd a year. The rents from the patnidars are realized within the municipality at the house of the plaintiff. In 1328 the total realization amounted to Rs. 4,101 odd and in 1329, Rs. 18,921 odd.

2. In 1328 the plaintiffs received within the municipality.

Rs. 1,293 on account of interest on G. P. Notes.

Rs. 852 on account of dividends on shares in companies.

Rs. 108 on account of interest from the Post Office Savings Bank.

Rs. 7,624 on account of decretal and other dues.

Rs. 303 on account of interest from deposit in the Pabna Savings Bank.

Rs. 944 on account of fees of plaintiff 2 as managing Director of a Limited Company.

3. The total amount of patni rent payable to the plaintiffs for properties within the municipality is Rs. 642.

4. The collections made at the plaintiffs' house within the municipality are remitted to Tantiband from where they go back to the Bank within the limits of the municipality.

The question that arises is whether on these findings it can be said that the "circumstances and property" of the plaintiffs "within the municipality" can be fairly estimated at Rs. 9,000, so as to admit of a personal tax of Rs. 21 per quarter.

Upon the decisions that have been cited before us the following points may be treated as settled.

1. The word "circumstances" is equivalent to "means": *Chairman of Giridih Municipality v. Suresh Chandra* (1); *Deb Narayan Dutt v. Chairman, Baruipur Municipality* (2).

2. The expression "within the municipality" governs both "circumstances" and "property": *Debendra Nath v. Chairman, Taki Municipality* (3).

3. The word "property" includes both real and personal property or estate and

(1) [1908] 35 Cal. 859=7 O. L. J. 631=12 C. W. N. 709.

(2) [1911] 39 Cal. 141=12 I. O. 32.

(3) A. I. R. 1921 Cal. 567.



tangible as well as intangible rights of value: *Chairman Giridih Municipality v. Suresh Chandra* (1).

4. When income or sale proceeds are brought from outside within the limits of the municipality and put into a Bank to the credit of a person it may without undue strain on the language, be described as his circumstance and property: *Chairman Jalpaiguri Municipality v. Jalpaiguri Tea Co. Ltd.* (4) per Mookerjee, J. The proceeds so deposited are property within the municipality: per Buckland, J.

5. What constitutes the circumstances and property of a person within the municipality must on a large measure depend upon the facts of the particular case: *Chairman Jalpaiguri Municipality v. Jalpaiguri Tea Co. Ltd.* (4).

It is true that in assessing the assessee's circumstances and property within the meaning of S. 85 (a) of the Act his circumstances and property which are only within the municipality itself have to be considered *Kameswar Pershad v. Chairman, Bhabua Municipality* (5) and *Chairman, Rajpur Municipality v. Nagendra Nath Bagchi* (6). But despite the able arguments of Dr. Mukerjee I am unable to see that in this case any question arises as to whether the measure of the assessee's liability is what he gets and not what he spends, such as arose and was decided in the case of *Chairman, Giridih Municipality v. Suresh Chandra Muzumdar* (1), and *Debendra Nath Rai Chaudhuri v. Chairman, Taki Municipality* (3) or whether the list in respect of income brought from outside is the extent to which it is to be spent within the limits of the municipality as was laid down in the case of the *Chairman, Joynagar Municipality v. Sailabala Dutt* (7).

Here apart from anything else there are two items in the findings of the Courts below which give us a fair estimate of the amount which was in the Post Office and the Savings Bank to the credit of the appellants. These items are Rs. 108 (on account of interest from the Post Office Savings Bank) and

Rs. 303 (on account of interest from deposit in the Pabna Saving Bank). These two items indicate the amount in deposit in these two places to be very near Rs. 9,000 if not more. This amount is undoubtedly "property within the municipality" within the meaning of the words as used in S. 85, Cl. (a). Mookerjee, J., in *Chairman, Giridih Municipality v. Suresh Chandra* (1) observed:

"I am unable to hold that the word "circumstances" was introduced in S. 85 to restrict the term "property." The intention on the other hand seems to have been to widen the scope of the section so as to make taxable what might perhaps be not properly comprised under the term property and at the same time ought not to escape assessment."

If, then, to the two items mentioned above, it is still necessary to add anything to make up Rs. 9,000 the "circumstances" of the appellants within the municipality are available for being taken into account. It is not easy to define what the "circumstances" are. They are not matters which can accurately be put down in £. s. d. But the amounts mentioned in the findings of the learned Subordinate Judge which pass through the limits of the municipality and are available to the appellants at any moment they may like to spend them and the fact that the appellants are wealthy zemindars can not be altogether ignored. We are of opinion that there is no error of law or of principle upon which the Courts below have proceeded and we accordingly dismiss the appeal with costs.

S.N./R.K.

*Appeal dismissed.*

## A. I. R. 1929 Calcutta 454

MITTER, J.

*Giribala Dasi—Appellant.*

v.

*Kedar Nath Naskar—Respondent.*

Appeals Nos. 1516 and 1517 of 1926, Decided on 19th March 1928, against the appellate decrees of Sub-Judge, 24-Parganas, D/- 13th February 1926.

(a) Bengal Tenancy Act, S. 3 (8)—Mourasi tenure comes within definition of "permanent tenure."

Mourasi tenures come within the definition of "permanent tenure" as stated in S. 3 (8) because the word "mourasi," which implies according to its literal meaning, "a succession from generation to generation" in the interest held by the mourasidar conveys the idea of

(4) A. I. R. 1922 Cal. 46.

(5) [1900] 27 Cal. 849.

(6) [1919] 23 C. W. N. 475=50 I. C. 394=29 C. L. J. 379.

(7) A. I. R. 1921 Cal. 485=48 Cal. 443.



permanency, as it can be predicated of such a tenure that it is held for an indefinite time: *A. I. R. 1925 P. C. 97, Expl.* [P 456 C 1]

(b) **Bengal Tenancy Act S. 12—Transferee of permanent tenure getting transfer registered and giving notice of transfer under S. 12—Tenure sold under Public Demands Recovery Act in pursuance of certificate in which transferee not named—Sale is nullity.**

The transfer of a permanent tenure becomes complete as soon as the transfer document is registered. And so where, after such a transferee has given the necessary notice of his transfer under S. 12, and the transfer document is registered, the tenure is sold under the Public Demands Recovery Act in pursuance of a certificate in which the transferee is not named, such a sale is a nullity: *A. I. R. 1923 P. C. 88*; *A. I. R. 1923 Cal. 13*; *32 Cal. 296, Rel. on.* [P 456 C 2]

*Pyari Mohan Chatterjee, Bankim Chandra Ray for Gurudas Mukherjee—*for Appellant.

*Hiralal Chakravarty, Anil Chandra Ray Chaudhury for Nasim Ali—*for Respondent.

**Judgment.**—These two appeals arise out of two suits brought by the plaintiff, now appellant, under S. 149, Cl. (3), Ben. Ten. Act, in which she wanted a declaration that she was entitled to rent deposited by the tenant-defendants in each of the two cases and she claimed that she purchased the tenure which originally belonged to Ishan Chandra Maity in 1910 and that she has been in possession thereof since then. The suit was resisted by defendant 1 who claimed to have purchased the property at a sale under the Public Demands Recovery Act in the year 1914. It is admitted that the plaintiff lands appertained to khas mahal Estate No. 2835 and were comprised in a chak of 172 bighas. The original owner of this tenure was one Gopal Chandra Chatterjee, whose interest was sold in execution of a mortgage decree against him and purchased by one Tapaswiram. Ishan and defendant 1 purchased this interest in the tenure from Tapaswiram. Ishan's interest was one-third and that of defendant 1 was two-thirds in this chak. In execution of a money decree, Ishan's interest was sold and purchased by one Rakhal Bhandari in 1907 and in the year 1910 Rakhal sold whatever he purchased from Ishan to the present plaintiff. The present plaintiff after his purchase deposited the landlord's fee as required by S. 12, Ben. Ten. Act. The defence of defendant 1 is that the interest of Ishan was extinguished by the sale un-

der the Public Demands Recovery Act and that it was not a transferable interest and passed no title in favour of the present plaintiff. The Court of first instance overruled the defence and gave the plaintiff decrees in the two suits. Against these decrees two appeals were carried to the Subordinate Judge by the defendant and there was a further second appeal to this Court in which, by consent of parties, it was agreed that this suit under S. 149, Cl. (3), should be tried as a title suit and the question of title shall be determined finally by the Subordinate Judge on remand. The Subordinate Judge has reversed the decision and decrees of the Munsif in the two suits. He finds, in the first place, that the interest of Ishan was not a transferable interest and that, therefore, the plaintiff acquired no title to the property, as his interest was not recognized by the Government who was the proprietor of this tenure. He further finds that, even if the interest of Ishan was transferable, it was extinguished by the sale in favour of defendant 1 under the Public Demands Recovery Act and as that sale still stands, the plaintiff has got no title to the plaintiff lands. He, accordingly, allowed the appeals and dismissed the plaintiff's suits. Against these two decrees of the Subordinate Judge of 24-Parganas, two second appeals have been taken to this Court and two points have been taken by Mr. Chatterjee who has appeared for the plaintiff-appellant in both these appeals. It is argued, in the first place, that the Subordinate Judge is clearly in error in holding that the interest of Ishan was not a transferable interest.

It is admitted that the interest of Ishan is heritable. It is further found from the khas mahal jamabandi register, which was produced by the defendants-respondents as their own document in the Court of first instance, that the interest of Ishan was a mourasi interest and the lower appellate Court was clearly in error in holding that the interest was not a permanent interest on an erroneous view of the meaning of the word "mourasi." It is argued, in the second place, that as the tenure was a permanent tenure, the moment it is shown that the landlord's fee has been paid under S. 12, Ben. Ten. Act and the deed registered by the registering officer



in favour of the plaintiff, the landlord-Government was bound to recognise the transfer and was bound to issue the certificate under the Public Demands Recovery Act in the plaintiff's name. The certificate not having been admitted in his name, his interest could not have passed at the sale in execution of the certificate which was held under the Public Demands Recovery Act in 1914. I think both these contentions of the learned advocate are sound and must prevail. The learned Subordinate Judge is clearly in error in holding that the word "mourasi" does not convey a permanent interest. As has been pointed out in the Tagore Lectures for the year 1895 by Mr. Sarada Charan Mitra, (1921 Ed. p. 205) who was one of the Judges of this Court and who is regarded as an authority on the land laws of Bengal, that mourasi tenures are, by the definition itself, "heritable" and which are :

"not held for any "limited time." The learned author at p. 203 further points out that it has now been settled that the words "with your sons and grandsons in succession (Bengali) "

i. e.,

"from generation to generation or generations born of your womb successively enjoy the same"

and words of similar import convey a permanent and transferable right. They convey an absolute right subject to payment of rent. If there are no words fixing the rent in perpetuity, the tenure becomes mourasi, but not mokarrari. There can be no doubt that the word "mourasi," which implies, according to its literal meaning, "a succession from generation to generation" in the interest held by the mourasidar, conveys the idea of permanency, as it can be predicated of such a tenure that it is held for an indefinite time. This tenure, therefore, comes clearly within the definition of "permanent tenure" as stated in S. 3, Cl. (8), Ben. Ten. Act. The Subordinate Judge was evidently misled by the decision in the case of *Katyayani Debi v. Uday Kumar Das* (1) in which their Lordships of the Judicial Committee said that a mourasi and mokarrari interest implies "permanent and transferable and at a fixed rent." From that it does not follow that mourasi interest is not a per-

manent interest without fixity of rental. It appears also in this case that there have been at least seven transactions of the property by way of sale and mortgage, etc. It appears also from the landlord's books, the jamabandi registers, that the name of the transferee is mentioned and that the transferee has been recognized by the Government. It is also said that there has been no alteration of rent. In my opinion, the use of the expression "mourasi" is sufficient to constitute the tenure a permanent tenure. In addition to that there are other circumstances, to which I have just referred, which place it beyond doubt that the tenure was one which was of a permanent character. The first ground taken appears to be well founded and must be given effect to.

With regard to the second ground taken, it appears to me that the sale under the Public Demands Recovery Act in favour of defendant 1 was a nullity, for it was a sale in pursuance of a certificate in which the plaintiff was not named, although the plaintiff had given the necessary notice of the transfer in his favour under S. 12, Ben. Ten. Act, and his transfer was complete as soon as the document was registered. As has been pointed out by the Judicial Committee of the Privy Council in the case of *Surapati Roy v. Ram Narayan Mukerji* (2).

"a transfer of a permanent tenure by a registered document was held to be complete under S. 12, Ben. Ten. Act, as soon as the document was registered, and the same view was expressed in the case of *Hemendra Nath Mukerji v. Kumar Nath Roy* (3), already referred to. Their Lordships consider that the present controversy is covered by the latter decision."

It was incumbent on the Government to have issued the certificate in the name of the present plaintiff, if they wanted to make the sale effective as against her or as against the tenure. The decree could not be regarded as a decree for arrears of rent within the meaning of S. 20, Cl. (3) of the Public Demands Recovery Act, for the real tenant was not made a party to the certificate. Consequently, what passed by the sale was only the right, title and interest of the judgment-debtor if anything passed at all. There is good authority for saying that if the real person liable under the certi-

(1) A. I. R. 1925 P. C. 97=52 Cal. 417=52 I. A. 160 (P. C.).

(2) A. I. R. 1923 P. C. 88=50 Cal. 680=50 I. A. 155 (P. C.).

(3) [1908] 12 C. W. N. 478.



fioate is not made a party, the sale is an absolute nullity. Reference may be made in this connexion to the case of *Lalit Mohan Sen v. Manoranjan Ghosh* (4). As was pointed out by their Lordships of the Judicial Committee in the case of *Khiarajmal v. Daim* (5), the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings pursuant to which the sale appears to have taken place. The sale, therefore, did not affect the interest of the plaintiff in any way. The result is that these appeals are allowed, the decrees of the Subordinate Judge in both the cases set aside and those of the Munsif restored with costs throughout.

S.N./R.K.

*Decrees set aside.*

(4) A. I. R. 1923 Cal. 13.

(5) [1905] 32 Cal. 296=32 I. A. 23=9 C. W. N. 201=8 Sar. 734 (P. O.).

### A. I. R. 1929 Calcutta 457

SUHRAWARDY AND MUKERJI, JJ.

*Sidh Nath Awasthi*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1054 of 1928, Decided on 11th February 1929, against order of Addl. Chief Presidency Magistrate.

(a) Criminal P. C., Ss. 432 and 442—Superior Magistrates can interfere only under Chap. 32 or by withdrawal.

Where a Magistrate has once become properly seised of a case by transfer or otherwise he is seised of the whole matter and a superior Magistrate cannot take action except under Chap. 32 or by withdrawal of the case to his own Court: 30 Cal. 449 and 4 C. W. N. 242, *Ref.* [P 458 O 1]

(b) Criminal P. C., S. 403—Breach of trust—Misappropriation—A person shall not be in jeopardy in respect of breach of trust more than once.

If a person commits breach of trust of or misappropriates different sums of money he commits so many offences. But it is not desirable that he should be tried as many times when he could have been tried for all of them at one trial: 2 A. L. J. 673; *Cr. Rev. No. 934 of 1919, Rel. on; A. I. R. 1923 Cal. 179, Ref.* [P 459 O 1]

*Probodh Chandra Chatterjee*—for Petitioner.

*Satindra Nath Mukharji*—for the Crown.

**Mukerji, J.**—On a chalan submitted by the police in which it was stated that the petitioner had, as a durwan in the employ of Messrs. Sew Narain Golap

Roy, committed criminal breach of trust in respect of a gross sum of Rs. 3,651-5-3, the Additional Chief Presidency Magistrate of Calcutta issued warrant against the petitioner on 19th July 1927. On 12th September 1927, the case was transferred by the Additional Chief Presidency Magistrate to the 4th Court, that is to say, to the Court of Mr. H. K. De, Presidency Magistrate. That learned Magistrate thereafter proceeded to try a co-accused of the petitioner who had also been sent up for trial on the same police chalan and discharged him under S. 253, Criminal P. C. On 15th November 1927, the trial of the petitioner commenced before Mr. H. K. De, the offence specified in the summary form prescribed by S. 370, Criminal P. C., being:

“Criminal breach of trust as a servant in respect of Rs. 3,651-5-3 realized on purjas entrusted to him by Ganpat Roy Chowdhury (the Manager of Messrs. Sew Narain Golap Roy), S. 403, I. P. C.”

Charges in respect of 3 items viz.: Rs. 257-8-3 Rs. 1,855-0-3 and Rs. 178-11-3 were framed against the petitioner as being the items in respect of which criminal breach of trust was committed by the petitioner on 6th June 1927, and the petitioner was convicted on these charges and was sentenced to undergo rigorous imprisonment for 3 months. The trial thus concluded before Mr. H. K. De, on 8th February 1928.

On 14th April 1928, another chalan was submitted by the police to the Additional Chief Presidency Magistrate stating that the petitioner had committed criminal breach of trust of three sums of money, viz., 700, 100 and 100 on 6th June 1927, 25th May 1927 and 24th May 1927, respectively, the other particulars being the same as in the previous chalan. It was stated in the chalan that the petitioner was undergoing the sentence passed on him by Mr. H. K. De. The Additional Chief Presidency Magistrate issued order for the petitioner being brought up for trial. The petitioner put in a petition objecting to the trial on the ground that these three items were included in the gross sum of Rs. 3,651-5-3 and maintained that he had already been tried for the whole offence that he had committed, and so under S. 403, Criminal P. C., could not be tried again. The Additional Chief Presidency Magistrate disallowed the objection, proceeded with



the trial and ultimately convicted the petitioner in respect of the said three items and sentenced him to undergo rigorous imprisonment for 3 months.

The petitioner then moved this Court and obtained this rule. The grounds of the rule are that S. 403, Criminal P. C., was a bar to the second trial of the petitioner, or, at any rate, on the principle underlying that section, no such second trial should have been held. It should be noted here that it is not disputed on behalf of the Crown that the three items in respect of which the second trial was held are included in the gross sum of Rs. 3,651-5-3 though they are not covered by any of the three items which formed the subject-matter of the charges framed in the first trial.

At the outset I may observe that I do not understand how the police could have submitted a second chalan when on the first one, which included all the items of the second chalan in the gross sum that was mentioned therein, cognizance of the entire offence had already been taken by the Magistrate. It is true that they might have moved the Magistrate for a second or a further trial in respect of some offence or offences which had not yet been tried; but such application would lie to Mr. H. K. De to whom the whole case, on the first chalan had been made over, and not to the Additional Chief Presidency Magistrate. It is well settled that in circumstances such as these it was Mr. H. K. De alone so long as the case had not been re-transferred from his file, who was competent to deal with any such application. Where a Magistrate has once become properly seised of a case by transfer or otherwise he is seised of the whole matter and a superior Magistrate cannot take action except under Chap. 32 or by withdrawal of the case to his own Court: *Radhaballav v. Benode* (1), *Moul Singh v. Mahabir* (2), *Golabdy v. Emperor* (3) *Ajab Lal v. Emperor* (4). Were this a ground on which the rule had been issued I should have felt no difficulty in making it absolute and quashing the conviction of the petitioner on this ground alone. To turn now to the grounds of this rule.

Now, there is a divergence of judicial opinion on the question whether after a trial in respect of a gross sum in respect of which breach of trust was alleged to have been committed between two specified dates, a second trial in respect of an offence alleged to have been committed on an intermediate date but not included in the gross sum is permissible. In *Appadurai Ayyar, In re* (5) the Madras High Court held that under such circumstances the charge in the first trial should be taken to have included all the items covered by the period and the same view was taken by Suhrawardy, J. in *Nagendra Nath Bose v. Emperor* (6). A contrary view was taken by the Bombay High Court in the case of *Emperor v. Kashi Nath Bagaji* (7). This contrary view also has been taken by Newbould and Greaves, JJ., in the aforesaid case of *Nagendra Nath Bose v. Emperor* (6) in which, however, Newbould, J., pointed out that it would make a considerable difference if it were shown that the defalcation which formed the subject of the charge in the second trial was within the knowledge of the prosecution and so could or might have been included in the charge in the first trial. These cases have but a remote bearing on the present case in which it is not the fact that the former trial was for a gross sum and so I am not called upon to express my own view on this matter.

The present case is one in which the prosecution knew perfectly well what was the gross sum in respect of which the petitioner had committed criminal breach of trust. It was a sum of Rs. 3,651-5-3. They could have, if they liked, proceeded against the petitioner in respect of this gross amount under S. 222 (2), Criminal P. C. Instead of doing so they elected to proceed on three items and got the petitioner convicted. Then they picked up three other items and got the accused tried a second time. Though S. 403, Criminal P. C., may not strictly apply in its terms to a case like the present, still there is abundant authority for the view that a second trial in circumstances such as these

(1) [1903] 30 Cal. 449.

(2) [1900] 4 C. W. N. 242.

(3) [1900] 27 Cal. 979=4 C. W. N. 827.

(4) [1905] 32 Cal. 783=9 C. W. N. 810.

(5) [1916] 17 Cr. L. J. 30=32 I. C. 153.

(6) A. I. R. 1923 Cal. 654=50 Cal. 632.

(7) [1910] 12 Bom. L. R. 226=5 I. C. 970=11 Cr. L. J. 337.



ought not to have been allowed to be held. Where six documents were alleged to be fabricated at one and the same time and at first the accused was tried for fabricating three of the documents and acquitted, a second trial for fabricating the other three documents, though not barred, was set aside, it being held that it was not desirable that the second trial should take place as the fabricating of all the documents was treated in the first trial as one offence: *Emperor v. Inamullah* (8). The principle underlying S. 403 have been often extended to cases not falling strictly within the letter of that section: e. g. *Emperor v. Jhabbar Mull* (9), *Emperor v. Bishun Das* (10), *Jaliram v. Raj Kumar* (11). Again in *Surja Kanta Bhattacharjee v. Emperor* (12) this Court quashed a trial under the following circumstances. S was convicted by Court of Sessions on a charge under Ss. 408 and 477-A, I. P. C., in respect of an item of Rs. 2 when he could have been but was not tried on a similar charge for a further sum of Rs. 7 at the same trial. This Court, on appeal, set aside his conviction and directed that he should not be retried, meaning, on the charge in respect of Rs. 2. Thereafter the prosecution wanted to proceed against S in respect of the other sum of R. 7. This Court stopped that trial.

I am of opinion that if the petitioner had moved this Court for stopping his second trial he would have found no difficulty in getting an order in his favour. But after the trial is over it is not possible to hold on this ground alone that the conviction is illegal. The fact however, remains that he did move the Magistrate for the purpose but failed.

I shall therefore, make the rule absolute to this extent that it will be ordered that the conviction will be upheld but the sentence should be reduced to the minimum that I can think of, namely, a day's rigorous imprisonment which he must have already served out.

**Suhrawardy, J.** — I entirely agree. As the law stands, it is difficult to hold

(9) [1905] 2 A. L. J. 673=(1905) A. W. N. 238.

(9) A. I. R. 1923 Cal. 179=49 Cal. 924.

(10) [1903] 7 C. W. N. 493.

(11) [1901] 5 C. W. N. 72.

(12) Criminal Revn. No. 934 of 1919, Decided on 28th November 1919.

the conviction is illegal. If a person commits breach of trust of or misappropriates different sums of money he commits so many offences. But it is not desirable that he should be tried as many times when he could have been tried for all of them at one trial. As for the sentence which my learned brother purposes to pass, it is usual in meting out sentence at the first trial to take into consideration the gross amount misappropriated.

P.R./R.K.

*Sentence reduced.*

## A. I. R. 1929 Calcutta 459

B. B. GHOSE AND BOSE, JJ.

*Abdul Bari Dewan and others*—Appellants.

v.

*Hrishikesh Mittra and others*—Respondents.

Appeal No. 104 of 1926, Decided on 31st July 1928, against original decree of Addl. Sub-Judge, Howrah, D/- 5th March 1926.

(a) Evidence Act, S. 104—Suit for establishing title and ejectment—Plaintiff claiming land in dispute under sale-deed—Defendants contesting the claim as holders of lakheraj property—Plaintiff has to prove that the land is within the geographical limits of the patni village—Burden of proving that the land is dedicated to a foundation as Niskar Pirattar then shifts on the defendants.

A dispute arose regarding lands which were claimed to be included in a pattah in favour of the plaintiffs granted under a sale-deed. The vendors were the daughter's sons of the original lessee. Being the expectant reversioners after the death of the widow of the original lessee a confirmatory lease was obtained in their favour. A mela used to be held at stated time in the year and the profits realised by the original lessee and after him the vendors of the plaintiffs. It was contested that the parcel of land was dedicated as Niskar Pirattar, and the income from the mela was utilized for the expenses of the foundation.

*Held*: that the most important question in such a case was whether the land in question was within the geographical limits of the village belonging to the zamindari of which patni was granted to the patnidars, the original lessors. If the lands were really within the ambit of the village then the burden of proving that the lands are Niskar Pirattar must rest on the defendants: A. I. R. 1922 P. C. 272, *Foll.* [P 460 C 2]

(b) Adverse possession—Acquisition of title—Evidence.

Mere holding of a mela and realisation of profits therefrom, even assuming that the



mela was held at the instance of fakirs who looked after a foundation does not prove their title to the land on which mela was held.

[P 462 C 1]

(c) Civil P. C., O. 16, R. 1—Summons to produce a document—Judge has no power to refuse to issue a summons at any stage.

The function of a civil Court is akin to that of a post office and it has no power to refuse to issue a summons at any stage. The only thing that the Court can do is not to adjourn a case for the production of a witness who is sought to be summoned at a late stage. In such a case the parties get the summons issued at their own risk.

[P 461 C 1]

(d) Civil P. C., S. 99—Refusal of summons under O. 16, R. 1—Party producing copy of document sought to be produced in Court but neither proving that it was original nor that it was true copy—There was no miscarriage of justice due to refusal.

Where a summons to a party to produce a document (chitta) was refused by the Court whereupon the party produced an alleged copy of the document sought to be produced but failed to prove that it was original or true copy compared with original.

*Held*: that there was no miscarriage of justice by such refusal.

[P 461 C 2]

(e) Evidence Act, S. 61—Use of document to settle disputes does not make it true copy.

That the man producing a document used the same to settle disputes between the villagers, and before him the document was in the possession of his father, does not make the document a true copy of the original (chitta).

[P 461 C 2]

*Sarat Chandra Roy, Nasim Ali, Babu Anil Ch. Roy Chaudhury and Norendra Nath Chaudhury*—for Appellants.

*Brojo Lal Chakraverty, Panchanon Ghosal and Urukram Das Chakraverty*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the defendants against the judgment and decree of the Subordinate Judge of Hooghly at Howrah by which he decreed the plaintiff's suit with regard to a plot of land situated within the putni mehal named Pir Seranga. The plaintiff's case shortly stated is that the land appertains to the tenancy of one Moti Lal Ghose who was the Naib of the previous putnidar of lot Seranga, and after his death a confirmatory lease was taken in favour of his daughter's sons during their minority by their father. These daughter's sons were expectant reversioners of Moti Lal's estate after the death of his widow. The daughter's sons Moti Lal, who may be described as the Sircars, were in possession of the land in question from whom the present plaintiff purchased the property by a deed dated 14th February 1920. When the plaintiff wanted to take

possession of this property there was a dispute raised by the defendants who claimed to be in possession of the property. That dispute led to a proceeding under S. 145, Criminal P. O., and the Magistrate found possession with the defendants and he made an order that they should be retained in possession until the plaintiff established his right to possession in the civil Court. The suit out of which the present appeal arises was for the purpose of establishing the plaintiff's title and for ejecting the defendants. The order of the Magistrate was dated 19th July 1921.

The defendants in their written statement denied the title of the plaintiff. They contested almost every statement of fact recited in the plaint. Their case was that the land in dispute along with other lands was dedicated as Niskar Pirattar as there was a very ancient foundation known as Hazrat Sultan Pir Sahab. This religious foundation was held in great sanctity by all classes of people in the locality, Hindus and Mahomedans, and a mela used to be held on the disputed land once a year which was frequented by every class of people and shops used to be held and the income taken for the purpose of the expenses of the foundation. The existence of this mela was admitted by both parties. The plaintiff's case was that the mela was founded by Moti Lal who used to realise the rents from the shopkeepers and after Moti Lal's death his son-in-law Chakku used to supervise the mela and realise the rents and after him the plaintiff's vendors. The defendants denied in their written statement that Moti Lal or Chhaku had any connexion with the mela. The most important question in such a case as this must be, in my opinion, whether the land is within the geographical limits of the village belonging to the zemindari of which a putni was granted to the putnidars, the original lessors, who were alleged to have granted a lease to Moti Lal. If the lands are really within the ambit of the village then the burden of proving that the lands are Niskar Pirattar lands must rest entirely upon the defendants. The latest authority for this proposition is the case of *Jagdeo Narain Singh v. Baldeo Singh* (1)

(1) A. I. R. 1922 P. O. 272—2 Pat. 38—49 I. A. 393 (P.O.).



The learned advocate for the appellants pressed two points strongly for our consideration in support of the appeal. He stated first that the Subordinate Judge had not found the title of the putnidars to the lands, that is to say, whether the lands were within the geographical limits of the putni mehal, and secondly, it was urged that it had not been proved that the disputed lands were included within the pattah in favour of the Sircars upon which the plaintiff based his claim. In opening the case on behalf of the appellants the learned advocate laid great stress upon a fact which he argued was an error of procedure on the part of the Subordinate Judge.

It was stated that the defendants called for a chitta in which the measurements of the different plots of land held by the tenants within the mouja Pir Seranga were recorded. They called for that chitta from the putnidar who is defendant 5 in the suit, but in the notice that was issued there was a mistake and instead of the actual date of the chitta 1256 B. S. the date given was 1276 B. S. That chitta was not produced by the zamindar. Thereupon in order to enable the defendants to produce a copy of the chitta the contesting defendants filed an application on 22nd February 1926 for issuing summons on the landlord to produce the chitta of 1256. The Subordinate Judge after recording his reasons in O. 61 rejected the prayer. It is contended and reasonably contended that the Subordinate Judge was not right in rejecting the prayer for issuing the summons. It is well-known that the function of the civil Court in issuing summons is akin to that of a post office, and has no power to refuse issue of summons. The only thing that the Judge can do is not to adjourn a case for the purpose of the production of the witness who is sought to be summoned at a late stage of the case. In all such cases the parties get summons issued at their own risk. They have to pay the costs. The Judge may fix a date for the witness to come to the Court according to the prayer of the party who asked for the summons. The case may be disposed of before that date. This is clearly a matter in the hands of the Judge, but in my opinion the Judge of a civil Court has no power to refuse to issue summons at any stage of the case. However, the point is whether there has been any

miscarriage of justice on account of the refusal of the Subordinate Judge to issue summons on the putnidar for the production of that chitta. If the landlord did not produce the chitta the defendants might have produced a copy of the chitta in order to establish their case, and as a matter of fact they did produce a paper which the witness who produced it professed to be a copy of the chitta. But during the course of his examination he could not say that it was a true copy of the chitta, which was compared with the original, and therefore the learned Judge did not accept it in evidence. It was further contended during the course of the argument that the document that was sought to be produced was not a copy but it was an original document. That was, however, not what the witness who produced the document said, nor was the proper custody of this document proved because the man who produced the document simply said that his father was a Morol and the document was with him and after his father it came into his possession. It used to be produced by him to settle any dispute between the villagers. That, however, does not make it a true copy of the original chitta and in my opinion the learned Judge rightly rejected that document. That chitta it is contended if accepted in evidence would have proved that in the chitta the land in dispute was mentioned as the mela land of Pir Saheb.

Now coming back to the two questions which I have set forth above as argued on behalf of the appellants, it appears that the defendants' witness admitted that this land was within the geographical limits of the zemindari as well as within the putni. This was stated by Khorshed Sardar, defendants' witness 1 and who appears to be a principal person on the side of the defendants. He says that the land in suit is towards the south-west of village Seranga, the proprietor is the Burdwan Maharaja and Tulsi Babu is the putnidar whose ancestors dedicated these moujas to Gopalji. That being so no further evidence was necessary to establish that the lands are within the putni moujah. Further more the thak map of the moujah has been produced in this case and the boundary of the moujah runs along the river which is also the southern boundary of the land in dispute. This fact being established the entire burden of proof that this is



Lakheraj Pirattar land shifts on the defendants, and on their side there is no evidence whatsoever except the holding of the mela once a year and the allegation that it is called Pir Saheb's land. As I have already stated there is a conflict of testimony as regards the realization of the profits of the mela. The Subordinate Judge has accepted the evidence that the profits of the mela were realized by Motilal and his successors after him and I do not see any reason to disagree from his view of the evidence. But in any case the mere holding of a mela for a few days in the year from what is known as Makar Sankranti day, even assuming that the mela was held at the instance of the Fakirs who looked after the foundation of the Pir Saheb, would not prove their title. They might have a right to hold the mela at the stated time if they had actually held the mela. On the other hand it is a fact that no Road Cess Return was filed by the defendants with regard to this land, no cesses paid and there is nothing to show except the bare statement of defendants' witnesses that this land is the lakheraj land of the Pir Saheb. Under these circumstances it is unnecessary to go again over the grounds of the judgment of the Subordinate Judge on this question and I agree with his conclusion that the property belongs to the putnidar and he was entitled to grant a lease of it and that it was not the lakheraj property of the Pir Saheb.

With regard to the second question, whether the disputed lands were included in the plaintiff's pattah or not, it has been found by the Subordinate Judge that the pattah mentioned the lands in suit as the mela lands and the Subordinate Judge held that for over 50 years the mela land has been in the possession of Motilal and thereafter of his son-in-law on behalf of Moti Lal's heirs. That is one matter of identification. Another piece of evidence which the Subordinate Judge has not noticed but which has been pointed out to us by the learned advocate for the plaintiff-respondent, is, that one of the witnesses for the defendants Sukhamay Bakshi took lease of the lands by two kabuliats from the landlord Exs. 11 and 18, one in 1916 and the other in 1920. These lands were situated on two sides of the disputed land to the east and to the west, and giving the boundaries of these two plots, the land in dis-

pute has been described as the land of the Sircars. That is also a link connecting the Sircars' pattah with the land in dispute. The points which have been argued before us are therefore of no substance and this appeal must therefore stand dismissed with costs.

**Bose, J.**—I agree.

M.N./R.K.

*Appeal dismissed.*

## A. I. R. 1929 Calcutta 462

MUKERJI AND BOSE, JJ.

*Nazar Ali*—Defendant—Appellant.

v.

*Indra Kumar Sutar and others*—Plaintiffs—Respondents.

Appeal No. 406 of 1926, Decided on 26th June 1928, against appellate decree of Sub-Judge, Chittagong, D/- 10th September 1925.

Bengal Tenancy Act, Ss. 49 (b) and 85—Suit for ejectment—Solenama in previous suit enhancing rent allowing defendants to continue generation after generation—Solenama created new lease and so was compulsorily registrable but registration was barred under S. 85—Embodying the lease in decree does not make difference in application of Registration Act, S. 17 (1) (d).

The plaintiffs who were raiyats sued the defendants under-raiyats, in ejectment on service of a notice to quit under S. 49. The defendant pleaded that the plaintiffs were not entitled to evict him relying upon a decree passed on the basis of a solenama in a previous suit for rent which the plaintiffs had instituted against him. By the solenama, the plaintiffs in consideration of an enhancement of rent, consented to allow him to hold this land permanently.

*Held*: that as it was not a term of the solenama that the defendant had the right to hold from generation to generation or that any such existing right was being admitted by it, it was impossible to escape from the conclusion that the solenama created a new lease in respect of land which the defendant held from before. It would not be operative as a lease unless it was registered under S. 17, sub-S. (1), Cl. (d), Registration Act, but S. 85, Cl. (2), Ben. Ten. Act, bars its registration. The fact that this lease was embodied in a decree did not make it any the more operative as a lease because S. 17, sub-S. (2), Cl. (6) excepts documents falling within Cls. (b) and (c) and not Cl. (d) of sub-S. (1): *A. I. R. 1927 Cal. 913* and *A. I. R. 1921 Cal. 451 (F. B.)*, *Rel. on*; *A. I. R. 1926 Cal. 666*, *Ref.* [P 463 C 2]

*Chandrasekhar Sen*—for Appellant.

*Charuchandra Sen*—for Respondents.

**Judgment.**—The plaintiffs alleging that they are raiyats and that the defen-



dant holds under them as an under-raiyat sued the latter in ejectment on service of a notice to quit under S. 49, Ben. Ten. Act. The defendant denied the service of the notice and pleaded that the plaintiffs are not entitled to evict him. He rested his case upon a decree passed on the basis of a solenama in a previous suit for rent which the plaintiffs had instituted against him. By the solenama, the plaintiffs in consideration of an enhancement of rent,—his case being that the rent previously payable was Rs 17 and it was enhanced to Rs. 25 and odd,—consented to allow him to hold this land permanently. The trial Court dismissed the suit, holding that service of the notice was not proved and that the plaintiffs are not entitled to ignore the solenama. The Subordinate Judge on appeal has reversed that decision and decreed the suit. The defendant has appealed to this Court. The Subordinate Judge has found for the plaintiffs on the question of service of the notice. This finding sets that matter at rest.

As regards the solenama and the decree, the Subordinate Judge has observed that a compromise decree is none the less a contract, and treating it as such he has held in substance that as in the solenama it was stated that the plaintiffs had raiyati right and the defendant dar-raiyati right, the lease that was created by the solenama came within the purview of the first of the three propositions laid down in the Full Bench decision of this Court in the case of *Chandra Kanta Nath v. Amjad Ali Haji* (1).

It is contended on behalf of the appellant that the view taken by the Subordinate Judge was erroneous and he relies for this contention upon two decisions of this Court, one in the case of *Jagadish Chandra Mukerji v. Rasik Mondal* (2), and the other an unreported case, viz., the decision in S. A. No. 506 of 1924, dated 21st April 1926. The respondents, on the other hand, rely on the case of *Rajani Kanta Banerjee v. Raj Kumari Dasi* (3).

The decree in the rent suit recites that the suit is decreed between the parties in accordance with the terms of the solenama. The material terms of the solenama were as follows: That the posses-

sion of the defendant in the lands would continue as before on the defendant paying a rent inclusive of cess, etc., of Rs. 25 and odd; that on the defendant giving the plaintiffs a goat at the time of the Saradiya Puja a deduction of Rs. 2-8 would be allowed from the rent; that the defendant would hold as under-raiyat under the raiyati of the plaintiffs; that the defendant would continue to hold the land from generation to generation on payment of such rent; that, in case of default damages would have to be paid at four annas per rupee; that no payment would be valid except on dakhilas, etc., etc. The defendant's case is that the rent that he used to pay before was Rs. 17 and a new rent was fixed by the solenama. It is not a term of the solenama that the defendant had the right to hold from generation to generation from before or that any such existing right was being admitted by it. It is, therefore, impossible to escape from the conclusion that the solenama created a new lease in respect of land which the defendant held from before. It would not be operative as a lease unless it was registered under S. 17, sub-S. (1), Cl. (d), Registration Act, but S. 85, Cl. (2), Ben. Ten. Act bars its registration. The fact that this lease was embodied in a decree did not make it any the more operative as a lease because S. 17, sub-S. (2), Cl. (6) excepts documents falling within Cls. (b) and (c) and not Cl. (d) of sub-S. (1) of S. 17: see *Rajani Kanta Banerjee v. Raj Kumari Dasi* (3). The case also comes directly within the first of the propositions laid down by the Full Bench in the case of *Chandra Kanta Nath v. Amjad Ali Haji* (1), and there is no estoppel.

The two cases relied upon by the appellant appear to have overlooked the distinction that there is between a document coming under Cl. (d) and one coming under Cl. (b) or Cl. (c), sub-S. (1), S. 17, when incorporated in a decree. The decree did not declare any rights, but merely superadded to the contract between the parties the command of a Judge, and it did not take the rights of the parties any further than the contract itself. In the said two cases something has been said as to the solenama having been used for proving an admission. In the solenama before us there was, as already stated, no admission of any exist-

(1) A. I. R. 1921 Cal. 451=48 Cal. 783 (F. B.).

(2) A. I. R. 1926 Cal. 666.

(3) A. I. R. 1927 Cal. 913.



ing right, but only a statement of the right that was being created by it.

We are of opinion that the view taken by the Subordinate Judge is correct and that this appeal, therefore, should be dismissed with costs.

M.N./R.K. *Appeal dismissed.*

### A. I. R. 1929 Calcutta 464

CAMMIADE AND S. K. GHOSE, JJ.

*Jadabendra Nandan Das Mahapatra and others*—Defendants—Appellants.

v.

*Behari Mula and others*—Plaintiffs—Respondents.

Appeal No. 1477 of 1926, Decided on 24th July 1928, against appellate decree of Sub-Judge, Midnapur, D/- 30th January 1926.

**Fishery**—No permanent right to, unless grant was express, implied or customary—Mere recording of such right in chitta does not prove permanent or lost grant.

In order that there should be a permanent right of fishing it is necessary that there should be a grant or that it should be possible to hold that a grant was implied. Mere recording in the Government chitta that certain persons have been given settlement of fishing rights does not prove that there was a permanent grant, nor does it lead to the presumption of a lost grant. It should be shown that it was at least the practice of Government to give permanent leases of fishing rights.

[P 464 C 2]

*Gunada Charan Sen and Gopendra Nath Dass*—for Appellants.

*Santosh Kumar Pal for Pramatha Nath Bandopdhaya*—for Respondents.

**Judgment.**—This is an appeal by the defendants in a suit relating to fishery rights in a portion of a khal. The plaintiffs claim to have fishing rights over a certain area, which has been recorded in the Record-of-Rights of the year 1898 as being in the khas possession of the defendant, who are the landlords. The khal lies within the khas mehal, of which the defendants are temporary settlement-holders under Government. The plaintiffs alleged that they had been dispossessed in 1923 by certain persons set up by the defendants to fish in the khal. The first Court held that the plaintiffs had tenant-right in the fishery on a portion of the khal claimed by them. The second Court has declared

the right of the plaintiffs to fish in the whole of that part of the khal, and it also declared that their rights are permanent.

An objection is taken in appeal to the declaration that the plaintiff's right is permanent. The learned Judge has given no satisfactory reason for coming to the finding that the tenancy of the plaintiffs is permanent. He states that so far back as the year 1833 the predecessor of the plaintiffs was recorded in the Government chitta of the khas mehal as having settlement of the fishery to that portion of the khal, and that subsequently, in the chitta of the year 1869, the son of that previous settlement-holder was recorded as a fisherman with fishing rights. Apart from that there is nothing that the learned Subordinate Judge could find to support the finding arrived at by him. In order that there should be a permanent right it is necessary that there should be a grant or that it should be possible to hold that a grant was implied. Mere recording in the Government chitta that certain persons have been given settlement of fishing rights does not prove that there was a permanent grant, nor does it lead to the presumption of a lost grant. The plaintiffs should have shown that it was at least the practice of Government to give permanent leases of fishing rights. In the absence of some sort of evidence from which one can infer that the settlement of the predecessor of the plaintiffs could have been permanent, the inference drawn by the Subordinate Judge from the chitta cannot be supported. The appeal is, therefore, allowed and the decree of the Subordinate Judge is modified to this extent that the fishery rights of the plaintiffs shall be declared not to be permanent. In other respects the decree of the lower appellate Court is confirmed. In the circumstances of the case we make no order as to costs in this appeal.

M.N./R.K.

*Decree modified.*



## \* A. I. R. 1929 Calcutta 465

RANKIN, C. J. AND MUKERJI, J.

*Shibnath Singh Ray*—Defendant—Appellant.

v.

*Saberuddin Ahmed* — Plaintiff—Respondent.

Appeal No. 158 of 1926, Decided on 22nd June 1928, against appellate decree of Sub-Judge, Nadia, D/- 5th September 1925.

\* (a) Civil P. C., O. 21, R. 57—Object of Attachment before judgment does not come to end because subsequent application for execution proved infructuous—Civil P. C., O. 38, R. 11.

Order 21, R. 57, was intended to provide a remedy for the grievance or inconvenience which is apt to arise, where, after an attachment in execution, the application for execution cannot further be proceeded with by reason of the decree-holder's default. And it is no part of the intention of this rule to say that an attachment before judgment, which existed before any application could be made in execution, and which prima facie would continue to have effect if no application for execution had been made, should fall to the ground merely because a subsequent application for execution has come to nothing: 16 C. W. N. 1907, *Foll.*; A. I. R. 1924 *Mad.* 494, *not Foll.*; 29 Cal. 773; 33 Cal. 633, *Dist.*; A. I. R. 1921 Cal. 101, *held obiter.* [P 466 C 1, 2]

(b) Civil P. C., O. 38, R. 11—Re-attachment is not waiver of attachment before judgment.

A re-attachment in execution is not of itself a waiver or abandonment of attachment before judgment: 6 Cal. 123, *Ref.* [P 457 C 2]

\* (c) Civil P. C., O. 38, R. 11—Attachment before judgment does not merge in subsequent attachment.

The attachment before judgment does not merge in the subsequent attachment and become subject to all the infirmities of the subsequent attachment. The effect of two attachments on the same property is that the property is under attachment but a person entitled to the benefit of either one of the attachments, remains, in the absence of abandonment, entitled to it. No doctrine of merger is applicable: A. I. R. 1924 *Mad.* 494, *Diss. from.* [P 467 C 2]

*Radhabenode Pal and Bhupendra Kishore Basu*—for Appellant.

*Nasim Ali*—for Respondent.

**Rankin, C. J.**—This is a second appeal by defendant 1 from the concurrent decisions of the Subordinate Judge of Nadia and the Munsif of Ranaghat. The plaintiff's suit was for a declaration of title to certain land, for ejectment of defendant 1 and for setting aside the purchase of the suit land by defendant 1 on 1929 C/59 & 60

12th May 1922, in execution of a decree against defendant 2. The plaintiff's claim is rested on a prior purchase made by him at a private sale on 29th September 1921, from defendant 2. The question between the parties turns upon whether or not, on the date of the plaintiff's purchase, the property was under attachment. The material dates are as follows:

The property was attached before judgment on 10th August 1919; a decree was passed on 10th June 1920; an appeal from the decree was dismissed on 9th February 1921; the decree-holder applied for execution on 14th June 1921; and took out a fresh attachment on 24th June 1921; this execution proceeding was ultimately dismissed for default on 6th September 1921; another application for execution was made on the 19th of that month.

This was the position at the date of the plaintiff's purchase. After the plaintiff's purchase, the decree-holder again took out a fresh attachment on 3rd December 1921, and the property was ultimately sold to the decree-holder on 12th May 1922. Defendant 1 is the heir of the decree-holder.

Now the question is whether the attachment before judgment made on 10th August 1919, was subsisting on 29th September 1921 notwithstanding that the application for execution brought on 14th June 1921, had been dismissed for default on 6th September. The Courts below have held that the attachment before judgment had by that time ceased to exist, that there had been a re-attachment on 24th June 1921, which, under R. 57, O. 21, Civil P. C., came to an end when the application for execution was dismissed on 6th September.

The defendant-appellant relies upon the case of *Ganesh Chandra Adak v. Banwari Lal Roy* (1). It does not appear from the report of that case that after the attachment before judgment the property had been re-attached in execution. But it was held that an attachment before judgment subsists for the purpose of a subsequent execution, notwithstanding that the first application for execution has been dismissed. It was said that the provisions of R. 57, O. 21, have no application to a case in which an order for attachment before judgment

(1) [1912] 16 C. W. N. 1037=14 I. C. 345=16 C. L. J. 86.



has been obtained. On behalf of the respondents, it is contended, first, that by re-attaching in execution, the decree-holder has waived or abandoned the attachment before judgment; secondly, that the attachment before judgment merges in the subsequent attachment; thirdly, that on a true construction of R. 57, O. 21, an attachment before judgment comes to an end when the application for execution is dismissed under that rule, fourthly, that in the present case, under the first application for execution a sale of the property had been held, though this did not ultimately proceed to completion by sale certificate and that the effect of that sale was to make the attachment before judgment an attachment in execution: *Arunachalam Chetty v. Periaswami Servai* (2).

On the third of these propositions, it is contended that *Ganesh Chandra's* case (1), was wrongly decided and that the decision of the Full Bench of the Madras High Court in *Meyyappa Chettiar v. Chidambaram Chettiar* (3), should be followed. This is a substantial point and we must carefully consider whether we ought to dissent from *Ganesh Chandra's* case (1) and refer this matter to a Full Bench!

In my opinion the decision in *Ganesh Chandra's* case (1) was right and I agree in the result arrived at by the dissenting judgments of Schawbe, C. J., and Wallis, J., in *Meyyappa's* case (3), though not in all the arguments which were adduced by them. R. 57, O. 21, was a new provision introduced in 1908. It is evident from the language of the rule itself, and it is still more evident from the circumstances under which it was passed, that it was intended to provide a remedy for the grievance or inconvenience which is apt to arise, where, after an attachment in execution, the application for execution cannot further be proceeded with by reason of the decree-holder's default. This was, and still is, a very common case. This decree-holder makes some informal arrangement to give the judgment-debtor time without obtaining full satisfaction of the decree, the application for execution is not further prosecuted; it is not withdrawn; neither party attends. In these circumstances, the object of the

rule is to say that the Court must make either an order for adjournment or an order of dismissal. The reason why it was necessary to require the Court, if it did not adjourn a proceeding to a definite date, to dismiss the application for execution formally and definitely can be amply illustrated from the decided cases.

In the absence of a definite order of dismissal the files of the Courts became encumbered with a number of applications for execution which were waterlogged and derelict, and a practice arose whereby such applications were ordered to be "struck off." This was a practice not justified by the Code and in cases where attachments in execution had already been ordered, the question arose whether the effect of an order "striking off" was that the attachment made upon application for execution was itself struck off or whether it remained notwithstanding such an order. Many other awkward and important questions arose out of this practice and the object of R. 57 was to ensure that this illogical and inconvenient practice should be stopped. Applications for execution were to be definitely dismissed if they were not adjourned to a future date. The object of the last sentence in R. 57 is to settle the question whether, when the application in execution is dismissed, any attachment made under that application should fall to the ground or should subsist, and the legislature has provided that it is to fall to the ground. In these circumstances, it seems reasonably clear to me that it is no part of the intention of this rule to say that an attachment before judgment, which existed before any application could be made in execution, and which *prima facie* would continue to have effect if no application for execution had been made, should fall to the ground merely because a subsequent application for execution has come to nothing.

I quite agree with Courts-Trotter, J., in *Meyyappa's* case (3), that this is not a question of giving a strict construction to a penal provision. Still the phrase "attached in execution of a decree" can only be extended beyond its proper meaning by reason of an implication required by the object of the rule or else by showing very clearly that it is required by some other rule of a germane character. *Prima facie* the "mischief" of the rule involves no reference to attachments be-

(2) A. I. R. 1921 Mad. 163=14 Mad. 902 (F.B.).

(3) A. I. R. 1924 Mad. 491=47 Mad. 483 (F.B.).



fore judgment, A perusal of the judgments in the *Madras* case does not disclose to me any ground upon which it could be held that unless upon the dismissal for default of an application for execution the attachment before judgment shall come to an end the true intention of any other rule is interfered with. Indeed I do not gather that any of the judgments of the Judges who formed the majority in that case claims that any other rule necessitates this for its own sake. What is argued is that they throw light upon the meaning of R. 57. In this way they attribute to R. 57 a meaning which is foreign to its purpose.

Again by R. 11, O. 38, it is provided that

"it shall not be necessary upon an application for execution to apply for a re-attachment of the property."

From this it is contended that, upon an application for execution being made, the attachment before judgment becomes an attachment in execution and nothing more, so as to be subject to all the infirmities of an attachment in execution. Doctrines of merger and other theories are ingrafted upon the simple language of the Code that it shall not be necessary to re-attach. By reason of this provision no execution based upon an attachment before judgment can be distinguished in validity or character from an execution based upon an attachment in execution unless indeed some particular enactment can be seen to be addressed to this distinction. There is, however, nothing in R. 11, O. 38, to give colour to the view that for the purposes of R. 57, O. 21 "attached in execution" is a phrase which covers attachment before judgment.

Upon the third contention of the plaintiff-respondent, I am, therefore, of opinion that the decision of this Court in *Ganesh Chandra's* case (1), was correct and that there is no necessity to send this matter to a Full Bench.

As regards the other contentions, it seems to me that they have little substance. At one time it was the practice to re-attach in execution, although an attachment before judgment was subsisting. In *Ramkrishna Das Surrowji v. Surfunnissa Begum* (4), this practice

was referred to by the Judicial Committee. The question is whether a re-attachment in execution, notwithstanding the terms of O. 38, R. 11, is of itself a waiver or abandonment of the attachment before judgment. I can see no ground for saying as a proposition of law that a man who does something which is not necessary must be taken to abandon any right. In this case there is neither an express abandonment nor any reason to suppose that abandonment was intended. It was indeed manifestly contrary to the interest of the decree-holder.

As regards the contention that the attachment before judgment merges in the subsequent attachment, and, therefore, becomes subject to all the infirmities of the subsequent attachment, I respectfully differ from the opinion expressed by Ramesam, J. in the *Madras* case (1). The effect of two attachments on the same property is merely that the property is under attachment, no doubt, but a person entitled to the benefit of either one of the attachments remains, in the absence of abandonment, entitled to it. No doctrine of merger seems to me to be in point.

As regards the respondent's fourth point, I fail to see why, because an ineffective sale was held under the first application for execution, it can be contended that the provisions of R. 57, O. 21, become applicable to an attachment before judgment. The provisions of R. 11, O. 38, may well operate to prevent its being said that a sale in execution of a decree is without any basis of attachment in execution, even although the decree-holder has availed himself in execution of the attachment before judgment. This argument appears to me to be subject to the same objection as applies to many of the arguments adduced in the judgments in *Meyyappa's* case (3). It ignores the scope and purpose of the rule which is to be interpreted, namely R. 57, O. 21.

In my opinion this appeal should be allowed and judgment entered for defendant 1 with costs in all Courts against the plaintiff.

**Mukerji, J.**—I fully concur and desire to add a few words as regards the three cases of this Court upon which reliance has been placed on behalf of the plaintiff-respondent to induce us to dissent from the view taken in the case of *Ganesh*

(4) [1830] 6 Cal. 129=7 I. A. 157=1 Sar. 151 (P. O.).



*Chandra Adak v. Banwari Lal Ray* (1). One of those cases in *Bhugwan Chunder Kritiratna v. Chunāra Mala Gupta* (5). In that case the question that arose was whether, under S. 285, Civil P. O. (Act 14 of 1882), the Court which attached the property under execution before judgment, ranked with a Court which attached it after decree, in the application of that section and it was held that it did. The only relevancy of this decision is that in the section aforesaid the words "has been attached in execution" occurred, which, however, have been altered to "is under execution" in the corresponding section, namely S. 63 of the present Code, for reasons which have no bearing upon the present question. The next case is *Sewdut Roy v. Sree Canto Maity* (6), which only favours the view that, on an application for execution being made, attachment effected before judgment became an attachment in execution for the purposes of S. 295, Civil P. C. (Act 14 of 1882). The two attachments may be treated as on the same footing and persons who are affected by such attachment may be in the same position so long as the attachments subsist, but from that it hardly follows that all the incidents relating thereto must necessarily be identical. Indeed the Code itself treats them as different in several important respects. As regards the remarks of Mookerjee, J. in the third case, on which reliance has been placed, namely, that of *Protap Chandra Gope v. Sarat Chandra* (7), they appear to be obiter, as the case itself was one in which no question of attachment before judgment arose. The remarks are in these words :

"In a case of attachment before judgment, the general rule applies that a revival of execution proceedings does not operate as a revival of the attachment so as to prejudice the rights of strangers who have, in the interval, acquired a title to the property": *Patringa Koer v. Madhava Nand Ram* (8) and *Mahabharat Dutta v. Surja Kanta De* (9).

The remarks do not necessarily indicate that an attachment before judgment falls with the dismissal of an execution petition for default, and the cases on which they purport to rely had nothing

to do with such an attachment. In this Court, the case of *Ganesh Chandra Adak v. Banwari Lal Ray* (1), does not appear to have been dissented from. I have carefully read the judgments of the learned Judges of other Courts who have taken a different view, but I am not convinced that we should dissent from the view that has been uniformly taken by this Court for a fairly long time.

M.N./R.K.

*Appeal allowed.*

### \* A. I. R. 1929 Calcutta 468

SUHRAWARDY AND GRAHAM, JJ.

*Ahmed Ali Sheik*—Petitioner.

v.

*Sabed Sardar and others*—Opposite Party.

Criminal Revn. No. 1142 of 1928, Decided on 8th March 1929, against order of Dist. Magistrate, Faridpur, D/- 11th October 1928.

\* Criminal P. C., S. 145—Court is not confined to police report in starting proceedings, nor bound to rely on the whole of it.

Though it is the imminence of a breach of the peace as disclosed in the police report which creates jurisdiction under S. 145, it cannot be held that the Magistrate is confined within the four corners of the report. It is his duty upon all the material before him to decide whether proceedings under S. 145 are necessary or not. And even if the Magistrate relies on the police report for starting proceedings under S. 145, he need not rely on the whole of it. The Magistrate is not bound to accept the version given by the police beyond what he requires for the support of his order under S. 145. If he is satisfied from the police report that there is a likelihood of a breach of the peace concerning any land, he is entitled to draw up proceedings without accepting the truth of the whole of the police report: *A. I. R. 1929 Cal. 311, Dist.*; 3 *P. L. J.* 287; 28 *All.* 406, *Ref.* [P 469 C 1; P 470 C 1, 2]

*Narendra Kumar Basu and Manindra Nath Majumdar*—for Petitioner.

*Nirmal Chandra Chakrabarty*—for Opposite Party.

**Graham, J.**—This rule was issued to show cause why certain proceedings under S. 145. Criminal P. C. should not be quashed. The main ground which has been urged before us is that inasmuch as the police report disclosed the fact that the first party was in possession of the land, and that the second party were aggressors and were trying to disturb his possession, the learned Magistrate had no jurisdiction to make an order under S. 145, and that the proper course for him to adopt was to issue an injunc-

(5) [1902] 29 Cal. 773=1 C. L. J. 97.

(6) [1906] 33 Cal. 639=10 C. W. N. 634.

(7) A. I. R. 1921 Cal. 101.

(8) [1911] 14 C. L. J. 476=12 I. C. 65=16 C. W. N. 332.

(9) [1918] 3 Pat. L. J. 310=45 I. C. 589= (1918) P. H. C. C. 343.



tion under S. 144, Criminal P. C., or to bind down the second party under S. 107, Criminal P. C. We have been referred to some decided cases in support of this contention and amongst them to a recent decision of our own in *W. Stewart v. Hubert Hughes* (1). The facts of that case are distinguishable from the present as the police report itself plainly showed that there was and had been for some time no immediate apprehension of a breach of the peace but only a possibility of such breach at some future date.

The real question here is whether the materials contained in the police report were sufficient to justify the order drawing up the proceedings, and whether taken as a whole they gave rise to an apprehension that a breach of the peace might occur. On behalf of the petitioner stress has been laid upon that portion of the report which states that the second party did not claim the land, and upon a later passage stating that in the opinion of the Sub-Inspector the first party was in possession and that Sabed Sardar, a member of the second party, was the engineer of all the goimals, that he had no land in the disputed plot but hoped to get some land through Kuram Khan by creating possession by force.

Now in the first place, it is to be observed that while the trend of the decisions is that it is the imminence of a breach of the peace as disclosed in the police report which creates jurisdiction, it cannot in my opinion be held that the Magistrate is "cabined, cribbed and confined" so to speak, within the four corners of the report. It is his duty upon all the material before him to decide whether proceedings under S. 145, are necessary or not. The words in the section are:

"is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land etc."

The foundation of his jurisdiction is not, therefore, solely the police report, and it would manifestly be wrong that his power to take action should be made dependent upon the opinion of the Sub-Inspector of police. Speaking for myself, I am certainly not prepared to subscribe to the proposition in its extreme form that it is the police report and the police report alone which gives jurisdic-

tion. Even so, however, and looking to the police report which was submitted in this case, what do we find? It is stated therein that from the past records it appeared that there was long standing enmity between the parties in respect of their neighbouring lands and the land in dispute and that several criminal cases had been instituted and disposed of. It is true as I have already said above that the report mentions that the second party did not claim the land. Then further on the report states that on enquiry the Sub-Inspector learnt that there was an actual immediate serious apprehension of a breach of the peace by the second party. Finally he says that under the circumstances he prays that an immediate injunction may be issued under S. 144, Criminal P. C., against the second party as a serious apprehension of a breach of the peace is apprehended. The Magistrate after having perused this report considered that the proper course was to draw up proceedings under S. 145, and he accordingly did so. It appears to me that this report undoubtedly does disclose that there appeared to be a reasonable apprehension of a breach of the peace. It is true that the Sub-Inspector has expressed his personal opinion that one of the parties was in possession and that the other was merely trying to oust him. But taking the report as a whole it seems to me that it cannot be said that the Magistrate was not justified in drawing up the proceedings.

There is one other matter which may be mentioned and it is this: that the learned Magistrate also appears to have based his decision to some extent upon a map which was filed in connexion with the original case under S. 145. The learned advocate for the petitioner has pointed out that this map is not on the record, and has urged that it could not have been before the Magistrate at the time when he drew up the proceedings. But this map has been referred to in the explanation which was submitted by the trying Magistrate to the District Magistrate, and it may fairly be presumed I think that it was before the Magistrate when he made his order. No doubt the map was in the record of the previous case under S. 145; and it seems probable that the record of that case was called for and perused by the Magistrate before he made the order which is complained

(1) A.I.R. 1929 Cal. 341.



of. Having regard to all the facts and circumstances of the case and the materials on the record in my judgment the order was a legal and proper order and the rule should be discharged.

**Suhrawardy, J.**—I agree. The facts seem to be that a police report was submitted to the Magistrate in which it was stated that there was a likelihood of a breach of the peace inasmuch as the first party was in possession of certain lands from which the second party was attempting to dispossess them. Against this report of the police there was a protest or narazi petition filed in which the correctness of the police report that the first party was in possession was disputed. The second party in fact claimed to be in possession of the land in dispute. This narazi petition appears to have reached the Magistrate before he had drawn up proceedings under S. 145, Criminal P. C. On these materials before him he drew up the proceedings. It cannot be said that he had not sufficient materials before him to apprehend that there was a dispute concerning any "land within the local limits of his jurisdiction." It seems to have been argued on behalf of the petitioner that if the Magistrate relied on the police report for starting proceedings under S. 145, Criminal P. C., he must rely on the whole of it. I cannot agree with this construction. The words are "a dispute likely to cause a breach of the peace concerning any land and so." If one party is in possession and the other is trying to dispossess him, it is a dispute concerning land. But it would be a sound exercise of discretion if the Magistrate has reason to believe that one party is in possession to pass prohibitory order against the party which is trying to disturb the peaceful possession of the other party. *Ganpat Singh v. Emperor* (2) and *Emperor v. Ram Baran Singh* (3). But I am not prepared to go so far as to hold in such a case that the Magistrate had no jurisdiction to start proceedings under S. 145, Criminal P. C. It may be more proper to take preventive proceedings under S. 145, even in such a case and maintain the party in possession than to bind the other party under S. 107, Criminal P. C. In my opinion,

the Magistrate is not bound to accept the version given by the police beyond what he requires for the support of his order under S. 145. If he is satisfied from the police report that there is a likelihood of a breach of the peace concerning any land he is entitled to draw up proceedings without accepting the truth of the whole of the police report. In this case in my opinion there were sufficient materials before the Magistrate to hold that there was likelihood of a breach of the peace and the question of possession of the land in dispute was not so clear as to compel the Magistrate to take action under S. 144, or S. 107, Criminal P. C. Let the record be sent down.

M.N./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 470

RANKIN, C. J., AND C. C. GHOSE, J.

*J. C. Galstaun*—Defendant — Appellant.

v.

*Pramatha Nath Roy and others* — Plaintiff—Respondents.

Appeal No. 645 of 1927, Decided on 7th March 1929, against appellate decree of Addl. Dist. Judge, 24 Parganas, D/- 19th November 1926.

(a) Civil P. C., S. 152—Consent decree.

An application under S. 152 to amend the consent decree on the ground of fraud is entirely outside the section. [P 471 C 2]

(b) Civil P. C., S. 151—Amendment of decree on ground of fraud — Separate suit will lie — S. 151 cannot be invoked.

If a party desires to have a consent decree amended or vacated upon the ground that it was fraudulently procured his proper course, and indeed his only course, is to proceed by separate suit for the purpose. There is no justification for invoking S. 151 at all. [P 472 C 1]

(c) Civil P. C., O. 47—Review of consent decree on ground of fraud is not competent.

It is not competent under O. 47 to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud: 4 P. L. J. 205, *Foll.* [P 472 C 2]

(d) Civil P. C., O. 47, R. 1 — "Any other sufficient reason"—Meaning explained.

These words are not unlimited and must be taken to point to a reason which is sufficient on grounds at least analogous to those mentioned in the rule: A. I. R. 1922 P. C., 112, *Foll.* [P 472 C 2]

*B. C. Mitter, C. C. Biswas and Manindra Kumar Bose*—for Appellant.

*D. N. Chakravarty, S. C. Basak and Jaten Mohan Bose*—for Respondents.

(2) [1918] 3 Pat. L. J. 237=47 I. C. 76=4 Pat. L. W. 357.

(3) [1906] 28 All. 406=(1903) A. W. N. 61.



**Rankin, C. J.**—In this case the appellant, J. C. Galstaun, was defendant in title suit No. 3 of 1918 in the Court of the Subordinate Judge at Alipore. The case had reference to certain land situate to the south of premises belonging to the appellant and was settled in terms of a petition of compromise filed on 28th November 1918.

Reading the petition of compromise as it now stands, and as it stood on the date of the decree, the first word of the third line on the third page is the word "whole" and the effect of the petition so read has been held to be that while the respondents were to give certain land to the appellant the appellant was to give in exchange an equal quantity of land from the land abutting certain roads, but if this land of the appellant was not sufficient to equalize in area the land which the appellant was to receive, then the appellant would pay for the whole of the land which he was to receive at a certain price. The respondent's contention is that the word "whole" in the place where it occurs as above mentioned has been substituted for the word "balance" the real bargain between the parties being that the appellant was to give to the respondents from his land enough to equalize in area the land which he was to receive, but that if he had not enough land at the place specified he should give what he had and pay the respondents for the balance. It appears that the land which the appellant was to get by this exchange was an area of about  $8\frac{3}{4}$  cottas and that the land which the appellant had at the place above-mentioned was short of that area by about two cottas.

The respondents, as plaintiffs, made an application in execution to enforce the consent decree, and it appears that they contended, first that the word "whole" should be "balance" and secondly that even if the consent decree were read as it stands the true meaning and intent thereof was to the effect that the appellant should give all the land he had at the place mentioned and should pay for the shortage only. The execution matter came before this Court on appeal and it was determined between the parties that as the decree stood its true construction was that the present appellant was to pay money compensation for the entire  $8\frac{3}{4}$  cottas. The

Court, however, took notice of the fact that the present respondents were contending that the compromise petition had been fraudulently tampered with and that the consent decree had been in this way fraudulently obtained by alteration of the word "balance" into the word "whole." The Court pointed out that such a question could not be raised in execution and went on to say that :

"any amendment on the ground that there was fraud in the matter must be made by the Court in the suit in which the decree was passed. It will be open to the Roys to make such application as may be necessary to the Court to make an enquiry in the matter."

The present respondent thereupon made an application before the learned Subordinate Judge for amendment of the decree alleging that the word "balance" had been fraudulently altered in the compromise petition. This application was not brought as an application in review under O. 47, Civil P. C.; indeed it was brought upon the eight anna Court-fee stamp whereas an application in review requires an ad valorem stamp of the same amount as the plaint. It would appear to have been contended by the present respondents that the application was brought under S. 152, Civil P. C., but it is clear that the case made is entirely outside that section. S. 151 has also been put forward as a section which governs and authorises the application for amendment of this consent decree upon the ground that the decree as it stands had been fraudulently obtained.

Accordingly, when the present appellant appealed to the District Judge against the order amending the decree he was made to face a preliminary objection on the part of the respondents to the effect that no appeal lay from the order complained of. He did his best to persuade the District Judge that as an order amending consent decree was, when made on contest, much the same in effect as an order directing after contest that an adjustment of suit be recorded under O. 23, R. 3, Civil P. C., one appeal at least should be given to him as it is given to a party against whom it has been held that a suit has been adjusted. This argument from analogy was not accepted by the District Judge who further held that under S. 96 of the Code, it was not possible to appeal from a consent decree. As O. 43,



of the Code does not specify orders made under S. 151 of the Code as being orders from which an appeal shall lie, the appeal to the District Judge was rejected as incompetent.

It appears to me that in these circumstances, it is necessary to examine the propriety of the procedure adopted by the respondents in this case. The order of the Subordinate Judge not only affects the proprietorship of some 6 cot-tas of land in Calcutta but also convicts the appellant of fraud, and indeed of a very grave fraud, not lacking in incidents which would bring it within the scope of the criminal law. If the appellant is to be told that there is no appeal whatever from this decision it is a serious matter for him. Even if the case could be regarded as within O. 23, R. 3, the appellant's right would be restricted to an appeal to the District Judge as no second appeal lies from an order made under this rule cf. S. 104, Sub-S. (2), Civil P. C. :

Now, it appears to me that if a party desires to have a consent decree amended or vacated upon the ground that it was fraudulently procured, his proper course and indeed his only course, is to proceed by separate suit for the purpose. The matter is certainly grave enough to deserve a separate suit. The questions which have to be decided are entirely different from those at issue in the original suit. The relief sought is a very well recognized form of relief appropriate to a suit. In English practice it is old law that a fresh action is necessary to set aside a consent decree upon the ground of fraud and that such relief is not properly sought in an action of review. It appears to me that S. 152 of the Code which is confined to clerical or arithmetical mistakes and to an accidental slip or omission, is based upon this general principle, and that S. 151 is in no way intended as a violation of that principle. If the relief can be properly obtained in a separate suit, it does not appear that there is any justification for invoking S. 151 at all.

Now a leading case in this Court upon this subject is the case of *Mt. Gulab Kuer v. Badshah Bahadur* (1), in which numerous decisions are considered. The authorities in this Court are not uni-

form, but putting the matter at the highest in favour of the respondents, it may be said that there is some difference of opinion upon the question whether, and in what circumstances, a consent decree may be reviewed under O. 47 of the Code. It was said in that case that

"while it must be conceded that a large preponderance of authority is against the contention that a consent decree can not on any ground be challenged upon an application for review of judgment, there is no foundation for the suggestion that there is a preponderance of authority in favour of the contention that a consent decree may be reviewed on the ground of fraud."

The main proposition decided in that case was that a party who had applied unsuccessfully under O. 47 for review of a consent decree on the ground that it had been obtained by fraud was entitled, notwithstanding his failure, to prosecute a remedy by suit. This decision was contrary to a previous decision in the case of *Ram Gopal v. Prasanna Kumar* (2), and I desire to reserve my opinion upon the point. In *Mt. Gulab Koer's* case (1) it was pointed out that there are weighty reasons why a regular suit should be regarded as a more appropriate remedy in such cases. Now, I desire to say that in my opinion it is not competent under O. 47 to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud. It appears to me that before such a doctrine can be taken as authorized by the Code it is very necessary to lay one's finger upon some enactment which is clearly intended to make so large and inconvenient an exception to the general principles which govern this matter. R. 1, O. 47, after speaking of a case where a party has discovered new and important matter which was not within his knowledge or could not be produced by him at the time when the decree was passed and of mistake or error apparent on the face of the record, introduces the words "or for any other sufficient reason." In *Chajju Ram v. Neki* (3) the Judicial Committee had occasion to point out that these words were not unlimited and must be taken to point to a reason which is sufficient on grounds at least analogous to those mentioned in the rule. It appears to me that if mistake or error is *prima facie* intended to

(2) [1906] 10 C. W. N. 529 = 2 O. L. J. 508.

(3) A. I. R. 1922 P. C. 112 = 3 Lah. 127 = 49 I. A. 144 (P.C.).

(1) [1911] 13 C. W. N. 1197 = 2 I. C. 129 = 10 C. L. J. 420.



be beyond the scope of the rule unless the mistake or error be apparent on the face of the record, it is curious, to say the least of it, that a party should employ this procedure for the purpose of making out a contentious case of fraud. In my opinion the correct doctrine under the Code of Civil Procedure is in no way different upon this point from that which is laid down for England in Daniels' Chancery Practice, 8th Edn. 709. The authorities in this Court to the contrary are neither numerous nor impressive and have not infrequently been challenged : cf. *Barhamdeo Prasad v. Banarsi Prasad* (4). On principle and as a matter of construction of O. 47 of the Code I approve of the view taken in *Ram Lagan v. Ram Brich Koer* (5), and were it necessary I should desire to refer the matter to a Full Bench.

In the present case, however, the applicants themselves did not even take the precaution of applying by way of review and they succeeded before the District Judge in having the defendant's appeal dismissed as incompetent. Assuming it to be possible that we should now treat this matter as arising under O. 47 of the Code by giving leave to the respondents to pay the necessary Court-fees, I am clearly of opinion that we ought not to do so. The method which they have adopted is highly inappropriate to the circumstances of the case, and moreover so long as there is any room for argument to the effect that the applicants, should they fail in review, can proceed all over again by suit, I should be most unwilling to allow the amendment upon any terms.

It has been contended before us that because the Division Bench of this Court which heard the appeal brought from the order made in execution expressed itself as though the best course for the respondents was to make an application in the suit for amendment of the decree, the present appellant should be held bound by this expression of opinion and must sit down under the decision of the Subordinate Judge, however, disastrous its consequences may be to his business or to his reputation. I am of opinion that the remarks made by the Division Bench in the execution matter carry with them no legal consequence what-

ever and were in the nature of gratuitous advice.

In my judgment the correct course for us is to treat this appeal as an application under S. 115, Civil P.C., against the order of the Subordinate Judge and to set aside the whole of the proceedings upon the application for amendment of the decree. It may or may not be that the respondents, if they bring a suit, will get an allowance under the Limitation Act for the time which has been expended before the Subordinate Judge. It will be a part of our order that the respondents do pay to the appellant his costs of the proceedings before the Subordinate Judge and in this Court.

C. C. Ghose, J.—I agree.

V.B./R.K.

Order accordingly.

### A. I. R. 1929 Calcutta 473

MITTER AND MALLIK, JJ.

*Pramatha Nath Das Bairagi*—Appellant.

v.

*Champa Dasi*—Respondent.

Appeal No. 498 of 1927, Decided on 7th May 1928, against appellate decree of Sub-Judge, Howrah, D/- 30th September 1929.

(a) Landlord and Tenant—Permanent tenancy—Pucca structure is not essential to establish permanent tenancy—Long possession at uniform rent—No attempt at ejectment—Several successions before passing of Transfer of Property Act—Inference of permanent tenancy is justified.

The existence of pucca structure is not essential in all cases in order to establish a permanent tenancy. Where there has been long possession at a uniform rent in a locality where the value of lands have enormously increased and no attempt at ejectment was made and there were several successions to the tenancy even before the passing of the Transfer of Property Act it is a legitimate inference that the tenancy was permanent : *A. I. R. 1925 Cal. 309, Expl. 30 C. W. N. 709, Rel. on.* [P 474 C 2]

(b) Evidence Act, S. 13—Statement in will regarding nature of tenancy may be taken as evidence.

A statement in the will made by tenant regarding the permanency of his tenancy may be regarded as one made in course of a transaction by which the property was bequeathed to the legatee under the will and consequently the statement made in the will may be taken as evidence under S. 13. [P 475 C 1]

*Braj Lal Chakravarty and Dharamadas Set*—for Appellant.

*Jadu Nath Kanjilal and Narendra Nath Chaudhury*—for Respondent.

(4) [1906] 3 C. L. J. 119.

(5) [1919] 4 Pat. L. J. 205=50 I. C. 497.



**Mitter, J.**—This is plaintiff's appeal and arises out of a suit in ejectment. Plaintiff's case is that the defendant holds under him the disputed land as a thika tenant at an annual rental of Rs 5-15-0 and that notice to quit was duly served upon him asking the defendant to vacate by the end of the Bengali year 1330 and that, as the defendant had not vacated the disputed land, the present suit was instituted. The defence of the defendant is that the land in suit is the land which he holds in permanent tenancy and at a fixed rental. He also raised the contention with regard to the validity and sufficiency of the notice. The Court of first instance held that the tenancy of the defendant was a precarious tenancy and as the notice was a six months' notice expiring by the end of the tenancy it was quite sufficient. The Munsif, accordingly, granted a decree to the plaintiff for khas possession of the land described in the plaint. An appeal was taken by the defendant to the Court of the Subordinate Judge of Howrah who reversed the decision of the Munsif and dismissed the plaintiff's suit.

Against this decision a second appeal has been taken to this Court and it has been argued by Mr. Chakravarti who has appeared for the appellant that the findings of fact arrived at by the lower appellate Court do not give rise to the legal inference that the tenancy of the defendant was a permanent tenancy. It is necessary, therefore, to examine the findings of the lower appellate Court. They may be summed up as follows: The defendant or his predecessor-in-title has been in possession of the disputed land for more than 80 years. They have been paying uniform rent at the rate of Rs. 5-15-0 per annum. The tenancy in question has devolved from heir to heir. There had been a hut in the land and there is also an existence of a tank on the land. The superior interest had passed by several transfers to the present plaintiff. There is no evidence that there was ever any pucca building or structure erected on the land, though the lands are situate within the Howrah Municipality and although the value of the land had been increasing for many years past, there never was any attempt made before by the landlord to increase the rent as to eject the tenant. "The land" says the Subordinate Judge:

"is now unoccupied for several years past owing no doubt, to the domestic circumstances under which defendant came to inherit it, but it is not questioned that Padmalochan lived on it by raising chapra sheds and by digging a tank."

The tank, according to the finding of the Subordinate Judge was excavated by Padmalochan, the original tenant. On these findings, the lower appellate Court has raised the inference that the tenancy was a permanent one. It has been argued on the authority of the case of *Abdul Hakim Khan v. Elahi Baksha* (1) that the facts found did not give rise to the legal inference of permanency of the tenancy. It is said that the existence of pucca structure is one of the essential conditions which is requisite to establish a permanent tenancy. As I read the decision in *Abdul Hakim v. Elahi Baksha* (1), I do not think that the learned Judges intended to lay down that the existence of pucca structure was essential in all cases in order to establish a permanent tenancy. It appears further in this case that there has been long possession at a uniform rent in a locality where, as has been pointed out by the lower appellate Court, the value of lands have enormously increased. That is an element which should be taken into consideration along with other facts in considering whether the rent was not increased or no attempt at ejectment was made because the landlord knew that the nature of the tenancy was permanent. The facts of this case fall within the purview of the recent decision of this Court in the case of *Bireswar Mookherji v. Troilokhya Dasi* (2). It is to be noticed that, before the passing of the Transfer of property Act, an ordinary tenancy was not heritable and as admittedly there have been several successions in the present case, the inference is legitimate that the tenancy was a permanent tenancy. If the land was held on a thika tenancy there is every reason to suppose that when the value of the land increased abnormally the same rent might not have been continued for a large number of years. In cases of this description no inflexible rule can be laid down and each case must depend on its own facts. There is a further element in this case which requires consideration.

(1) A. I. R. 1925 Cal. 309=52 Cal. 43.

(2) [1926] 30 C. W. N. 709.



A will was executed by Padmalochan in which he described this land as a mokarrari mourasi one with a rental of Rs.5-15-0 per annum. This will was mentioned in the written statement of the defendant and it is said that there is no evidence on behalf of the plaintiff to show that he was not cognizant of the statements made in this will. It is true that the defendant has not established that the statement in the will was brought home to the knowledge of the landlord. But some inference adverse to the landlord can be made from the circumstance that although the will was mentioned in the written statement and it was made an exhibit in the case and the probate of will was produced in the case and yet the plaintiff did not say in his deposition in Court that he was not cognizant of the contents of the will of which probate had been taken. There is this fact that after the death of Padmalochan when the will became operative, the plaintiff had been taking rent from the legatee who happened to be his son. It is said that no inference should be drawn from this circumstance for if this will had not been executed, the land in question would have devolved under the Hindu law on his son and there is some force in this contention. The fact remains, however, that the son got this property under the will and the statement in the will may be regarded as one made in course of a transaction by which this property was bequeathed to the legatee under the will and consequently the statement made in the will may be taken as evidence under S. 13, Evidence Act. In the circumstances, we think that the lower appellate Court was right in drawing the conclusion that the tenancy was a permanent tenancy.

Mr. Chakravarti has, however, strenuously contended that there is a conflict between the case *Abdul Hakim v. Ellahi Baksha* (1) and the case *Bireswas Mookerji v. Sm. Troilokhya Dasi* (2). I do not think, however, that there is any real conflict for it does not appear from the report of the case of *Abdul Hakim v. Ellahi Baksha* (1), that this element of increase of the value of the land existed in that case; it does not appear in that case that no attempt was made either to eject the tenant or to enhance his rent notwithstanding the

increased value of land. I do not think, therefore, that we should be justified in referring the case to a Full Bench. Taking all the circumstances of the case into consideration, I think that the decision of the learned Subordinate Judge is right and must be affirmed. The appeal is accordingly dismissed with costs.

**Mallik, J.**—I agree.

M.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 475

SUHRAWARDY AND JACK, JJ.

*Taher Sheikh Chowkidar and others*  
—Appellants.

v.

*Otaruddi Howladar and others*—Respondents.

Appeal No. 696 of 1926, Decided on 20th June 1928, against appellate decree of Sub-Judge, Khulna, D/- 11th September 1925.

Civil P. C., O. 41, R. 17—Appellant absent—Appeal cannot be decided on merits.

By the words "the Court may make an order that the appeal be dismissed" it is meant that the Court may dismiss the appeal or may adjourn it to some other date or pass other order, but the Court is not authorized to consider an appeal in the absence of the appellant and decide it on merits. The law contemplates that the appellate Court must hear both parties to the appeal and then decide it according to its judgment. [P 476 C 1]

*Amin Ahmad and Abdul Quasem*—for Appellants.

*Jadunath Kanjilal and Babu Bhudhar Haldar*—for Respondents.

**Judgment.**—There are two plaintiffs in this suit, which is for khas possession of land on the ground of abandonment and transfer of a non-transferable occupancy holding by the original tenant. The trial Court found that so far as plaintiff 1's interest was concerned there was an abandonment and unauthorized transfer. As to plaintiff 2, it found that he had recognized the transferee as a tenant and accordingly it passed a decree in favour of plaintiff 1 for joint possession with the defendant and dismissed plaintiff 2's suit. The defendant appealed and plaintiff 2 cross-appealed or to be more precise filed a cross-objection. On 26th August 1925, the appellate Court passed an order that the pleaders must get ready on the date fixed, namely, 9th September 1925. On 9th, the following order was passed:



"The respondent's pleader does not appear, though he was assured that the appeal would be heard to-day. The appellant heard. Judgment to-morrow."

On 10th, judgment was postponed till the next day, and on 11th, the learned Subordinate Judge passed the judgment appealed against. He dismissed the defendant's appeal and then proceeded to consider plaintiff 2's cross-objection on the merits, although no one was present on his behalf and found that the view of the Munsif that plaintiff 2 recognized the defendant as a tenant was wrong: and, in the result, he dismissed the defendant's appeal, allowed the cross-objection and decreed the entire suit. The appeal is on behalf of the defendant and the only point that is taken before us is that the Subordinate Judge was not justified in deciding the cross-objection of plaintiff 2 when no one appeared on his behalf. This contention has a good deal of substance in it. Under O. 41, R. 17, if the appellant does not appear and the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. The previous Code contained the words "the appeal shall be dismissed."

This portion of the rule has been altered in the new Code in order to give jurisdiction to the appellate Court to pass such order as it thinks proper in the circumstances of the case other than dismissing the appeal and further to make the order of dismissal for default not open to appeal. By the words "the Court may make an order that the appeal be dismissed" it meant that the Court may dismiss the appeal or may adjourn it to some other date or pass other order, but it certainly does not authorize the Court to consider an appeal in the absence of the appellant and decide it on merits. It was not contemplated by the alteration in the rule to invest the Court with power to decide an appeal on the merits in the absence of the appellant and the reason is this. This appeal was not argued by appellant-plaintiff 2 and, therefore, there was no reply to the appellant's argument by the respondent, that is to say, defendant 1. The law contemplates that the appellate Court must hear both parties to the appeal and then decide it according to its judgment. That is the procedure laid down in O. 41, R. 30, Civil P. C. The procedure followed by the

Court is wrong and the decree passed by it in favour of plaintiff 2 must, accordingly, be set aside. There are some points in this case which show the impropriety of deciding an appeal in the absence of the pleader for the appellant without giving an opportunity to the other side to reply to such statements as might have been made on behalf of the appellant. The memorandum of cross-objection on behalf of plaintiff 2 was filed on insufficient stamp. That question was not decided by the Court and it should not have been heard without its being properly stamped. Accordingly the order passed with regard to the Court-fee that the plaintiff should get khas possession in the entire lands on his depositing the Court-fee on the memorandum of cross-objection within three days is not the proper order to pass.

There is another point with reference to mesne profits. The Munsif said that no evidence had been given as to what would be the amount of mesne profits. But he gave plaintiff 1 liberty to bring a fresh suit for mesne profits. Now the Subordinate Judge has decreed the plaintiff's whole suit and ordered that mesne profits be ascertained by the lower Court. There is no reason given for it. Besides, as there was no appeal by plaintiff 1, against the order dismissing the claim for mesne profits, the Court was not justified in passing a decree in his favour with regard to mesne profits. All these irregularities are due to the Subordinate Judge taking upon himself to decide the case without having it argued before him by both sides. The decree in so far as it relates to the claim of plaintiff 2 must, accordingly, be set aside. Now the question is as to what order we should pass in this case. If the occurrence had taken place before us and if the appellant was informed of the date of hearing, but was not before the Court on that date the order which we would generally pass was to dismiss the cross-objection. That is the order which the lower appellate Court should have passed. We have jurisdiction to pass such an order in second appeal as we are responsible for the proper disposal of the case according to law.

As regards the defendant's appeal before the lower appellate Court it cannot be heard after the concurrent findings of



the Courts below and that portion of the present appeal which relates to the interest of plaintiff 1 must stand dismissed with costs. The result is that this appeal is partially allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs in all Courts against plaintiff 2.

R.K. *Appeal partially allowed.*

### A. I. R. 1929 Calcutta 477

RANKIN, C. J., AND B. B. GHOSE, J.

*National Insurance Co., Ltd.*—Appellants.

v.

*Nissim Abraham Gubbay and others*—Respondents.

Appeal No. 44 of 1928, Decided on 12th July 1928, against judgment of Costello, J., in Suit No. 534 of 1927.

(a) Administration—Suit for—Joining party for watching proceedings is a mistake—Civil P. C., O. 1, R. 10.

In an administration suit it is a mistake to make an order for a person to be a party for watching the proceedings. There is neither meaning nor purpose in such an order.

[P 477 C 2]

(b) Administration—Suit for—Order for costs should be so made as to relieve persons with unencumbered share—Civil P. C., S. 35.

The correct course in administration suits, when orders for costs are made, is to make them in such a form that the person who has not encumbered his share shall be relieved as far as possible in the matter of costs created by the fact that another cosharer has assigned or encumbered his share: *Greedy v. Lavender*, (1849) 11 Beav. 417, Rel. on.

[P 478 C 1]

*N. N. Sircar and A. C. Bantra*—for Appellants.

*B. L. Mitter, S. N. Bannerjee and B. K. Ghosh*—for Respondents.

**Rankin, C. J.**—This is an application made by the present appellant before the learned Judge on the original side in the course of an administration suit to administer the estate of one Abraham Ezekiel Gubbay, who died in November 1906, the suit being brought in 1917. It appears that, with the exception of a certain wine business, the testator left all the properties to his executor upon a trust for conversion and for distribution, in the following shares: 7/16th to Ezekiel Abraham Gubbay, who was the executor; 4/16th to Nissim, who, in the administration suit, was the plaintiff; 3/16th to Elias; 1/16th to See-

mah and 1/16th to Joseph. In the end, by various assignments, Ezekiel became entitled, in his own right, to 11/16th share absolutely of the fund and, by various transactions made between him and the appellants—the National Insurance Co., Ltd.—the present position is this: The appellants are in the position of mortgagees as regards 11/16th share, where the equity of redemption is in the estate of Ezekiel, who has become insolvent and they are in the position of being sub-mortgagees of the 4/16th share of Nissim. This application was made to enable the appellants to be made parties to the suit and they also asked that they might have the carriage of the proceedings under the order, dated 26th November 1924, directing the sale of certain properties belonging to the estate. It appears that the suit has been going on for a very long time and the order for sale was made almost four years ago. It does not seem as if the parties had been prosecuting the order for sale with any great diligence, because, although the order was completed in January 1925, and summons was taken out on behalf of the unencumbered share of Joseph amounting to 1/16th in March 1926, nothing practically had been done till the time when this application was brought on. In these circumstances, the learned Judge made an order to the effect that the applicants should be added to the suit as party defendants, but he qualified that with various words, to say:

“for the purpose of watching the proceedings in this suit on the condition that the applicant do pay its own costs and be not entitled to any costs as against any of the other parties to this suit: And it is further ordered that the said applicant shall pay its own costs and shall not be at liberty to add its costs of and incidental to this application to its claim as such mortgagee and sub-mortgagee as aforesaid.”

The first question is whether or not the appellants should be made parties to this administration suit. It appears to me to be a mistake to make an order for a person to be a party “for watching the proceedings.” I see neither meaning nor purpose in such an order. In my judgment, the appellants who have sufficiently shown in this case that they have an interest to the extent of 15/16th share in the property ought to be allowed to become parties to the proceedings in order that there may not be any delay in



carrying out the order for sale. I have no doubt, therefore, that the words "for the purpose of watching the proceedings in this suit" ought not to be present in this order.

As regards the conditions as to costs: It seems to me that the argument of the appellants is right. The position is that the share of Joseph which is entirely unencumbered ought not to be made to pay a larger share of the costs because another party has encumbered its own share. This appears to be a matter which has often been considered and we have been referred to the case of *Greedy v. Lavender* (1). In my judgment, there can be no doubt that the correct course, in such a case, when orders for costs are made, is to make them in such a form that the person who has not encumbered his share shall be relieved as far as possible in the matter of costs created by the fact that another cosharer has assigned or encumbered his share. The practice seems to be clearly enough laid down in the following passages in Daniell's Chancery Practice, 8th edn., p. 1075, to which we have been referred:

"Where a person entitled either to a legacy or share of a residue incumbers his legacy or share, or by any act of his own occasions additional expense in respect of it beyond what is necessary for the due administration of the estate, the additional expense will be thrown upon the legacy or share; and only one set of costs will be allowed out of the estate to the person entitled and his incumbrancers, and such costs will in general be made payable to the first incumbrancer, or to the incumbrancers in order of their priorities, and then to the person entitled. Where, however, each of the incumbrancers stood upon some portion of the share included in his incumbrance, the costs were directed to be divided among them equally."

It appears to me that, both as regards the present application and as regards any other future application, that is the principle which the Court would do well to apply. It is not, however, correct that an order should now be made purporting to govern or control future orders for costs, and as any order for costs is made, it will be for Joseph to represent to the Court that this principle is one which is to be applied and in that way to make sure that the Court administers this estate without throwing any improper burden on him. It is not necessary, in my opinion, that the present order should be qualified by a condition pur-

porting to bind the hands of the Court as regards future orders for costs.

The next question is whether or not the second part of the prayer should be granted, namely, that the appellants should be given the carriage of the proceedings under the order for sale. It seems to me that this matter is very largely academical. It will be for the Registrar to effect the sale and so far as the questions of getting proper price, issuing sufficient advertisement, choosing suitable date and so forth are concerned, the matter will be in the hands of the Registrar. What it is necessary to make sure of, is that the person who shall be given the carriage of the proceedings under the order for sale will not make delay in perfecting the order and carrying it out. As to that matter, the position seems to be this: Neither Nissim nor indeed Joseph appears to have been particularly active in insisting upon the order for sale being carried out. Both of them had certain merits at different stages of the suit. Nissim got the order in November 1924, and it is noticeable that he has done nothing since then. In the same way, in March 1926, Joseph's attorney asked for the carriage of these proceedings. But he does not appear to have been prosecuting that matter since then with any particular diligence. We have to consider whether it would not be better that the carriage of these proceedings should be given to those mortgagees who presumably will desire to get back their money within a reasonable time. It is said that these mortgagees are amply secured. But that is no sufficient answer. As regards Nissim, it is said that he is the plaintiff and he has a possible chance—but that is not made out to my satisfaction—of getting something for himself if the sale is properly effected. As regards Joseph, the objection to him is that he is a lunatic, which does not, in itself, go very much against him. In my opinion, for the present purpose, the price to be fetched does not depend upon the person who should have the carriage of the proceedings. That will depend upon the efficiency of the Registrar at the sale. The main thing we ought to look at is to give the carriage of the proceedings to somebody who will carry them out forthwith without any chance of the matter being hung up for a year. On the whole, considering that the ap-

(1) [1848] 11 Beav. 417.



pellants have got interest to 15/16th of the property, it appears to me that the best course would be that they should have the carriage of the proceedings. They are given only the carriage of the proceedings under the order for sale. When the sale is effected and the money is brought in this order will have no effect.

As regards costs both before Costello, J., and of this Court, I think the proper order should be that Joseph and Nissim should get their costs out of the general estate and the appellants should add their costs to their mortgage. Costs will be taxed on scale 2 so far as applicable.

**B. B. Ghose, J.**—I agree.

M.N./R.K. *Order accordingly.*

### A. I. R. 1929 Calcutta 479 (1)

CAMMIADE AND S. K. GHOSE, JJ.

*Murari Mohan Khomari*—Appellant.

v.

*Khirode Nath Jana*—Respondent.

Appeal No. 1199 of 1926, Decided on 16th July 1928, against appellate decree of Sub-Judge, Mindapur, D/- 21st January 1923.

**Practice—Judge—Proof of erasure of writing in absence of other party for private satisfaction of Judge is improper.**

It is a thoroughly improper proceeding to have something done by a pleader to prove to the private satisfaction of the Court, that it is possible to remove writing from paper without leaving a trace of the writing having been there. The Court should have this performance done in Court and in the presence of the other side. [P 479 C 2]

*Sarat Chandra Bose and Gopendra Nath Das*—for Appellant.

*Santosh Kumar Pal*—for Respondent.

**Judgment.**—This appeal is by the plaintiff in a suit on a mortgage. The mortgagor had sold the mortgaged property to defendant 2, who contested the suit. His defence was that the mortgage had been satisfied. The mortgage bond was produced in Court by the plaintiff and it contains no endorsement of satisfaction. Defendant 2 stated to the Court that the bond had been shown to him by his vendor, that is to say, the mortgagor, defendant 1, at the time of the sale to him, and that at that time that bond contained an endorsement of satisfaction. Both the Courts below dismissed the suit, holding on certain oral evidence that the bond had been satisfied and the

mortgage redeemed. The learned Munsif found that he had to explain away the fact that the mortgage bond produced in Court, the genuineness of which was not disputed, bore no endorsement of satisfaction. He, therefore, resorted to the thoroughly improper proceeding of having something done by a pleader, in the way of proof, to his private satisfaction that it was possible to remove writing from paper without leaving a trace of the writing having been there. The learned Munsif should have had this performance done in Court and in the presence of the other side. The learned Subordinate Judge entirely ignored this matter. Therefore, what one finds is that the learned Subordinate Judge, without explaining away a very serious circumstance, professed to rely, not on the testimony of his own eyes, but on the statement of witnesses who could lie. The question being one of fact, we must send this case back, so that the appeal may be reheard.

The judgment and decree of the lower appellate Court are set aside and the case is sent back to that Court for a rehearing. Costs in this appeal will abide the result,

M.N./R.K.

*Case remanded.*

### A. I. R. 1929 Calcutta 479 (2)

SUHRAWARDY AND GRAHAM, JJ.

*Mukunda Patre*—Complainant—Petitioner.

v.

*Purusattam Shah*—Accused—Opposite Party.

Criminal Revn. No. 1415 of 1928, Decided on 15th March 1929.

**Criminal P. C., (5 of 1898), S. 253—Complainant not examined—Discharge order is irregular.**

Failure to examine complainant before discharging accused is an error of law. Magistrate's personal knowledge that the complainant's witnesses were untrustworthy is no adequate reason for discharging the accused. [P 480 C 1]

*Hem Chandra Dhar*—for Petitioner.

**Judgment.**—This rule was issued calling upon the Chief Presidency Magistrate and the opposite party to show cause why an order of the 4th Presidency Magistrate, Northern Division, Calcutta, discharging the accused Purusattam Shah (now the opposite party) under S. 253, Criminal P. C., should not be set aside. The grounds on which the



order is assailed are that the complainant was not examined and that the learned Magistrate ought not to have passed his order of discharge upon his own personal knowledge and certain matters which do not appear on the record; and that he ought to have held that a prima facie case was made out. In the explanation of the learned Magistrate he admits that there was an error of law inasmuch as the complainant was not examined and upon this ground alone the rule should be made absolute because it is clear that the complainant was entitled to have his evidence recorded. The Magistrate then goes on to observe that inasmuch as the prosecution witnesses 3 and 4 had been witnesses in other cases before him and as the modus operandi in those cases was similar to the modus operandi in the present case he viewed their evidence with suspicion. Finally he has observed that without the evidence of the prosecution witnesses 3 and 4 the prosecution case is hopeless, no matter whether the complainant is examined or not. It seems to us that the reasons which have been given for the order of discharge are quite inadequate. We accordingly make the rule absolute; set aside the order of discharge and direct a further enquiry according to law by a Magistrate other than the Magistrate whose order is complained of.

V.B./R.K.

*Rule made absolute.***A. I. R. 1929 Calcutta 480**

PEARSON AND MALLIK, JJ.

*Jagabandhu Chawdhuri and another—*  
Accused—Petitioners.

v.

*Abdul Sobhan Sarkar —* Opposite  
Party.

Criminal Revn. No. 1 of 1929, Decided  
on 2nd May 1929.

**Criminal P. C., S. 476-B—Entire matter  
should be considered on merits.**

An appellate Court in cases of appeals under  
S. 476-B, should reconsider the entire matter  
on its merits : *A. I. R. 1925 All. 544, Foll.*

[P 480 C 1]

*N. K. Bose, Debendra Narain Bhatta-  
charjee—*for Petitioners.

*Bimal Chandra Das Gupta—*for Oppo-  
site Party.

**Mallik, J.**—This Rule was issued on the District Magistrate of Dinajpur to show cause why the order of the District Judge of Dinajpur dismissing the petitioner's appeal against an order of the Munsif of Thakurgaon making a com-

plaint against the petitioners under S. 476, Criminal P. C., should not be set aside. The rule was issued on two grounds : The first ground is that the judgment in appeal is not in accordance with law ; and the second ground is that the learned District Judge has failed to exercise jurisdiction vested in him by law in refusing in effect to exercise his own discretion in the matter and to revise the exercise of discretion by the Court of first instance, namely, the Munsif of Thakurgaon. The contention before us is that the learned District Judge when the matter came up on appeal before him under S. 476-B, Criminal P. C., did not approach in the way in which he should have approached it. It was said that under that section the learned Judge ought to have gone into the merits of the case as he was bound to do in all appeals before him. This contention seems to me to be well founded. As has been held in *Ram Charan Das v. Emperor* (1), the legislature intended that an appellate Court in cases of appeals under S. 476-B, Criminal P. C., should reconsider the entire matter on its merits. This the learned District Judge in the present case has not done. From his judgment it appears that according to him there were two distinct views which could be taken of the facts of the case and he disposed of the appeal before him by only holding that the learned Munsif had, before passing his order, duly considered the facts of the case and by saying that he (the District Judge) would not be justified in interfering with the exercise by the Munsif of his discretion. The learned District Judge in his judgment nowhere says what his own view of the facts of the case was. This certainly was not a disposal of the matter after a full consideration of the entire case on its merits.

The result is that Rule is made absolute. The order of the District Judge dismissing the appeal is set aside and it is directed that the appeal under S. 476-B be reheard by the learned District Judge in the light of the observations made above.

Let the stay of proceedings continue pending the disposal of the appeal.

**Pearson, J.**—I agree.

P.R./R.K.

*Rule made absolute.*


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(1) *A. I. R. 1925 All. 544.*



**A. I. R. 1929 Calcutta 481**

SUHRAWARDY AND JACK, JJ.

*Asutosh Bhuiyan and others* — Appellants.

v.

*Radhika Lal Goswami*—Respondent.

Appeal No. 2383 of 1925, Decided on 11th June 1928, against appellate decree of Addl. Dist. Judge, Midnapur, D/- 10th August 1925.

**Bengal Tenancy Act, S. 111-B**—Suit under—Time begins to run from publication of Record-of-Rights—Period of 3 months after certificate is only suspended.

A cause of action for a declaratory suit under S. 111-B arises on final publication of Record-of-Rights as a cloud is cast upon the title of the plaintiff, on the publication of the record. But as no suit under S. 111-B shall be instituted within three months from the date of the certificate of final publication the period of limitation is subsequently suspended for three months after the certificate is made: 23 C. W. N. 883 and A. I. R. 1925 Cal. 518, *Rel. on.* [P 481 C 2]

*Heramba Chandra Guha and Jnan Chandra Ray*—for Appellants.

*Gunada Chandra Sen and Mani Lal Bhattacharya*—for Respondent.

**Suhrawardy, J.** — The appellants brought a suit for declaration of their nishkar right to the lands in suit on a declaration that the entry in the Record-of-Rights to the contrary was wrong. Both the Courts below have held that the suit was barred under Art. 120, Lim. Act. The Record-of-Rights was finally published on 31st January 1918, and the certificate was signed on 6th June 1918. The present suit was brought on 8th May 1924. It is not disputed that the present suit is one contemplated by S. 111-B, Ben. Ten. Act. The Courts below have held that the cause of action arose on 1st February 1918, and even making allowance for three months as provided in S. 111-B, the suit is barred under Art. 120, Lim. Act. The appellants contend that the date of the signing of the certificate should be reckoned as the date on which their right to sue accrued and, therefore, their suit is within time. The various sections bearing on this point are not happily worded so as to put the matter beyond all reasonable doubt; but there are decisions of this Court as well as of the Patna High Court which seem to have finally settled this matter.

According to the law thus interpreted

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the cause of action arises on the final publication of the Record-of-Rights. The reason is this. An entry in a finally published record does not create any title in favour of any person. It only raises a presumption that it is correct unless the contrary is proved. As it is only a piece of evidence, it is not necessary for the party against whom it is made to institute a suit to correct it. He may bring a suit for the purpose and if he does so, he is bound by the ordinary law. *Ramgulam Singh v. Bishnu Pargash Narain Singh* (1). Under S. 103-A (2), after disposing of the objections referred to in that and previous sections, the Revenue Officer shall finally frame the record and shall cause it to be finally published in the prescribed manner. Under S. 103-B (3), every entry in a Record-of-Rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct unless it is proved by evidence to be incorrect. The certificate signed by the Revenue Officer stating that the Record-of-Rights has been finally published shall be conclusive evidence of such publication under S. 103-B. A cause of action for a declaratory suit arises when a cloud is cast upon the title of the plaintiff. As under S. 103-B (3), the presumption of correctness at once attaches to an entry on the publication of the record, the right to sue to get rid of the presumption or to remove the cloud from the plaintiffs' title accrues on the date of publication.

Now S. 111-B says that no suit relating to certain matters mentioned therein shall be instituted within three months from the date of the certificate of final publication. If the final publication and the making of the certificate are not simultaneous the result must be that the cause of action arises immediately on the publication of the Record-of-Rights and the period of limitation is subsequently suspended for three months after the certificate is made. The position does not appear to be happy, but this is the only conclusion that can be drawn from the various sections of the Act and the interpretation put upon them by judicial decisions. A suit for alteration of rent or the determination of the status of any tenant cannot be brought under S. 111 until three months after the publication

(1) [1926] 11 C. W. N. 48.



of the Record-of-Rights. This provision indicates that every other suit can be brought as soon as the Record-of-Rights is published. This seems to be the plain intendment of the law as contained in the several sections as understood by Courts. In *Rajani Nath Pramanik v. Monaram Mandal* (2) it is observed that a certificate signed by the Revenue Officer is conclusive evidence of its publication; but the presumption as to the correctness of the entry arises from the publication which is provided by S. 103 A.

The same view was taken in *Prodyat Kumar Tagore v. Balgobinda* (3). Though that was a case under S. 111, the law, so far as it related to the point of limitation, was similarly laid down. The result of these considerations is that in the present case the plaintiffs' right to sue for the declaration that they had nishkar right in the land in suit arose immediately on the final publication of the Record-of-Rights, namely, on the 31st January 1918. But as the right to bring a suit for this purpose was suspended for three months from the 6th June 1918, the date when the certificate was signed, they are entitled to an extension of the period of limitation provided by S. 120, Limitation Act, by three months under Cl. (4), S. 111-B. The last day, therefore, on which the suit should have been filed was the 30th April or 1st May 1924. The suit, having been filed on the 8th May 1914, is barred by limitation. This appeal, accordingly, fails and is dismissed with costs.

**Jack, J.**—I agree with the conclusion arrived at by my learned brother in this case, but would like to add a few remarks. It is true that in a suit for a declaration that an entry in the Record-of-Rights is wrong, the cause of action starts from the date of publication of the Record-of-Rights, since the presumption of the correctness of the entry then arises and it is that presumption that clouds the plaintiffs' title, but this is a suit under S. 111-B, Ben. Ten. Act which lays down that no such suit shall be instituted within three months of the date of final publication. Under S. 120, Lim. Act, the period of limitation starts from the date when the right to sue accrues. The right to sue accrues from the date of final publication since there is no prohibition

in the Bengal Tenancy Act against the institution of the suit immediately after final publication of the Record-of-Rights; at the same time I think it can hardly have been the intention of the legislature to allow the institution of a suit between the date of final publication and the date of signing the certificate and this is where the difficulty lies.

The case of *Prodyat Kumar Tagore v. Balgobinda Ditchit* (3) was under S. 111, Ben. Ten. Act and in that section the period during which no suit is to be brought starts from the final publication and not as in S. 111-B from the certificate of publication. The case of *Rajani Nath Pramanik v. Monaram Mandal* (2) was an Eastern Bengal case, in which it was held that S. 111-B could not be applied to extend the period of limitation, because in that case three months from the date of the certificate of final publication had expired before the East Bengal and Assam Amending Act came into force.

R.K.

*Appeal dismissed.*

### \* A. I. R. 1929 Calcutta 482

MUKERJI AND MITTER, JJ.

*Moolji Sikka and Co.*,—Plaintiffs—  
Petitioners.

v.

*B. N. Ry. Co. Ltd.*,—Defendants—  
Opposite Parties.

Civil Revn. No. 1000 of 1928, Decided on 1st February 1929, against decree of Small Cause Court Judge, Sealdah, (24 Parganas), D/- 9th May 1928.

\* Railways Act, S. 72 (2) (a)—Date of Risk Notes, Forwarding note and Railway receipt not same—Company is protected if notes refer to consignment.

So long as it is established that the Risk Notes, the Forwarding Note and Railway Receipt refer to the consignment in question the Company is amply protected, though Risk Notes, the forwarding order and Railway Receipt do not bear one and "the same date" as stated in the approved forms of Risk Notes A and B; *A. I. R. 1923 Lah. 162 Diss.* from 20 C. W. N. 685 *Dist.* [P 483 O 2]

*Surendra Madhab Mullick and Probodh Chunder*—for Petitioner.

*Romes Ch. Sen and Jitendra Kumar Sen Gupta*—for Opposite Parties.

**Judgment.**—A wagan-load of biris weighing 353 bags and 4 baskets was booked by the petitioners from Gondia to Shalimar on the B. N. Ry and delivery was taken, 16 bags and 2 baskets

(2). [1919] 23 C. W. N. 833=53 I. C. 968.

(3) A. I. R. 1925 Cal. 518.



were found damaged by water. The claim in the suit to which this rule relates was for recovery of compensation for the damage aforesaid. The trial Judge dismissed the suit holding that as the consignment was covered by Risk Notes A and B the Ry. Co. were protected from liability. The petitioners have then obtained this rule.

In support of the rule several grounds have been urged. In the first place it has been contended that as the petitioners took delivery after the damages had been assessed and a certificate of such assessments showing the amount of it as Rs. 334-8-0 had been given to the petitioners and after the Chief Station Master at Shalimar had promised to make good the amount the railway Co. are under a disability to plead the Risk Notes. In answer to this contention it is enough to say that nothing has been proved which would go to raise an estoppel of this nature against the Co. Nextly, it has been urged that the goods were not carried in the proper vehicles enjoined by the rules and so there was misconduct on the part of the Co.'s servants which would deprive the Co. of their protection under the Risk Notes. The finding on this point as recorded by the Subordinate Judge is against the petitioner. Thirdly, it has been urged that the conditions under which the Risk Notes could be taken were non-existent and so the Risk Notes are not operative. What is said under this head is that Risk Note form A is to be used when Articles are tendered for carriage in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit, but that, in point of fact, no packing conditions were in existence at the date of despatch of the goods, and that Risk Note Form B is to be used only when there is an alternative rate quoted for the goods in the tariff and the consignor avails himself of the lower rate while at the date of the despatch there was only one rate. Neither of these matters appears to have been specifically raised in the Court below. In view, however, of the importance of the case we have allowed the parties to go into these matters. We find that the arguments so far as these matters are concerned are based on some erroneous supposition. The Forwarding Note itself bears the endorsement

"Packed in bags and baskets instead of boxes as required by the packing conditions prescribed."

showing that such rules did exist at the time. The tariff rates produced before us show that there were alternative rates and the petitioners availed themselves of the lower rate.

The Risk Notes, therefore, were taken on the basis of existing conditions and in our opinion were operative. Nextly, it has been contended that the agreement to limit the liability of the Co. was void as the Risk Notes were not duly executed within the meaning of S. 72, sub-S. (2) Cl. (a), Railway Act. We find ourselves unable to agree in this contention, because the Risk Notes have been proved to have been signed by the plaintiff's agent at Gondia who delivered the goods to the Ry. Administration. Lastly, it has been urged that the agreement is void in that it was not in a form approved by the Governor-General-in-Council, as it must be, under S. 72, sub-S. (2), Cl. (b). The defect that is pointed out is that whereas in the approved Forms of Risk Notes A and B it is stated that the Risk Notes, the Forwarding Order and the Ry. Receipt must bear one and "the same date", here the Risk Notes bear date 13th July 1926 and the Ry. Receipt, 15th July 1926. Reliance for this contention has been placed upon a decision of Tek Chand, J., in the case of *E. I. Ry. v. Jot Ram Chandra Bhan* (1), A. I. R. 1928 Lahore 162. With all respect to the learned Judge we must say we are unable to agree with him in the view that he has taken with regard to a discrepancy of this character. The case of *Mahabasha Bankapur v. Secy. of State* (1) upon which he has relied is, in our opinion, widely different. We are of opinion that so long as it is established that the Risk Notes, the Forwarding Note and Railway Receipt refer to the consignment in question the Co. is amply protected.

As all the contentions urged in support of the Rule fail, the rule must be discharged with costs 2 gold mohurs.

V.B./R.K.

*Rule discharged.*



**A. I. R. 1929 Calcutta 484****B. B. GHOSE AND GARLICK, JJ.***Surendra Nath Chatterji* — Appellant.

v.

*Jahnavi Charan Mukherji* — Respondent.

Appeal No. 109 of 1926, Decided on 1st May 1928, from original decree of Dist. Judge, Hooghly, D/- 12th June 1928.

**(a) Will—Proof to establish.**

The proof necessary to establish a will in India is not an absolute or conclusive one, but such proof as would satisfy a prudent man : 39 Cal. 245, Rel. on. [P 488 C 2]

**(b) Succession Act (1925), S. 61 — Signature of testator proved—Knowledge of contents by testator is presumed—If suspicious circumstances are proved propounder must remove them.**

On proof of the signature of the deceased or his acknowledgment that he has signed the will he will be presumed to have known the provisions of the instrument he has signed. This presumption, however, is liable to be rebutted by proof of suspicious circumstances, such as, if the testator from want of education or physical infirmity was unable to read or unable to understand the provisions of the document or his capacity for executing the instrument is doubtful. Then the propounder of the will is bound to remove those suspicious circumstances. [P 489 C 1]

*B. K. Ghosh, Surendra Nath Ghosal, Nanda Gopal Banerji and Hem Chandra Sen*—for Appellant.

*A. N. Chaudhuri, Bijan Kumar Mukherji, Apurbadhan Mukherji and Dharmadas Sett*—for Respondent.

**B. B. Ghose, J.**—This is an appeal by the applicant for probate of a will and a Codicil against a portion of the decree of the District Judge of Hooghly. The will was alleged to have been executed by one Ram Lal Mukherji, dated 6th September 1914 and the Codicil was executed by the same gentleman dated 11th September 1920. Ram Lal died on 9th April 1923. He was a gentleman of considerable properties and died at a good old age. It is said that he was 85 years of age at the time of his death. It is unnecessary to state in detail the members of his family at the time of his death and shortly before that as the facts have been fully set out in the judgment of the District Judge. It is sufficient to say that he was survived by four sons, Mritunjoy, Ganga Charan, Jahnavi Charan and Jahnavi Prosad and two daughters and

a large number of grandchildren. He became a widower in the year 1890, and after that he went to live more or less as a recluse in a house built on a rock near the town of Monghyr in the province of Bihar. Previously he was a permanent resident of Boinchee in the district of Hooghly. The house in which he lived at the time of his death was described as Pirpahar. None of his sons lived there and it appears from the evidence that if any of them ever visited him it must have been on rare occasions. The most curious thing is that one of the sons, Ganga Charan, practised as pleader at Monghyr and lived about 2 miles from the house of his father, but even he seems to have seldom visited his father.

It appears that on one occasion when he required some money for the marriage of his daughter, he wrote to his father by post about the money and on another occasion it appears that Ram Lal wanted information from Ganga Charan about the repair of a motor car belonging to himself and the information as to where the motor car could be repaired was intimated by Ganga Charan by a letter written through the post. Again it appears that Jahnavi Prosad one of the sons, who is one of the respondents here, wanted to have some money from his father a short while before his death and he went to Monghyr from the district of Hooghly and lived with his brother Ganga Charan from which place he asked for permission to see his father. Apparently that permission was not granted and from the correspondence it appears that Jahnavi Prosad came back disheartened on account of his father not allowing him to see him. It appears further from the evidence that two of his grandsons by his first son Mritunjoy, named Kashipati and Pashupati used to live with Ramlal, that they were both favourites of Ramlal, but that Pashupati was much more so than Kashipati. One test of this greater affection which Ramlal felt for Pashupati is that in 1904 he made a gift of the house at Pirpahar to Pashupati and the fact that that gift was a genuine gift appears from the statement made by Ramlal in 1920 that the house in which he lived belonged to Pashupati's widow, Pashupati having died at that time. Kashipati died in 1918 and



Pashupati died in May 1919 at Benares. Certain other grandchildren had also died about that time. These things must have been as the learned Judge observed, a serious blow to the old man. It will be seen later what effect these bereavements had on his mind as regards his power of discrimination. The will of 1914 was attested by several respectable witnesses including Lt. Colonel Megaw, I. M. S. (then Major) who afterwards became the Director of Tropical School of Medicine in Calcutta, Babu Baidya Nath Bose who was the well-known Principal of the College at Monghyr and his son Babu Hem Chandra Bose, a pleader of the place who was apparently in good practice as he was Public Prosecutor of that place for some time. The will was deposited with the Sub-Registrar under the provisions of the Registration Act, and the usual note was made on the sealed cover by the testator himself, which we have seen. The Codicil was also attested by several witnesses. With this Codicil I shall have to deal in detail, and it is unnecessary to deal with this Codicil alone having regard to what I am just going to say. The application was resisted by two of the sons of Ramlal, Jahnavi Prosad and Jahnavi Charan. The other sons and the grown up grandsons did not take part in these proceedings. But this is a matter of very little importance one way or the other. Those other persons might think that it was not worth their while to fight the case, and no presumption can be made either in favour of the applicant on account of their silence nor against the objectors on that ground.

The grounds on which the two objectors resisted the application of the petitioner, shortly stated were that the will had been executed when the alleged testator was 76 years of age, and the Codicil when he was about 82 years old, that from about 12 years before his death he became weak and infirm both physically and mentally and incapable of managing his own affairs owing to softness of the brain, that other persons wielded considerable influence over his mind and the alleged testator became a mere creature in the hands of these persons. Amongst those persons was his grandson Pashupati and other persons connected with him including Sur-

endra Nath Chatterji, the appellant before us and petitioner before the lower Court. It was alleged specifically that the deceased was not in a sound disposing state of mind at the time of the alleged will or of the alleged Codicil and that therefore the application for probate should be refused. The learned Judge in an elaborate judgment considered all the circumstances of the case and in the result allowed the application of the propounder in part. He made an order granting probate of the will of 1914 and refused probate of the Codicil dated 11th September 1920. From the part of the decree refusing probate of the Codicil the petitioner in the Court below appeals to this Court. The objectors in the Court below, the respondents here, prefer a cross-objection against that part of the decree by which the District Judge granted probate of the will of 1914.

Mr. Choudhury, counsel for the respondents, candidly stated before us that having regard to the nature of the evidence and the findings of the learned District Judge he does not consider it proper to take up the time of the Court in pressing the cross-objection. But at the same time he reserves the liberty for his clients to press their objection before any higher Court if they choose to carry the case further. Our labour has been a good deal lightened by the course which Mr. Choudhury has thought proper to take with regard to this case. We have therefore to look to the propriety of the order made by the District Judge with reference to the Codicil dated 11th September 1920.

The observations of the learned Judge with regard to the Codicil in question are to be found in his judgment at pp. 172 and 173. It is not quite clear although the learned Judge criticized the evidence of the attesting witnesses to the Codicil, whether he found that it was duly executed and attested or not. The learned Judge says that the memory of the alleged testator had been failing and that the contents of the Codicil show that it was not only for the benefit of Pashupati's children but for strengthening the hands of Suren Babu and for his immediate benefit. The two questions in my opinion have not been kept separate by the learned Judge, that is, as to the matter of due execution and attestation and as to the



question of undue influence and of sound disposing mind. The learned Judge states in one place in his judgment that the effect of the bereavements on the old man's health and mind, especially the death of the youthful and promising and beloved grandsons, was very great and he seems to think that his mind was so unhinged that he was not capable of understanding what he was doing. He concludes that portion of the judgement by these words:

"At this time (that is, at the time of Pashupati's death) he was more than 80 years old and if as pointed out he had lost his faith in Jahnavi Charan also the old man could not but have been unbalanced."

The learned Judge also seems to have been of opinion that undue influence was exercised on the mind of the testator where he states:

"It may be the old man was a willing victim; but as years passed by and from proved conduct of Suren Babu and Arun, I find that the influence was exercised unduly and improperly,"

and

"I am convinced from after Pashupati's death in 1919 it does not appear he had power of discrimination or will power which would enable him to make a disposition of his property properly."

The District Judge concludes his finding in this way:

"As regards issue 4 (that is the issue with regard to the will) I find that there is satisfactory evidence of execution and attestation and it has not been proved the will is the outcome of undue influence. The probate therefore may be granted. My conclusion is that this second Codicil has not been proved to have been legally executed and attested and further, I am of opinion that at the time of this Codicil Ram Lal Babu could not have possessed a disposing frame of mind. On the other hand, he was under the influence of Suren Babu which influence has clearly been unduly and unfairly exercised. This is my answer to issues 5, 6 and 7. In answer to issue 8 I say that the conscience of this Court has not been satisfied and the Court declines to grant the probate of this document."

I will first deal with the question of sound disposing mind of the alleged testator at the time of the execution of the Codicil. (His Lordship then discussed evidence and came to the following conclusion). All these facts show that Ram Lal was not deficient in intellectual powers towards the end of 1920 and afterwards and the finding of the learned Judge on the evidence that Ram Lal was quite capable of executing the will, but had no sound disposing mind

when he executed the Codicil seems to be inconsistent.

Ram Lal was under the impression that Pashupati had been foully done to death. His belief was that although he had sent medical men to attend on Pashupati, the medicines prescribed by these medical men were not allowed to be administered to him. Further there is a hint that incantations were used for the purpose of hastening his death. Ram Lal was a believer in Occult powers and his letters to Jahnavi Charan show that he thought that Jahnavi Charan was a saint and a seer possessed of occult powers. I may here interrupt myself to say that Jahnavi Charan was a graduate of the Calcutta University and an M. A. If he falsely led his father to believe that he had occult powers that was certainly very wrong. But there are believers in occult powers in the country as well as in other countries among men who are undoubtedly of the keenest intelligence. Although Ram Lal believed in the occult powers of Jahnavi Charan, his letters show that he was very parsimonious about money for acts done by Jahnavi on his behalf for acquiring merit in the other world. As an instance, it appears from certain letters that he used to pay Rs. 25 for saving a cow from slaughter and Rs. 10 or so for saving a sheep and small sums of money for saving fish and putting them back into the river. But these letters show at least in two instances that an extra sum of Rs. 2 was paid to Jahnavi Charan and that money was directed to be kept in deposit although Jahnavi Charan was addressed in these letters as the blessed one, a seer, lord and so forth. There appears to be one reason why Jahnavi Charan was addressed by his father in such honorific terms and the reason seems to have been that Jahnavi Charan led his father to believe that by his pious spiritual exercises he could cure Pashupati of the disease from which he was suffering. After the death of Pashupati the letters do not show that Jahnavi Charan was addressed in the same high flown language although the letters do not show any particular dislike towards Jahnavi Charan. However, it is nobody's case that the fact that Ram Lal believed in occult powers show that his intelligence had suffered in any way in the least. The position therefore after the death of Pashupati was this:—



Ramlal was against all persons who were in some way or other connected with the will alleged to have been executed by Pashupati. He had also suspicions as regards the people who were about him at Benares at the time of his death that they neglected his proper treatment, and these people were the father of Pashupati, Suvankari the widow of Kashipati, and there may be other persons we do not know. After the death of Pashupati the appellant Surendra Nath seems to have come into contact with Ram Lal. He brought down from Benares the widows of Kashipati and Pashupati and their children to Monghyr. The evidence is that Surendra met Ramlal only on a few occasions, 3 or 4, 4 or 5. On each occasion he stayed with Ramlal for a very short time. He undoubtedly went there before the execution of the Codicil. Surendra also went there when Ramlal was examined with reference to Pashupati's will. But he used to live in the town of Monghyr. It further appears that Ramlal felt very much attached towards the son of Pashupati as he would naturally be if he loved Pashupati as appears from the evidence. Pashupati was the person who assisted him in managing the zemindari and as a matter of fact the objectors say that it was Pashupati who had exercised undue influence upon him for the execution of the will of 1914. This was the state of the family and the condition or state of mind of Ramlal at the time of the execution of the Codicil.

The learned advocate for the respondents did not contend and could not contend that there was any evidence of undue influence being exercised on Ramlal for the execution of the Codicil in question. He also had to admit, as I have already stated, that Ramlal had sufficient mental capacity for executing the Codicil. Mr. Choudhury's argument was that the judgment of the District Judge may be supported on other strong grounds and he put his argument as follows: Ramlal was really advanced in years. He was hard of hearing as is natural at his age. His eye-sight was growing dim. He himself stated in his evidence in January 1921 that since two months previous to that date his eye-sight was getting dim. It was his habit to have his work done in the matter of correspondence by Norendra Kumar Biswas who was the tutor of

Kashipati and Pashupati when they were young. He acted as a sort of Secretary after they had grown up, and was known as the Master Mohasaya. The Codicil was drafted by a Firm of Attorneys in Calcutta under instructions received from Surendra Nath.

Surendra Nath does not come forward to give evidence as to what instructions he received and what instructions he conveyed to the attorneys. It should also be remembered that the attorneys were the attorneys of Surendra himself and they never previously acted on behalf of the testator. The reason given for Surendra not giving evidence in the case is certainly not satisfactory. The learned advocate argues upon these circumstances that there is a gap in the chain of evidence, and it has not been proved that the Codicil was prepared according to the instructions of Ramlal or that he executed it with full knowledge of its contents. It is evident that the instructions which were sent through Surendra could not have been verbal instructions because the draft contains various dispositions which could not possibly have been given or carried verbatim by word of mouth. Reference is made to the Will of 1914 in the draft and it is quite apparent that a copy of the will must have been in the possession of Ram Lal which was given to Surendra for the use of the Solicitors for the preparation of the draft. The evidence with regard to this is very unsatisfactory. But in my opinion the respondents should have asked the clerk from the attorney's office who produced the Day Book of the Attorneys from what instructions the attorneys had prepared the draft. Now the argument of the respondents resolves itself into this, that the condition of Ramlal should be taken into consideration in judging whether the Codicil was one which was really executed by him with full knowledge of its contents. It is not denied that Ramlal knew English, but it is said that his knowledge of English was very limited. It requires a greater knowledge of English than what Ramlal seems to have possessed in order to understand the draft, and there is no evidence that the draft or the Codicil itself as drawn was ever read over to him. Surendra takes some benefit under the Codicil, although it is small. The greatest benefit is taken by Pashu-

*S. N. D.*  
Advocate High Court  
Lamdu & Kashipati



pati's son a minor of tender age. The learned Judge has stated that there is no reason why Kashipati's sons should be deprived of what was given to them under the will and Pashupati's son be made the object of bounty of the testator who had 85 lacs from his father. Now the statement of fact by the learned Judge that Pashupati's son had got 85 lacs from his father is not supported by evidence. It would rather seem that if the fact had not been different Ramlal would not have taken such keen interest in getting the will rejected. We cannot dive into the mind of the testator why Kashipati's son was not made an object of his bounty. Nor can we divine why Siva Prosad a grandson was deprived of the four annas share of the dwelling house at Boinchee which was given to him under the will of 1914. If the Codicil is proved otherwise these facts are not sufficient for discrediting the document.

The main question is whether there are such grounds for suspicion as would lead us to hold that it has not been sufficiently proved that Ramlal had really executed the Codicil with full knowledge of its contents. Now I must take the findings of the learned Judge one by one. There is no reason to suppose that the Codicil was not legally executed. It is unnecessary to state in detail the facts which the learned Judge considers as damaging against the witnesses. The Codicil was registered by Ramlal, the execution was admitted before the Sub-Registrar and there is no reason to suppose that the attesting witnesses did not see the testator put his signature to the Codicil or that they had not attested the signature as required by law. True, Arun Deba is a junior pleader and Abinash Babu is the health officer of the local municipality and they were called for the purpose of attesting the document and the other attesting witnesses were the Secretary of Ramlal, Narendra Kumar and a Gomastha, Saukhi Lal. There is no good reason for disbelieving their testimony that the Codicil was executed by Ramlal in their presence and attested by them. There is also no question that Ramlal at the time did possess sound disposing mind. The only question is whether Ramlal executed the Codicil with full knowledge of its contents. The expression of the learned Judge that the conscience of the Court was not satisfied

with regard to this Codicil must have been taken from the well-known case of *Barry v. Butlin* (1). The expression that the conscience of the Court is to be satisfied, I presume, is a heritage from the observations of the Ecclesiastical Courts in England which had formerly jurisdiction with reference to wills. Now what is the evidence that is necessary for the purpose of removing any suspicion as regards wills? In a recent case, *Robins v. National Trust Co.* (2), Lord Dunedin remarks,

"Now the English Courts have gone what some might think pretty far on the question of what duty lies on those who propound a will."

That was also what appears to have been directly held in the case of *Jarat Kumari Dassi v. Bissessur Dutt* (3). There the learned Chief Justice, Sir Lawrence Jenkins, observed and it was concurred in by Woodroffe, J., that in India there was only one test or proof with regard to all civil cases. I respectfully agree with the opinion of the learned Judges in that case, and I would say that in all cases whether it is a will case or a case with regard to any other document, the Court must be satisfied upon the evidence in order to make a decree in favour of the party relying on the document. There is no absolute test for weighing evidence, specially as regards oral evidence which is given by the contending parties in a Court of justice. The Judges should try their best to ascertain the truth and that can only be done in the manner provided in the Evidence Act, and the proof necessary to establish a will in this country is not an absolute or conclusive one, but such proof as would satisfy a prudent man.

Moreover, it seems to me that the propounder of a will has to remove only such suspicious circumstances as are suggested by the objectors. The question therefore in this case is what is the suspicion that is raised in this case which must be removed by the petitioners. I have stated the main objections of the respondents put forward in the Court below. The facts alleged by the objectors have not been supported by the evidence. There is absolutely no

(1) [1840] 2 Moore P. C. 480.

(2) [1927] A. C. 515 at p. 519.

(3) [1912] 39 Cal. 245=13 I. C. 577=16 C. W. N. 265.



evidence of undue influence exercised by anybody. The evidence is quite clear that Ramlal had sound disposing mind at the time of the Codicil and long after. The ordinary burden upon the propounder to prove due execution and attestation has in my opinion been discharged. Then the question is whether Ramlal executed the Codicil after knowing its full contents. The general rule, I need hardly say, is that on proof of the signature of the deceased of his acknowledgment that he has signed the will, he will be presumed to have known the provisions of the instrument he has signed. This presumption however is liable to be rebutted by proof of suspicious circumstances, such as if the testator from want of education or physical infirmity was unable to read or unable to understand the provisions of the document or his capacity for executing the instrument is doubtful. Then the propounder of the will, is bound to remove those suspicious circumstances. But as I have already said I do not think wills stand on any different plane from any other instrument which a person is bound to prove in order to succeed. In this case whatever might be the suspicious circumstances alleged on behalf of the objectors here for the first time, these are in my opinion removed by the evidence adduced in this case notwithstanding that Surendra has not given evidence as to the instructions given. The draft of the Codicil has been produced and there is a note on the draft by Ramlal with his own hand that he approved it, and it was sent back to the Firm of Attorneys by post with a covering letter, Ex. 5, dated 19th August 1920. The letter runs thus:

"Dears Sirs, I have received the draft Codicil drawn by you according to my instructions sent to you through Babu Surendra Nath Chatterji. I have carefully gone through the draft and find the same in order and drawn in exact accordance with my instructions. I have made an alteration and I enclose the same herewith. Please have it engrossed and return it to me at an early date for execution. Yours faithfully: Ram Lal Mukherji. Enclosure-Draft Codicil."

This letter is in the hand-writing of Narendra and signed by Ramlal. Narendra was cross-examined on this and his reply was that the whole of the letter was dictated by Ram Lal. No question was put to him as to whether Ram Lal was capable of dictating such

a letter as that. If this is believed, and there is no reason to disbelieve it, then Ram Lal had a fairly good knowledge of English. Moreover as the learned Judge observes if his knowledge of English was limited, the sons would not have carried on correspondence with him in English. In any case from the proved fact of the strong will of Ram Lal it cannot be assumed that he ever signed the paper without fully knowing its contents. Narendra says:

"Exhibit 5 is the verbatim reproduction of what Ram Lal Babu dictated. When the Codicil arrived by post the Babu read it through to himself."

From the fact of the note on the draft which was written and signed by Ram Lal with his own hand and the letter, Ex. 5, I have no doubt in my mind that Ram Lal executed the Codicil with full knowledge of its contents.

One other fact should be mentioned here. The letter Ex. 5 states that there was only one alteration in the draft while the draft shows that there are 2 or 3 alterations. But that one alteration was an important alteration that the executor shall not be liable to account to any one and will deal with the property as if he was the malik. It seems that Ram Lal thought that was the only one important alteration which should be mentioned. There is no evidence in whose hand-writing the alterations were made. Jahnavi Prosad, who only of the two objectors gave evidence, says that it was in Surendra's hand-writing. but Surendra does not appear to have been there at the time when the draft reached Ram Lal by post and no question was put to any of the witnesses for the applicant as to the hand-writing of the alterations. I do not therefore attach much importance to the evidence of Jahnavi Prosad that the alterations are in the hand-writing of Surendra. It has also been contended why should a perfect stranger to Ram Lal like Surendra be made the absolute master of the property. It is difficult to understand what motive led Ram Lal to act like that. Apparently Ram Lal had no faith in any member of his family when he thought that Pashupati had been done to death by his own people. He found this stranger Surendra, who is a sort of cousin of Pashupati's widow, had interested himself on behalf of Parijat and her infant son and was



conducting the litigation with regard to Pashupati's will. He might have thought that this is the person who would take interest in the affairs of the infant. The provision that Surendra would not be accountable to any person is of no serious consequence, because he would be liable to account to the legatees whether the testator says so or not.

I think I have disposed of all the objections raised and in my view the learned Judge's decision with regard to the Codicil must be set aside and probate granted to the petitioner of the Codicil dated 11th September 1920.

I have not made any observations with reference to another Codicil which the learned Judge has not believed. That Codicil was executed in March 1920, and that has only an indirect bearing on the case. No probate was asked for and it is unnecessary to deal with the execution or proper attestation of that document.

The appeal is allowed, the judgment and decree of the learned Judge with reference to the Codicil of 11th September 1920 is set aside and probate of the same should be granted to the applicant.

The cross-objections are dismissed without costs. Having regard to the fact that the legal heirs of Ram Lal are the objectors and the other circumstances of the case the costs of both parties in both Courts will come out of the estate. We assess the hearing-fee at Rs. 500.

**Garlick, J.**—I agree.

R.K.

*Appeal allowed and  
Cross-objection dismissed.*

## **A. I. R. 1929 Calcutta 490**

**MUKERJI, J.**

*Juman Sadagar* — Accused — Petitioner.

v.

*Corporation of Calcutta*—Complainant—Opposite Party.

Criminal Revn. Case No. 471 of 1929,  
Decided on 22nd May 1929.

Calcutta Municipal Act (2 of 1923), S. 271—Pendency of suit for ejectment of tenant, or existence of injunction against owner of premises or mere application under S. 527 would not relieve owner from liability for conviction for non-compliance with notice under S. 271 but such proceedings cannot be ignored while considering what should be

proper sentence for offence of non-compliance.

The pendency of a suit in ejectment against the tenant or the existence of an injunction against the owner of the premises restraining him from taking possession of the premises or even the mere filing of an application under S. 527 would not be sufficient to relieve the owner from a liability for a conviction for non-compliance with a notice under S. 271 requiring him to erect privies connected with the premises. One cannot entirely overlook, however, the existence of such proceedings in considering the gravity of the offence and in determining the proper sentence. [P 491 C 2]

*Satindra Nath Mukherjee* — for Petitioner.

*Gopendra Krishna Banerjee*—for Opposite Party.

**Judgment.**—This Rule has been issued to show cause why the conviction of the petitioner under S. 488 read with S. 271, Calcutta Municipal Act, (Act 2 B. C. of 1923) should not be set aside or such other or further order made as to this Court may seem fit and proper. The facts necessary to be stated are the following. The petitioner holds a certain property, to wit, premises No. 7 Gas Street, Calcutta, on a lease. The premises in question were in the occupation of a tenant Kissen Ram Shaw who, it is said, held the same under a registered kabuliati for two years from 8th December 1920 and on the expiry of the term has been holding over. In October 1927 the Corporation of Calcutta served a notice on the petitioner under S. 271, Calcutta Municipal Act, requiring him to erect two connected privies in the premises. The petitioner, having failed to comply with this requisition, was convicted at first on 3rd April 1928, and sentenced to pay a fine of Rs. 25 and again on 12th June 1928 and sentenced to pay a fine of Rs. 30. The present conviction against which this rule has been issued was upon an application in which it was stated that the petitioner continued in not complying with the aforesaid notice under S. 271 of the Act from 13th June 1928 to 10th September 1928.

The fact that there was non-compliance with the notice in question between the dates to which reference has just been made was admitted on behalf of the petitioner by the pleader who appeared for him before the learned Municipal Magistrate. The Rule that has been issued by this Court has been sought to be supported by reference to certain proceedings



in other Courts and on a reference to which it has been argued that the conviction is not maintainable. I shall presently refer to those proceedings. The petitioner appears to have filed a suit in ejectment against the tenant being title Suit No. 715 of 1927 of the Court of the Munsif at Sealdah. This suit was filed sometime in the year 1927. It ended in a decree against the tenant Sri Kissen Ram on 19th July 1928. The petitioner states that when he tried to execute the ejectment decree for getting khas possession of the said premises, one Jiblal Shaw alleging that he was the tenant's brother filed a declaratory suit against the petitioner on 13th August 1928 being suit No. 209 of 1928 in the Court of the Subordinate Judge at Alipore and on 14th August 1928 obtained an injunction against the petitioner restraining him from taking possession of the said premises. On being called upon to answer the charge with regard to which the petitioner has now been convicted he appeared before the Court and on 4th December 1928 placed all the facts before the Municipal Magistrate and upon that he was advised to make an application under S. 527 of the Act in the Small Cause Court of Sealdah in order to obtain facility for getting possession of the premises for the purpose of constructing the privies thereof.

The petitioner states that on his undertaking to make the said application the case was adjourned and on that he on 13th December 1928 did, in point of fact, file the said application in the said Court. That application, the petitioner states, is yet pending. On these facts, the petitioner contends that the order of conviction which was passed against him was one which was not justifiable.

Now, it seems to me upon the provisions of the law as it stands that the pendency of a suit in ejectment against the tenant or the existence of an injunction against the petitioner or for the matter of that the mere filing of an application under S. 527 of the Act would not be sufficient to relieve the petitioner from a liability for a conviction for non-compliance with a requisition such as there was in the present case under S. 271, Calcutta Municipal Act. At the same time, however, it seems to me that in order to consider the gravity of the offence which one commits in not com-

plying with a requisition of this character at a time when proceedings of the nature to which I have already referred are pending, one cannot entirely overlook the fact of the existence of those proceedings. It is true that S. 527 of the Act says in Cl. (3) of it that :

"after eight days from the date of any such order, the said occupier shall afford all such reasonable facilities to the owner for the purpose aforesaid as may be prescribed in the said order ; and in the event of his continued refusal to do so, the owner shall be discharged, during the continuance of such refusal from the liability which he would otherwise incur by a reason of his failure to comply with the said provision or requisition."

But the subsection does not mean that the pendency of an application under S. 527 or for the matter of that, of other proceedings bona fide taken by one for getting khas possession of the property, need not be considered for the purpose of determining what should be a proper sentence to be imposed upon him for his failure to comply with the requisition. I am not oblivious of the fact that the application under S. 527 was made only on 13th December 1928 and not at any time during the period from 13th June 1928 to 10th September 1928 during which the offence is said to have continued.

The fact that it was not made within the period aforesaid only means that the application does not absolve the petitioner from liability. The proceedings that the petitioner took for the purpose of getting khas possession of the property, I am clearly of opinion, were taken by him bona fide and I think he was perhaps wrongly advised in not taking proceedings under S. 527 of the Act in the first instance. Having regard to those proceedings and in view of the fact that that application has been made and is actually pending, some consideration, in my opinion, should be shown to the petitioner in the matter of the sentence that is to be passed on him and in that view of the matter I would reduce the sentence passed on the petitioner to a fine of four annas per diem for the 75 days for which the learned Magistrate has convicted him in other words, that the petitioner should be sentenced to pay a fine of Rs. 18-12-0 in default to undergo simple imprisonment for 18 days.

It appears from a perusal of the ordersheet of the case which has been started on the application under S. 527 of the Act that on several occasions the peti-



tioner was ready with his witnesses but on the prayer of the opposite party the hearing of the application was adjourned and it further appears that on the last two days for which the case was fixed, namely, 20th April 1929 and 11th May 1929 the opposite party was ready but the petitioner for some reason or other asked for and obtained an adjournment. The petitioner will be well advised not to apply for such an adjournment again and to have the matter brought to an end in order that if he obtains an order under S. 527, sub-S. 3 in his favour he may get the benefit which that section would confer on him. The Rule will be made absolute only to this extent that while the petitioner's conviction stands the sentence passed on him will be reduced as aforesaid. Balance of the fine, if paid, will be refunded.

S.N./R.K.

*Rule made absolute.***A. I. R. 1929 Calcutta 492**

MITTER, J.

*Durga Prasad Thakur—Appellant.*

v.

*Tarakeswar Moulik and others—Respondents.*

Appeal No. 541 of 1928, Decided on 13th December 1928.

**Civil P. C., O. 41, R. 27—Admissibility of additional evidence—Appellant cannot complain if additional evidence is taken for him.**

The appellant cannot in second appeal complain that additional evidence received in the lower appellate Court giving the appellant an opportunity of establishing by production of further evidence that the dakhilas given by the landlord were genuine, was wrongly received by that Court: 36 Cal. 833 (P. C.), *Rel. on.* [P 493 C 1]

*Benode Mitter, Radha Binode Pal and Prem Ranjan Roy Chowdhury—for Appellant.**Sarat Chandra Roy Chowdhury and Dwijendra Krishna Dutt — for Respondents.*

**Judgment.**—This is an appeal by the defendant and arises out of a suit commenced by the plaintiffs for recovery of possession of the lands described in the plaint about 13½ cottas in area after establishment of their title to the same.

The defence of the defendants was that the plaintiffs or their vendor Harinath had no title to the suit land which originally belonged to one Barani Bewa, defendants' grandfather's sister who made a verbal gift of the land to the defendant's father Jharu Mondal and that the

defendant after inheriting the land from Jharu Mondal sold the land to Durga Prasad, who is the appellant before me. The Munsiff decreed the plaintiff's suit. Against this decision an appeal was taken by the defendants to the Court of the Subordinate Judge of Rajshahi and the learned Subordinate Judge after taking additional evidence at the appellate stage has affirmed the decision of the Munsiff.

A second appeal has been taken to this Court by defendant 7 who has purchased the interest of defendants 1 to 4 and Sir Benode Mitter appearing for defendant 7 has contended that the case should be remanded to the lower appellate Court on account of various errors of procedure which have affected the merits of the case. It is said that the lower appellate Court having proceeded to decide the appeal by the reception of inadmissible evidence the appeal should be reheard after excluding the additional evidence and other inadmissible documentary evidence. It appears that the plaintiff's case was that the jote in question belonged to one Harinath and that they purchased from Harinath, the said jote on 13th August 1919 and that Harinath and after him plaintiffs possessed the land in suit through their tenant one Chhabuli who is defendant 5 in the present litigation. The case of the defendant, as I have indicated, is that the jote originally belonged to Barani and that Barani made an oral gift to her nephew Jharu Mondal, that defendants 1 to 4 are the heirs of Jharu and that they were possessing the disputed land through defendant 5. There was previous rent suit against Chhabuli which was instituted by the present plaintiffs on the basis of their purchase of the jote from Harinath and on the basis of a re-settlement in Barga of the disputed lands with defendant 5 in the year 1326 corresponding to 1907. In that suit it was decided that there was no relationship of landlord and tenant between the present plaintiffs and defendant 5 and it was held that the plaintiffs were not possessing disputed land through Chhabuli i. e. defendant 5. In that suit it was also held that the entry in the Record-of-Rights that Hari Nath was possessing the land through defendant 5 was a doubtful entry. The learned District Judge who decided the appeal from the decision of the rent suit found that the circumstances were such as to show that



there was no relationship of the landlord and tenant between plaintiffs and defendant 5 and there was no agreement to pay Barga rent. The learned District Judge left open the question of plaintiffs' titles.

The grounds taken by Sir Binode Mitter fall substantially under four heads. It is argued in the first place that the Subordinate Judge ought not to have allowed appellants' evidence to be taken at the appellate stage for the purpose of considering as to whether the dakhilas filed by the defendant are genuine or not. It appears that both sides produced dakhilas in the Court of the first instance from the sherista of the landlord and the Munsiff with reference to the dakhilas of the defendants said that they did not relate to the disputed land. The Munsiff said this :

"Thus I must hold that the defendants' dakhilas Ex. B. Series, if they are genuine do not refer to the suit land or that such dakhilas have been manufactured with the help of landlord's gomastha who has nothing to lose by the issue of spurious dakhilas in duplicate."

After hearing the appellant the learned Subordinate Judge on 5th August 1927 recorded the following order :

"Heard the learned pleaders of both sides. It is very important in this case to find out which set of dakhilas is true. The result of the case hinges much upon it. Both parties are to take proper steps for enlightening the Court on the point. After taking evidence on that point I shall hear the appeal."

It appears that in pursuance of this order on 29th October 1927 when the appeal was finally taken up, the appellant examined one of the landlords, Babu Girija Bhusan Rai, who produced a number of documents Ex 9 to 9z, 9z to 9z28 and Ex. 10 which had been used in evidence. It is complained on behalf of the appellant that O. 41, R. 27, Civil P. C., does not authorize the appellate Court to take additional evidence in such circumstances. It appears to me, however, that the additional evidence was taken for the purpose of giving the defendants an opportunity of establishing by production of further evidence that the dakhilas given by the landlord were genuine. It seems to me that in the circumstances the defendant cannot now complain that the additional evidence was wrongly taken. In this connexion I may refer to an observation of their Lordships of the

Judicial Committee in the case of *Jagarnath Pershad v. Hanuman Pershad* (1). Their Lordships said this (at p. 839).

"On the argument of the appeal it was objected that the examination of three witnesses by the Court of appeal was irregular; but it appears that the examination was taken with the assent of both sides. It is not open, therefore, to any body to complain of it now."

Therefore this ground of appeal must fail. It was argued in the second place that as it was decided in the rent suit as between plaintiffs and defendant 5 that defendant 5's possession was not the possession of the plaintiff that question is *res judicata* between the plaintiff and defendant 5. I think this contention is sound but even if full effect is given to this contention that does not affect the decision of this appeal for the effect of the decision of the Court of appeal below is that there was no relationship between plaintiffs and defendant 5 in the year 1326 and plaintiffs alleged their re-settlement in the Barga with defendant 5. The present suit was instituted in 1923 within 12 years of 1326 i. e. 1919; consequently, even if plaintiffs cannot show that the possession of Chhabuli was not his possession since 1326 his suit cannot be held to be barred by the statute of limitation.

The third ground taken was that the lower appellate Court has relied on certain recitals in another document which was not inter partes and which was with respect not to disputed land but to some other parcel of land. It appears to me, however, that no reference has been made by the lower appellate Court to this document which is Ex. 3 in the case but the lower appellate Court has not referred to it at all. This ground of appeal must fail.

It was argued in the fourth place that the lower appellate Court was in error in stating that there was no evidence to rebut the khatian whereas, the previous rent decree was good evidence to rebut the entry in the khatian which showed that defendant 5 was a tenant under Harinath through whom the plaintiffs claimed. It appears, however, that the learned Subordinate Judge did consider the effect of Ex. K which is the decree in the rent suit and he said rightly that the effect of that decree is that the Court did not believe the resettlement with Chhabuli by the plaintiffs in 1326 and found the absence of relationship of land-

(1) [1909] 36 Cal. 833=3 I. O. 465=36 I. A. 221.



lord and tenant between them. As I have said the effect of that is that Chhabuli's possession was not the possession of the plaintiffs from after 1919 and this does not affect the question of limitation.

As all the grounds raised in this appeal fail this appeal must be dismissed with costs.

V.B./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 494

CUMING AND PEARSON, JJ.

*Tarak Nath Mukherjee* — Plaintiff—Appellant.

v.

*Sanat Kumar Mukherjee and others*—Defendants—Respondents.

Appeals Nos. 206, 207 and 208 of 1927, Decided on 21st March 1929.

(a) Civil P. C., S. 64 and O. 38, R. 10—Scope.

Section 64 makes no distinction between attachment before or after judgment: 23 C. L. J. 115 *Discussed*. [P 495 C 1]

(b) Civil P. C., S. 64—Agreement to sell prior to attachment cannot prevail against attachment—Transfer of Property Act, S. 54

As the agreement to sell entered into before attachment does not create any interest or charge on the property, it cannot prevail against attachment: 23 C. L. J. 115, *not Applied*. [P 495 C 1]

*Braja Lal Chakrabarti and Bijan Kumar Mukherjee*—for Appellant.

*Rupendra Coomar Mitter; Sarat Chandra Bose; Amarendra Narain Bagchi and Hira Lal Chakraborty*—for Respondents.

**Cuming, J.**—The facts of the case out of which these appeals arise are these: One Himadri had a certain share in a certain taluk. He was involved in debt and there were a number of decrees out against him. On 14th June 1921 in execution of a money decree his share in the taluk was sold. He then applied on 14th July 1921 to have the sale set aside on depositing the decretal amount and this was allowed on 18th July 1921. It will appear that the money to do this was supplied by the plaintiff in the present suit, Babu Tarak Nath Mukherji. On 8th July Himadri had entered into an agreement to sell to Mukherji his interest in the taluk and Mukherji paid him in advance some Rs. 26,000 odd of the purchase money and it was this money which was used to satisfy the decretal amount of the decree I have already referred to.

One Kali Nath Bose had meanwhile obtained another decree against Himadri and in execution of the decree attached the same property on 25th September 1921.

On 16th September 1921 two persons Niladri and Sanat had instituted money suits against Himadri and attached the property before judgment in one suit on 10th August 1921 and in the other on 3rd September 1921. On 29th November 1921 the agreement for sale I have already referred was completed and the property sold to Mukherji. The balance of the purchase money Rs. 5,386 odd was paid some time before this date. Mukherji then put in objection to the three attachments under O. 21, R. 58 but was unsuccessful. Mukherji deposited the decretal amount in Kali Nath Bose's case. He has brought three suits. One against Kali Nath Bose asking for a declaration that the property was not liable to be sold in execution of Kali Nath's decree and asking for a refund of the purchase money.

In the other two suits he asked for a declaration that the property was not liable to be sold in execution of the decree.

In Kali Nath Bose's case the Court held that the property was liable for the decretal debt. In the other two cases it was held that the property was liable to be sold in execution of the decrees which had since been obtained subject to a mortgage charge of one Raja Sreenath Roy and subject to the right of the plaintiff to have his claim for specific performance of contract enforced against the auction-purchaser. There were appeals and cross-appeals to the District Court. That Court passed the following decree:

"that the title of the plaintiff to the property would be confirmed but that he would pay certain sums to the defendants which would be charge on the property."

A like cross-appeal in suit No. 71 was dismissed. The plaintiff has appealed and there are also cross objections by the defendants. The plaintiff's case briefly is that the property is not in any way liable for the payment of the defendant's decrees. The question therefore to be decided in these appeals is a simple one, viz., whether the attachment which took place before the sale or the sale itself shall prevail. So far as this point is concerned S. 64, Civil P. C., supplies a



complete answer, for any private transfer or delivery of the property attached subsequent to the attachment is void against all claims enforceable under the attachment. Admittedly the sale [was completed on 29th November after the attachment. The section makes no distinction between attachment before or after judgment. The plaintiff appellant however would rely on the agreement of sale of 8th July and would seem to contend if I understand his argument rightly that this agreement to sale would create some obligation on the property which obligation if I understand him rightly would prevail over the attachment.

The obligation presumably referred to here must be such an obligation as is referred to in S. 40, T. P. Act, an obligation which does not amount to an interest in the property or an easement. S. 54, T. P. Act makes it quite clear that a contract for sale does not create any interest or charge on the property.

Therefore at the time of the attachments the appellants had no interest in or any charge on the property which was attached. He had at the most an obligation as contemplated under S. 40, T. P. Act which might allow him go to the transferee and compel the transferee to sell to him the property.

But it is equally clear that as a result of the obligation no charge or interest has been created by such obligation and as far as I can understand nothing can prevail against the attachment except some prior interest or charge. It might be that as a result of the obligation or agreement, Mukherjee might be able to go to the person who had purchased the property at an execution sale and ask that he should perform the contract for sale.

The appellant has relied in support of his contention on the case of *Madan Mohan v. Rebati Mohan* (1).

If I understand that decision rightly it did not decide or lay down any principle of law but was decided on some principle of natural justice, for, the learned Judge (Woodroffe, J.) concludes his judgment by saying that the natural justice of the case demands that the defendant's purchase should prevail. The facts of that case were that the plaintiff had attached certain properties before judgment on 6th November 1895 and

purchased them at an execution sale on 19th August 1897. Before the sale on 28th May 1897 the defendant purchased the property by a kabala in pursuance of a contract executed before the attachment. In deciding this case Woodroffe, J., no doubt discusses S. 64, Civil P. C., and also O. 38, R. 10 and remarks that the creditor can only attach the right, title and interest of his debtor at the date of attachment and cannot complain if his debtor has created an obligation against him prior to the attachment. Perhaps he cannot complain and as far as I can see he would have no grounds of complaint, for, an obligation does not as far as I can see affect the right, title and interest of the judgment-creditor at the time of the attachment. It creates no charge or interest and the very use of the expression obligation shows that the learned Judge realized that it was not a right. Neither would it be title or interest. Obviously therefore the creditor would have nothing to complain about, for as far as I can see, it cannot affect his right to bring the property to sale in execution of his decree. The learned Judge further on states that :

"It seems to me that if we are to hold that a plaintiff creditor can ignore the obligation incurred by a debtor we should use the provision of S. 64 for a purpose which was not intended, that provision being for the protection of the creditor against transaction subsequent to the attachment."

The transactions referred to are transfers or delivery of the property and an agreement to sell is neither. But as it creates no interest or charge in the property there is nothing to protect the the judgment-creditor against. In my opinion he is not affected by anything that creates no charge or interest in the property. But after all the decision of that case depends as far as I can see on no principle of law but on some principle of natural justice and I find some difficulty in applying to the present case some principle of natural justice which was applicable obviously to the particular facts of that particular case.

I am therefore of opinion that the attachment must prevail over the subsequent sale to the plaintiff and that the property is liable for the satisfaction of the three decrees already referred for the execution of which the property had been attached both before and after judgment. The plaintiff-appellant states that if this

(1) [1916] 23 O. L. J. 115=34 I. C. 953=21 C. W. N. 158.



be our decision he does not quarrel with the form of the lower Court's order and will not contest it.

The cross-appeals in the event of the decision being against the plaintiff-appellant as it is, are not pressed and are dismissed. The result is that the appeals fail and are dismissed with costs.

**Pearson, J.**—I only desire to add that I am unable to take the same view of the basis of the decision in *Madan Mohan v. Rebati Mohan* (1), as Cuming, J. I think that decision was given on a consideration of the scope and effect of S. 64, Civil P. C., coupled with O. 38, R. 10 as affecting the circumstances of that case, and that it is not to be disposed of saying that it was rested not upon principles of law but upon natural justice only. For the purpose of the present case however the only question is whether in the circumstances the attachment held good to the extent of the then unpaid balance of the purchase money under the prior agreement of July. At the time of the attachment there is admittedly no question of any transfer of interest in the property, which, therefore, remained in the vendor. Neither the contract for sale nor the attachment created any such interest. Then as regards the argument that the attachment cannot interfere with the pre-existing rights under O. 38, R. 10, the question arises as to what those rights actually were. The vendor's right was to receive the balance of the purchase money, but only upon execution of the conveyance operating as a transfer and from that he was prohibited in terms of the attachment order: see O. 21, R. 54. In my view when the attachment was made it was an attachment affecting the right, title and interest of the debtor in the property at any rate to the extent of any balance then receivable under the agreement: the debtor's existing interest in the property became thereby affected to that extent and the creditor became entitled to have it applied, in the events which happened towards payment of his debt. That, I think, is the fair effect of S. 64, Civil P. C. and O. 38, R. 10 in the circumstances of the present case.

I would therefore agree with the order proposed to be made in this appeal.

S.N./R.K.

*Appeal dismissed.*

## A. I. R. 1929 Calcutta 496

CUMING AND PEARSON, JJ.

*Giribala Dasi*—Applicant—Petitioner.  
v.

*Prokash Chandra Dutt* — Opposite Party.

Civil Revn. No. 1241 of 1928, Decided on 8th March 1929 from order of Dist. Judge, Burdwan, D/- 31st August 1928.

Succession Act (39 of 1925), S. 268—Probate Court may order inventory to be made.

Under the provisions of S. 268, a probate Court has the same power in ordering an inventory to be made as the ordinary civil Court has under O. 39, R. 7, Civil P. C.

[P 496 C 2]

*Radha Binode Pal*—for Petitioner.

**Judgment.**—The facts of the case out of which this rule has arisen are these: the petitioner is a widow. Her brother-in-law applied for probate of her deceased husband's estate. Notice was duly served on the petitioner. She duly filed her objection and at the same time made an application for the appointment of a Court Officer to inspect and make an inventory of all the moveables left by her husband, which ran the risk of being stolen and misappropriated by the opposite-party. The learned District Judge rejected the application of the petitioner for making an inventory of the movables left by her husband on the ground that there was no provision for such a proceeding in the Succession Act. S. 268, Succession Act provides that:

"the proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, as far as the circumstances of the case permit by the Code of Civil Procedure 1908."

Under O. 39, R. 7, Civil P. C., the Court may on an application of any party to a suit make an order for making an inventory of properties. Under the provisions of S. 268, Succession Act a probate Court has the same power in ordering an inventory to be made as the ordinary civil Court has. The rule is therefore made absolute. The order of the learned District Judge is set aside and the case sent back to him to be dealt with in accordance with law.

S.N./R.K.

*Rule made absolute.*



A. I. R. 1929 Calcutta 497

LORT-WILLIAMS, J.

*Rahimbux Ashan Karim*—Plaintiff.

v.

*Central Bank of India, Ltd.*—Defendant.

Original Civil Suit No. 2626 of 1927,  
Decided on 10th August 1928.

(a) Contract Act, S. 229—Member of pledgor firm also member of pledgee's advisory committee for advancing loan—No notice of pledgor's fraud can be imputed to pledgees—Transfer of Property Act, S. 3.

The fact that a person who was a member of the pledgor firm and who applied for the loan and offered a pledge of the goods as security, was also a member of the local advisory committee of the pledgee Bank, to assist their agent in deciding whether to grant loans, does not fix the pledgees with constructive or imputed notice of the pledgor firm's fraud: *In re Hampshire Land Co.*, (1896) 2 Ch. 743; *Houghton and Co. v. Nothard Lowe and Wills Ltd.*, (1923) A. C. 1, *Ref.*

[P 493 C 1]

(b) Interpretation of Statutes — Words should be given widest possible meaning consistent with context unless otherwise intended by the Act.

When construing an Indian Act, words should be given their widest possible meaning consistent with the context, unless there is something in the Act itself to indicate that they are intended to be used in the artificial and technical sense which they have acquired in English law, or in any other restricted sense.

[P 500 C 1,2]

(c) Interpretation of Statutes—Consideration about previous state of law should not influence examination of language of Statute which should be given its natural meaning.

The proper way to approach the construction of a statute which is intended to be a code of law is in the first instance, to examine the language of the statute and ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with that view: *Bank of England v. Vagliano Bros.*, (1891) A. C. 107, *Foll.*

[P 503 C 2]

(d) Contract Act, Ss. 178 and 108—Word 'possession' must be given fullest and widest meaning—Contract for sale of goods—Possession with vendor—Third party pledgee or vendee acquires good title when he has no notice of original vendee's interest in the goods.

It is impossible even if it were permissible or desirable, to limit or restrict the natural meaning of the word 'possession' in Ss. 178 and 103 in any way which would be consistent with other sections of the Act, or could be based upon any clear, consistent and com-

prehensive principle. The extent of the sections should be limited only by giving to the word 'possession' its fullest and widest meaning, both natural or ordinary and technical or artificial, and including both actual possession and possession in law, subject to the provisos therein contained. [P 504 C 1]

Where there was a contract of sale of ready ascertained goods upon credit, and both the property in the goods and the right to possession passed to the buyers at the date of the contract but the goods part of which were paid for, remained in the possession of the sellers who pledged some of them to a third party, the pledgee having no notice of the buyer's interest in the goods.

*Held*: that the pledge, and even if there was a sale, the sale came within the scope of Ss. 178 and 103 respectively and as such passed a good title to the third party. (*Case Law discussed.*) [P 504 C 1]

(e) Contract Act, S. 178—Documents.

Section 178 contemplates documents which have a lawful owner other than the pledgor.

[P 504 C 2]

(f) Contract Act, S. 179—Contract for sale of goods—Possession with vendor who pledged them to third party without notice of vendee's interest—Pledgee obtains no interest under S. 179.

Where there was a contract of sale of goods on credit and the property in goods and rights to possession passed to the vendee but vendor retained possession and pledged the goods to a third party without notice of the vendee's interest in them.

*Held*: that the pledgees obtained no right or interest under S. 179. 42 Bom. 205, *not Foll.*

[P 506 C 1]

*N. N. Sircar, T. Ameer Ali and S. C. Mitter*—for Plaintiff.

*B. L. Mitter, and W. W. K. Page*—for Defendant.

**Judgment.**—Substantially the facts in this case are undisputed. The plaintiffs are a mercantile firm dealing in cutlery and other goods. The firm of Kerr Tarruck & Co. were an importing firm and for a long time prior to 1927 had been used to import such goods in accordance with orders given by the plaintiffs and sell to them under various agreements. It was not part of the business of Kerr Tarruck & Co. to act as warehousemen, nor did they hold themselves out as such. On 15th January 1927 the plaintiffs and Kerr Tarruck & Co. made a typewritten agreement in the nature of giving plaintiffs a monopoly in Calcutta for one year. This agreement needed the assent of the exporters in Germany, and pending the arrival of that, on 16th February the plaintiffs accepted drafts for goods covered by the agreement of 15th January and a verbal agreement



was made in case the exporters' consent was withheld, by which the plaintiffs agreed to take the goods already imported and to be imported under the monopoly agreement at 72 per cent less than the invoice price and make payment therefor within five months from the date of a fresh contract which was to be entered into. Kerr Tarruck & Co. were to draw hundis on the plaintiffs and the particulars of the goods were to be set out on the hundis. Delivery orders were to be issued, but the plaintiffs were to take delivery as they required the goods; meanwhile the goods were to remain in Kerr Tarruck & Co's godowns free of rent. Delivery orders were issued sometimes at the time when the hundis relating to the goods referred to in such delivery orders were accepted, and sometimes earlier and sometimes later. The exporters refused their consent and thereupon on 20th July a list of the goods covered by the agreement, which goods had by that time arrived, was made out and on 21st July a contract was made by which the plaintiffs agreed to purchase from Kerr Tarruck & Co. these goods which consisted of 319 cases of cutlery. This agreement is partly printed and partly typewritten. The latter portion is to the effect that the cases were shipped as per an attached statement, dated 20th July 1927. Payments were to be made within five months from date and deliveries were to be taken within that time. The printed portion is inappropriate to some extent as it is intended obviously to apply to a contract for goods to be imported, whereas on 21st July these were ready goods having already arrived in Calcutta. Payments were to be made by hundis to be drawn by Kerr Tarruck & Co. and accepted by the plaintiffs, and these in fact were drawn payable at various dates within the five months mentioned; and delivery orders were issued to the plaintiffs from time to time; meanwhile pending delivery the goods remained in Kerr Tarruck & Co's godowns.

So far as they are material, Cls. 4 and 5 of the contract are as follows:

(4) We engage to accept on presentation and to pay on or before maturity the draft drawn upon us for the goods shipped in execution of this order.

(5) Should we fail to pay for the goods in accordance with para. 4 of this contract, you are hereby authorized to sell the goods on

our account without giving us any notice, by private sale or public auction, and we agree to pay you any loss or deficiency arising on such sale, together with all costs, charges and expenses with usual brokerage and interest at the rate of 12 per cent. per annum. We further agree to pay you all local charges and expenses together with 2½ per cent commission.

The effect of this contract, therefore, was that there was a sale of ready ascertained goods upon credit, and both the property in the goods and the right to possession passed to the plaintiffs at the date of the contract. The present action affects only 140 of the cases, of which 75 cases have been delivered to the plaintiff & 65 remain undelivered which are of the value of Rs. 32,500. Nine hundis were accepted and nine delivery orders were issued. These covered the whole of the goods in suit. Two of the hundis were paid by the plaintiffs. One was unpaid and remained in the hands of Kerr Tarruck & Co., and six were negotiated by them and were dishonoured by plaintiffs on presentation. Full particulars of all these matters are set out in Ex. D. No demand for delivery had been refused prior to the dishonour of the hundis. Plaintiffs made a demand from defendants on 1st December but at that time the six hundis had been dishonoured.

On 12th October 1927, Kerr Tarruck & Co. were adjudicated insolvent and towards the end of November plaintiffs discovered that they had pledged these goods to the defendants on 24th and 25th August 1927. The plaintiff's claim against the defendants is for delivery of goods in suit or Rs. 32,500 their value and interest at 6 per cent until realization.

The following are the issues raised:

(1) Was there an agreement for the purchase and sale of the goods in suit as alleged in para. 3 of the plaint?

(2) Have the plaintiffs paid for the goods and the duty and charges in respect thereof?

(3) If not, were the plaintiffs entitled to demand the goods from the defendant bank?

(4) And was the refusal of the bank to deliver wrongful?

(5) Was there a valid pledge as alleged in para. 5 of the written statement?

(6) Are the plaintiffs entitled to maintain this suit in respect of the goods not paid for?

(7) What damages, if any, are the plaintiffs entitled to?

The main issue to be decided is whether there was a valid pledge and whether the defendants can avail themselves of the provisions of S. 178 or 179, Con-



tract Act. At first the goods lay in godowns rented by Kerr Tarruck & Co. in premises belonging to the Bengal Bonded Warehouse Association, the contents of which godowns were pledged by Kerr Tarruck & Co., to the Imperial Bank, who had a sort of floating charge over all goods of Kerr Tarruck & Co., lying in their godowns at any particular time. When Kerr Tarruck & Co. desired to repledge them to the defendants, they removed the goods, then numbering 95 cases, from the rented godowns to godowns in the same premises controlled by the Bengal Bonded Warehouse Association, who issued warehouse certificates for them and these were endorsed in favour of and handed to the defendants as security. Subsequently 30 out of the 95 cases were delivered to the plaintiffs at their request and upon delivery orders previously issued.

The fact that Mr. B. N. Sircar, the senior partner of Kerr Tarruck & Co., who applied to the defendants for the loan and offered a pledge of the goods as security, was also a member of the local advisory committee appointed under article 117 of the articles of association of the defendant bank, to assist their agent in deciding whether to grant loans, does not, in my opinion, fix the defendants with constructive or imputed notice of Kerr Tarruck & Co.'s fraud. It would not be within the region of common sense to presume that Mr. B. N. Sircar would communicate the facts establishing his own guilt to his colleagues on the advisory committee or to the defendants. *In re Hampshire Land Co.* (1), *Haughton and Company v. Nothard, Lowe and Wills, Limited* (2). Nevertheless I consider the episode unfortunate and the practice inadvisable. To allow members of the advisory committee to recommend loans to be made to one another, is to create a conflict between interest and duty, which might easily give rise to a suspicion of malafides.

The main issue which I have to decide is whether there was a valid pledge, and this will depend upon whether the transaction comes within the provisions of S. 178, Contract Act. That section is as follows :

"A person who is in possession of any goods or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents; provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly : provided also that such goods or documents have not been obtained from their lawful owners or from any person in lawful custody of them, by means of an offence or fraud."

And if the ordinary or popular meaning is given to the word "possession," it is clear that Kerr Tarruck & Co., who were persons who had sold goods and continued in possession of them and who held documents of title to them, fulfilled the requirements of the section.

It is, however, argued on behalf of the plaintiffs that the word must be construed in a restricted and technical sense, as has been decided in a line of cases beginning as far back as 1873, and that Kerr Tarruck & Co. were not in possession of the goods, within such restricted meaning, at the time of the pledge. It becomes necessary, therefore, to examine these decisions. *Greenwood v. Holquette* (3) was decided in 1873, shortly after the Act came into operation. It was a case referred for the opinion of the High Court from the Calcutta Small Cause Court, and, therefore, not in the nature of an appeal, and it concerned the sale of a piano let out on a hire-purchase agreement. It was a case, therefore, under S. 108 of the Act, which so far as is material to the present discussion, is as follows :

"No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases :

"Exception 1.—When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other documents showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary : provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods."

The case was not argued by counsel and the decision was probably one of the

(1) [1896] 2 Ch. 743=65 L. J. Ch. 860=75 L. T. 181=3 Manson. 269=45 W. R. 136.

(2) [1928] A. C. 1.

(3) [1873] 12 Beng. L. R. 42=20 W. R. 467.



first under the new Act. Couch, C. J. held that:

"In construing this Act, which is to be the law of contract for India, we must not adopt as a rule of construction, that it was intended to make the contract law of India the same as the law of England. Indeed, there are reasons for thinking that the legislature intended that in some respects there should be a different law for India; and therefore we cannot refer to any English case as a guide"

and that the words "notwithstanding any instructions of the owner to the contrary" indicated an unqualified possession and not restricted otherwise than by the owner giving instructions to the person who has it,

"such for example as that of a factor or agent where the owner of the goods although he has parted with possession may give instructions to the person in possession what to do with the goods,"

which is the kind of possession that an owner has, and that the section did not apply to a person who has only a qualified possession such as a hirer of goods or where the possession is for a specified purpose, because in such cases the owner has no right to give instructions.

I agree respectfully with the method of construction laid down by the learned Judge. We must look at the words of the section itself and of the Act of which it forms part, and apply ordinary and unrestricted meanings to them, unless it is made clear in the section or in the Act that extraordinary or restricted meanings are intended. The word "possession" has an ordinary and natural meaning, and also a restricted and technical meaning. It is a word of ambiguous meaning and its legal senses, meaning thereby its senses in English law, do not coincide with the popular sense. "Possession is said two waies, either actual "possession or possession in law." (Termes de la Ley). It may mean physical control, sometimes called de facto possession or detention or it may mean legal possession, which may exist with or without de facto possession and with or without a rightful origin. It may also mean the right to possession, which may amount to ownership, or may be of a temporary or special character. In my opinion, therefore, when construing an Indian Act, words should be given their widest possible meaning, consistent with the context, unless there is something in the Act itself to indicate that

they are intended to be used in the artificial and technical sense which they have acquired in English law, or in any other restricted sense.

But I disagree, as respectfully, with the conclusion which the learned Judge has drawn, that the words to which he referred indicate that "possession" must be restricted to the kind of possession which a factor or agent has. All that they indicate is that such possession is included, not that all other kinds of possession are excluded. That is to say, they indicate that the provisions of the Factors Acts (13 of 1840 and 20 of 1844) are included in Ss. 108 and 178, not that these sections are co-extensive only with those Acts, which referred specifically only to factors and agents entrusted with goods or documents of title to goods: see *Ramdas Vithaldas v. Amerchand & Co.* (4).; see also *Le Geyt v. Harvey* (5), where Sargent C. J. says:

"The language of this proviso is, doubtless, very general, and the omission of the expressions 'agent' and 'entrusted with' used in the repealed Factors Acts doubtless gives the section a larger scope than those Acts possessed as construed by the Courts in England."

The learned Judge went on to say that it would be straining the expression "by consent of the owner" beyond its plain meaning if it were held applicable to cases where the possession was entirely beyond the control of the owner of the goods. However, whether I am right in this view or not, the present case comes under S. 178, which contains neither the words referred to nor the words "by the consent of the owner." Moreover, the possession of a person under a hire-purchase agreement is quite different from that of a vendor of goods who remains in possession, so much so, that the latter has been brought specifically within similar provisions in both the English Factors Act, 1889 and the Sale of Goods Act, 1893, whereas the former has not. And lastly it is clear that the possession of Kerr Tarruck & Co. would pass the tests of both Couch, C. J. and Sargent, C. J., for the goods were not entirely or at all beyond the control of the plaintiffs, who had every right to give instructions to Kerr Tarruck & Co. about them, and who could have asked for and obtained delivery at any time up to the

(4) A. I. R. 1916 P. C. 7=40 Bom. 630=43 I. A. 164 (P.C.).

(5) [1884] 8 Bom. 501.



date of the insolvency. In *Biddomoye Dabee v. Sittaram* (6), goods had been left in a house in charge of a servant during the owner's temporary absence, and he had pledged them. These cases therefore came under S. 178 and were stated for the opinion of the High Court by the Judge of the Calcutta Small Cause Court. No one appeared for the defendants. Garth, C. J. observed that S. 178 was intended to embody the Factors Act, 5 & 6 Vic. C. 39 and that it was never intended to alter the existing law, but to meet the case of an agent entrusted with goods. The learned Judge does not state his sources of information upon which this statement is based, and it was not necessary for his decision; as he points out, the distinction between possession and custody is referred to in the section. The servant never possessed the goods but had only the bare custody of them. The goods remained in the possession of the plaintiff. In my opinion this case is clearly distinguishable. No one would think of describing such goods as being in the servant's possession. The goods were kept in the mistress's house, and it would be as great a misnomer to say that they were in the servant's possession, as it would be to say that the house was in the servant's possession while his mistress was out shopping. Both goods and house remained in both the de facto and de jure possession of the mistress, who retained effective physical control over them. Neither the servant nor any one else had any right to prevent her from entering the house and taking the goods at any moment. Sir James Stephen in his Digest of the Criminal Law, 7th Edn., Art. 401, says that a moveable thing is in the possession of the husband of any woman or the master of any servant who has the custody of it for him and from whom he can take it at pleasure.

In *Shankar Murlidhar v. Mohanlal Jaduram* (7), a buffalo calf had been left to be taken care of and had been sold by the gratuitous bailee. West, J. held that S. 108 does not extend to every detention of chattels with the owner's consent but has particular relation to persons allowed by the owners to have the indicia of property or possession

under such circumstances as may naturally induce others to regard them as owners, and constituting some degree of negligence or defect of precaution imputable to the true owners. In this case also the learned Judge advanced no reasons and quoted no authority for putting this extensive gloss upon the plain words of the section. But he held on the authority of *Greenwood v. Holquette* (3) that detention for a particular limited purpose, as he described the bailment of the buffalo, was not such a possession as is contemplated by the section. It should be noticed, however, that the possession in this case would have fulfilled both the requirements of instructions given by and being within the control of the owner, which Couch, C. J. and Sargent, C. J. had laid down as their reasons for excluding possession taken for a specific purpose. This only shows in what difficulties and desperate devices one becomes involved in trying to qualify the plain words of a section in such a way as to make it fit one's own preconceived notions of what the law ought to be, or what one thinks the legislators ought to have said, or intended to say. It is sufficient, however, to observe that this was a decision under S. 108 and the detention, whether it amounted to possession or only to bare custody, was altogether different from the possession with which we are concerned in the present case.

In *Seager v. Hakma Kessa* (8), a wife who lived with her husband had pledged jewellery belonging to him. This again was a case stated by the Chief Judge of the Small Cause Court. Jenkins, C. J. held that to come within S. 178 the pledger must have juridical possession and not mere custody. The word "juridical" does not appear in Stroud's Judicial Dictionary, but the expression seems to be only our old friend "legal possession" in a more impressive form. In my opinion, the wife in this case never had possession, either de facto or de jure, any more than she could be said to have had possession of her husband's table silver during his daily absence from home. Possession, both in fact and law, was always in the husband, until the jewellery was removed from his possession by means of an offence such as is indicated in the second pro-

(6) [1878] 4 Cal. 497=3 O. L. R. 398.

(7) [1887] 11 Bom. 704.

(8) [1900] 24 Bom. 458=2 Bom. L. R. 403.



viso to the section. The position of the wife was the same as that of the servant in *Biddomoye Dabee v. Sittaram* (6).

In *Naganada Davay v. Bappu Chettiar* (9) a jewel had been hired for four days and then pledged. Boddan, J. held that "possession" meant the same thing in both sections in spite of the difference in wording, that "possession" in S. 178 was distinguished from "custody," and meant such possession as an owner has, and not a qualified possession, such as a hirer of goods has; while Subrahmania Ayyar, J., held that, though the hirer undoubtedly had legal possession, it was not the kind of possession contemplated by S. 178. The learned annotators of Contract and Specific Relief Acts, 5th Edn., at p. 638, are driven to admit that the hirer surely had possession and not bare custody, though they think it impossible to hold that the Act meant to authorize a pledge where the hiring was for only four days and they observe that the language of the Act seems incautiously wide. In my opinion, there is nothing to indicate whether its width is due to lack of caution or to intention on the part of those who drafted it and passed it. But the same annotators at p. 523 say that the clauses corresponding to S. 108 in the Contract Bill drafted by the Law Commissioners provided in effect that a purchaser acting in good faith and in the absence of suspicious circumstances might acquire a good title from any person in possession of goods, in other words, that every place in India should be a market overt. The Select Committee to which the Bill was referred objected to this clause, the ground of objection being substantially that the provision would make British India an asylum for cattle stealers from the Native States. The clause, after a good deal of controversy, was ultimately moulded in its present form and in *Ramdas Vithaldas Durbar v. Amerchand & Co.* (4), their Lordships of the Judicial Committee said that the Act was an amending as well as a consolidating Act, and that they saw no improbability in the Indian Legislature having taken the lead in a legal reform, for which England had to wait for several years. This was said with reference to the inclusion of a railway receipt within the meaning of an "instrument

(9) [1903] 27 Mad. 424.

of title" in S. 103, but it would apply equally to the validation of a sale, pledge or other disposition made by a vendor of goods who continues in possession, for which reform England had to wait until the Factors Act of 1889. However that may be, in *Administrator-General of Bengal v. Premlal Mullick* (10) their Lordships directed that proceedings of the Indian Legislature cannot be referred to as legitimate aids to the construction of the Act in which they result.

In *Nandlal Thakersey v. Bank of Bombay* (11) a muccadam entrusted with goods had pledged them, and Bachelor, J., while admitting that the language of S. 178 is very wide and that the Judges in trying to define the exact extent of the section had not adopted the same canon in all cases, held that as the legislature had acquiesced in those restrictive interpretations, and the Judges were agreed at least that mere possession is not enough, the principle of stare decisis ought to be applied, and though he thought that the kind of possession intended was such as a factor has, he refused to attempt to lay down the exact limits of S. 178. He relied, inter alia, upon the so-called distinction, which other Judges had observed, drawn by the legislature between possession and mere custody. But it is not easy to discover the exact meanings of "lawful owner" and "lawful custody" in the section. "Unlawful custody" and still more "unlawful ownership" is difficult to envisage, and it seems that possession, whatever meaning is intended, may be obtained not only from the owner, but from any one having mere custody of the goods, in the absence of offence or fraud.

In *Leon Saubolle v. K. V. Seyne & Bros.* (12), which was another case of hire-purchase, Greaves, J., while he was of opinion that such came within the provisions of S. 178 considered that he was bound by the decision in *Greenwood v. Holquette* (3), though in *Abdul Hassan Khan v. Rangilal* (13), where there was no default in the payment of instalments, the Punjab Chief Court had held that the section applied. The

(10) [1895] 22 Cal. 788=22 I. A. 107=6 Sar. 603 (P. C.).

(11) [1910] 12 Bom. L. R. 316=5 I. C. 457.

(12) [1918] 23 C. W. N. 352=50 I. C. 476.

(13) [1902] 34 P. R. 1902=23 P. L. R. 1902.



learned annotators, above referred to, admit that the possession in this case was certainly "juridical," and say that the terms of the Act make it difficult to hold otherwise, whatever its framers may have intended. The same Court in *Framji v. McGregor* (14) held that S. 108 applied to a case where a vendor of certain horses was allowed by the vendor to remain in possession of them.

In *Profulla Kumar Bose v. Nabo Kishore Rai* (15), defendant 1 employed defendant 2 to take delivery of a parcel of jute which defendant 1 had despatched, consigned to himself. The railway receipt was made out in his own name as consignee, and without endorsing it he entrusted it to defendant 2, for the purpose of obtaining delivery. Defendant 2 endorsed it in the name of defendant 1, and pledged it to plaintiffs who took delivery and on the security of the goods made a loan to defendant 2. Defendant 2 was not an agent whose ordinary business it was to sell or pledge goods. The learned Judges, Richardson, J. and Shamsul Huda, J. referred to the "sweeping provisions" of S. 178, and said that apart from authority, and if the section were construed as it stands:

"it would at least be a possible view that the word 'possession' is used in its ordinary and natural sense and that the draftsman or legislature intended to include all possession recognized as such by the law, and to leave it to the two provisos to limit the scope of the general rule enacted in the first clauses" and they held that as defendant 2 had the indicia of possession which he had acquired under such circumstances, that the owner could give instructions to him as to their disposal, he fulfilled the test laid down in *Greenwood v. Holquette* (3) and came within S. 178. The learned Judges would seem to have misunderstood the tests suggested in that, and the other cases already referred to. It is quite clear that whether what defendant 2 had, was possession or mere custody, it was not possession such as a factor has, nor was it unqualified, nor such as an owner has. If anything, it was a qualified possession or possession given for a specific purpose, or perhaps only the mere custody of a servant.

In *Roopchand Jankidas v. National Bank of India Ltd.* (16), certain share

certificates and a blank deed of transfer were handed by the bank to an employee for the purpose of getting the shares registered, and he sold them. Chaudhuri, J., held that this was qualified possession given for a particular purpose, and according to the authorities, not within S. 108. But, in my opinion, as the certificates were on the bank's premises they were in the bank's possession, both de facto and de jure, and when the employee removed them with the intention of defrauding his employers he brought himself within the second proviso.

In *Ramasami Gupta v. Kamalammal* (17) jewels were lent gratuitously and pledged by the borrower after having them a considerable time. It was held that the possession was qualified and for a specific purpose and, therefore, according to the authorities, outside of S. 108.

In considering the effect of these cases I make, in the first place, the general observation that however much I may respect the reasoning and decisions of the learned Judges who tried them, none are binding upon this Court. Secondly, that a careful perusal of their judgments indicates how difficult they found the task of construing these sections, and what doubts they felt about the soundness of the conclusions to which they had come. Thirdly, that a large number of the decisions are upon S. 108, which is very differently worded to S. 178; and lastly that in one of the cases was the position of a seller who remains in possession considered, and certainly not the position of an unpaid seller, as in the present case.

In *Bank of England v. Vagliano Brothers* (18), Lord Herschell in the house of Lords laid down in memorable words, the proper way to approach the construction of a statute which is intended to be a code of law.

"I think the proper course is in the first instance to examine the language of the statute and ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

No difficulty is experienced in construing these sections if the natural meaning is given to the words. The difficulties

(14) [1902] 27 P. R. 1902=81 P. L. R. 1902.

(15) [1919] 23 C. W. N. 907=54 I. C. 224.

(16) [1918] 46 Cal. 342=48 I. C. 975=22 C. W. N. 1042.

(17) A. I. R. 1922 Mad. 44=45 Mad. 173.

(18) [1891] A. C. 107=60 L. J. Q. B. 145=64 L. T. 353=55 J. P. 676=39 W. R. 657.



arise when one begins to have regard to the previous law, or to technical and artificial meaning to which the words have been restricted by English lawyers. No definition of the word "possession" is given in the Act itself, and I can find no clear and reliable indication in the context to show that the legislature intended any but the fullest and widest meaning to be given to it. The word appears in the following sections; — Chap. 7: Sale of Goods Ss. 95, 97, 98, 99, 100, 104, 105 and 108, and Chap. 9: Bailment, Ss. 148, 149, 178 and 180. I think it will lead to endless confusion if one meaning is to be placed on the words in S. 178, and a totally different one in Ss. 95, 97, 98, 100, 104, 105 and 108.

According to the argument advanced by counsel on behalf of the plaintiffs, the word should be replaced in Ss. 95, 97 and 98 by "custody" or some such expression, or at any rate that

"a seller in possession of goods sold" in S. 98 is not "a person who is in possession of any goods" in S. 178, or a person who is "by the consent of the owner, in possession of any goods" in S. 108."

I am unable to accept such a contention, and in my opinion, the defendants in the present case were persons in possession of goods within the meaning of S. 178.

It is not perhaps strictly necessary for the purposes of this case to decide whether if they had sold, instead of pledged, the goods they would have come within S. 108; but in my opinion, they would, and the word "possession" has the same meaning in both sections. Further, I consider that it is impossible, even if it were permissible or desirable, to limit or restrict the natural meaning of the word in these sections in any way which would be consistent with other sections of the Act, or could be based upon any clear consistent and comprehensive principle. The extent of the sections should be limited only by giving to the word "possession" its fullest and widest meaning, both natural or ordinary and technical or artificial, and including both actual possession and possession in law, subject to the provisos therein contained. I agree with Mr. Sircar's argument on behalf of the plaintiffs that defendants cannot avail themselves of the warehouse certificates. These documents never belonged at any time to the plaintiffs nor to any one except Kerr Tarruck & Co. In my opinion

S. 178 contemplates documents which have a lawful owner other than the pledgor. This is shown by the second proviso, But I do not think that you can read into this section the words "by the consent of the owner" which occur in S. 108.

I have now to consider only the first proviso to S. 178, it being admitted that the second is not applicable to the facts of this case.

The Indian Penal Code, S. 52 defines "good faith" as follows:

"Nothing is said to be done or believed in good faith which is done or believed without care and attention."

and doubtless the standard required is such as is expected of a man of ordinary prudence. The "reasonable presumption" referred to in the proviso may be regarded as explanatory of the words "good faith."

In approaching this question, it must be remembered that Kerr Tarruck & Co. were an old established firm of the highest commercial reputation, that the defendants had had considerable dealings with them for many years, that the senior partner, Mr. B. N. Sircar, who negotiated this pledge, was a man of the highest repute, so much so, that he had been appointed by the defendants to serve upon their advisory committee in Calcutta, and that not a breath of suspicion as to the financial stability of his firm had arisen at that time.

Their application for a loan, though passed by his colleagues on the advisory committee, all men of high commercial standing and business acumen, was referred by them to the head office for confirmation. They applied for a temporary loan of Rs. 50,000 for two months to be reduced as deliveries were taken by buyers, but only Rs. 30,000 were ever taken up, and they already had a lien against piece-goods of Rs. 1,00,000 but had not availed themselves of it. Further defendants had previously lent money to Kerr Tarruck & Co. on pledge of goods and bonded warehouse receipts. It is suggested, however, that the defendants were negligent because the plaintiffs' name appeared upon some of the invoices for these goods and they omitted to make any enquiry to test the truth of Kerr Tarruck & Co's., statement made in their letter of 8th August 1927 that the goods belonged to them.

In the first place it is to be observed that the invoices were not submitted to



defendants as documents of title, but merely to show the value of goods upon the security of which the loan was to be advanced. The invoices were those of German firm of cutlery manufacturers at Solingen and were addressed to Kerr Tarruck & Co., who were the purchasers. Upon some of them (eight out of twenty) under the indent number the plaintiffs' name appeared; in the others the space was blank and they bore dates from 19th November 1926, to 14th April 1927. If the indent name had been observed by the defendants, and if they had deduced therefrom that plaintiffs had an interest in the goods, and had made enquiry of Mr. Sircar, it is hardly likely that he would have been unable to give a plausible explanation. Doubtless large quantities of goods are imported by importing firms such as Kerr Tarruck & Co., under indents which for one reason or another are not taken up by the firms ordering them, and it can hardly be suggested that the defendants ought to have communicated with Kerr Tarruck & Co. Moreover, it is very unlikely that defendants' attention would be drawn to the indent name at all; as they had no reason whatever for doubting the integrity of Mr. Sircar or his firm.

Further, it is urged that as the defendants negotiated some of the hundis accepted by the plaintiffs on one at least of which the cutlery case numbers appeared they ought to have connected this circumstance with the invoices and their suspicion ought to have been aroused. These transactions were in respect of what are known as clean bills, as opposed to bills supported by documents. In my opinion, such care and particularity is beyond any standard which ought to be expected from business men of ordinary prudence and I find, therefore, that defendants acted in good faith within the meaning of the proviso.

These conclusions to which I have come really dispose of the case and make it unnecessary for me to consider the other points which have been raised. As, however, they have been argued, and in view of the fact that my conclusions may be upset upon appeal, I will deal with them shortly.

Assuming that Kerr Tarruck & Co. do not come within the protection given by S. 178, then it is claimed that defendants

can avail themselves of the provisions of S. 179, which are as follows :

"Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest."

I am not sure that the effect of this section is correctly stated by Scott, C. J., in *Lakhamsey Ladha & Co. v. Lakhmichand Padamsey* (19), where he says :

"Section 179 does not limit the scope of S. 178, but saves a pledge to the extent of the pledgor's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to S. 178. In other words, whenever he has an interest, the person in possession of the goods or documents has unconditional authority to charge at least that interest."

The section does not refer to "possession" or to documents. But any person, having a limited interest in goods, may pledge them to the extent of that interest.

Assuming, therefore, that Kerr Tarruck & Co., do not come within the provisions of S. 178, had they a limited interest in the goods, which plaintiffs have not paid for, and to that extent at any rate is the pledge valid? They might have had such an interest, by reason of Cls. 4 and 5 of the agreement of 21st July 1927, if such clauses were intended to apply at all to a sale of ready goods, and by reason of their inchoate right of lien as unpaid vendors upon credit and that interest might have passed to the defendants as pledgees.

*Gunn v. Blockow, Vaughan & Co.* (20), is an authority for the proposition that in the case of a sale upon credit, the vendor's lien revives when the credit expires without payment having been made, and it makes no difference if the vendors have negotiated the bills by means of which credit was given. The plaintiffs having lost their right to immediate possession of the goods not paid for could not have maintained an action for them in conversion or detinue, which is founded upon that right, even against a wrong doer, *Lord v. Price* (21). But the pledge itself was a wrongful conversion and plaintiffs' right of action arose, therefore, at that time before the period of credit expired : *M'Combie v. Davies* (22), and the conversion would itself extinguish any

(19) [1916] 42 Bom. 205=40 I.C. 148=19 Bom. L.R. 335.

(20) [1875] 10 Ch. 491=44 L.J. Ch. 732=32 L. T. 781=23 W.R. 739.

(21) [1874] 9 Ex. 54=43 L.J. Ex. 49=22 W.R. 318=30 L.T. 271.

(22) [1905] 6 East. 533.



right of lien apart from the fact that a right of lien lasts only so long as the lien-holder continues in possession. I am of opinion therefore, that defendants obtained no right or interest by reason of S. 179. Upon the issue raised whether the plaintiffs can maintain the action in view of their non-payment of customs and other charges for which they were liable to Kerr Tarruck & Co., I find on the evidence that such dues were discharged as and when they arose by virtue of an agreement for adjustment of accounts made between the parties.

For these reasons, I am of opinion that the defendants ought to succeed in this suit. Therefore, there will be a decree in their favour dismissing this suit with costs.

M.N./R K.

*Suit dismissed.*

### A. I. R. 1929 Calcutta 506

PEARSON AND MALLIK, JJ.

*Abdul Mannaf and others—Petitioners.*

v.

*Mahammad Nurulla Chaudhury —*  
Opposite Party.

Criminal Ref. No. 280 of 1928, Decided on 3rd May 1929, Reference made by Addl. Sess. Judge, Noakhali.

Criminal P. C., S. 107—Even after issuing warning notices to the parties concerned a Magistrate can draw up proceeding against a party under S. 107.

On the basis of a police report warning notices had been issued to the parties concerned on 8th September 1928. On 8th October he drew up proceeding against one of the party under S. 107, Criminal P. C.

*Held:* that as the order of 8th September 1928 was not final order disposing of the police report, the Magistrate did not become functus officio and was competent to take proceedings under S. 107, Criminal P. C.

[P 506 C 2, P 507 C 1]

*Nurul Huq Chaudhury — for Petitioners.*

*Sures Chandra Taluqdar and Sudhan-shu Sekhar Mukherji — for Opposite Party.*

**Mallik, J.**—This is a reference under S. 438, Criminal P. C., made by the Additional Sessions Judge of Noakhali recommending that the order passed by the Sub-Divisional Magistrate of Noakhali (Sadar), dated 8th October 1928 be set aside. The facts which have given rise to this reference are briefly these. On 1st September 1928 a report was submitted by the Sub-Inspector of Police whereby he asked the Sub-Divisional

Magistrate to draw up proceedings under S. 107, Criminal P. C., against Abdul Mannaf and others. This report of the Sub-Inspector came to the Inspector of Police and the Inspector suggested that both parties might be warned. Thereupon on 8th September 1928 the Magistrate issued warning notice on both parties. Nothing further was done in the matter till the 8th October 1928 when the Magistrate passed the following order:

"Read further police report. Draw up proceedings against the 2nd party under S. 107, Criminal P. C."

Whereupon proceedings under that section were drawn up against the petitioners.

The learned Sessions Judge has given two grounds for his recommending that this order dated 8th October 1928 be set aside. The first one is that although the order of the Magistrate dated 8th October purports to have been passed on a second report, there is nothing in the record of the case to show that such a report ever existed. The learned Magistrate in his explanation does not say anything very definitely about the existence of such a report. That the proceeding under S. 107 were drawn up not on a second report but on the basis of the original report of police, dated 1st September 1928 would appear pretty clear from the proceeding itself. In the proceeding that was drawn up against the petitioners there is a clear statement that the basis of the proceeding was the report submitted by the police on 1st September 1928. It must, therefore, be accepted that the order which has been recommended to be set aside was an order passed on the report of the police, dated 1st September. Now the question is whether the learned Magistrate could pass such an order on the basis of that report of 1st September on which he had passed the order for issuing warning notices to both parties? This would depend on whether the order passed by the Magistrate on 8th September should or should not be taken to be an order finally disposing of the matter. I am of opinion that this order of 8th September issuing warning notices to the parties ought not to be taken as an order disposing of the report of the police finally one way or the other. It cannot be said that the learned Magistrate by issuing the warning order on 8th September



ber became functus officio because there is no provision to be found in the Criminal Procedure Code whereby such an order can be passed by him.

In view of the aforesaid observation we are unable to accept the reference.

The reference is, accordingly, rejected.

**Pearson, J.**—I agree.

P.R./R.K. *Reference rejected.*

### A. I. R. 1929 Calcutta 507

SUHWARDY AND GRAHAM, JJ.

*Rajani Kanta Roy*—Petitioner.

v.

*Ibrahim Sarkar*—Opposite Party.

Criminal Revn. No. 1202 of 1928, Decided on 20th March 1929.

(a) Criminal P. C., S. 139-A—Omission in exercise of discretion by Magistrate in following the direction of law does not vitiate the entire proceeding but is irregularity covered by S. 537.

Where a Magistrate issued a notice under S. 133 on a person to show cause why he should not remove an obstruction on a public river and the person filed a written statement admitting the public character of the river but claiming that the obstruction was on his zamindar's khas land and not on the river and the Magistrate proceeding under S. 137 and having come to the conclusion that the obstruction was on the bed of the river, made the order absolute and passed orders for removal of the obstruction.

*Held*: that S. 139-A ought not to apply to such a case, but the language of the section is so general that even in such a case the Magistrate should exercise a good discretion in following the direction of the law and omission to do it does not vitiate the proceeding but is an irregularity covered by S. 537.

[P 507 C 2]

(b) Criminal P. C., S. 139-A—S. 139-A applies where public right is denied.

The section applies only in a case where a party wants determination of the public character of the river or way obstructed. The object with which the section was enacted seems to be that where the existence of the public right is denied, the Magistrate has to make an enquiry. If it is not denied, then the section hardly seems to apply.

[P 507 C 2, P 508 C 1]

*B. C. Chatterjee and Akhil Chandra Dutt*—for Petitioner.

*Mrityunjoy Chatterjee and Debabrata Mukherji*—for Opposite Party.

*Anil Chandra Roy Chowdhury*—for the Crown.

**Suhrawardy, J.**—This rule was issued on two grounds. The first is that the procedure laid down in S. 139-A, Criminal P. C., was not followed in this case. What happened was that the petitioner was charged with obstructing a river called the Margara river by throw-

ing earth into it and raising the land over which the water used to pass. The Magistrate issued a notice under S. 133, Criminal P. C., on the petitioner to show cause why he should not remove this obstruction. He appeared on the date fixed for showing cause and asked for time. On the following day he filed a written statement in which he admitted that the river said to have been obstructed was a public river but that he had not obstructed it but had built his shop on the land which belonged to his zemindar. He claimed that the land over which he was charged with throwing earth and building was a part of his zemindar's khas land. The trying Magistrate thereafter proceeded under S. 137 Criminal P. C., and being of opinion that the obstruction caused by the petitioner was on the bed of a river he made the rule absolute under that section and passed an order for removal of that obstruction. No doubt S. 139-A requires the Magistrate to ask the party against whom a rule has been issued under S. 133, as soon as he appears whether he denies the existence of any public right in respect of the way, river &c., &c., & if he does so, the Magistrate shall proceed under S. 137 if he finds that there is no ground for such denial.

But in this particular case the omission by the Magistrate to comply with the section does not to my mind vitiate the entire proceeding. On the day the petitioner filed his written statement he admitted therein that the river which is said to have been obstructed was a public river; but he contended that the obstruction which was said to have been put up was not in the river and was upon the land which was his khas land and not a portion of the river. In such cases, strictly speaking, S. 139-A ought not to apply. But the language of the section is so general that I am not prepared to hold that even in such a case as this the Magistrate should not exercise a good discretion in following the direction of the law, but the omission to do it does not necessarily vitiate the entire proceeding. It would be an act of superfluity when a party comes before the Magistrate and admits the public character of the river which he is said to have obstructed to ask him whether he denies or admits its public character. This section applies only in a case where a party



wants a determination of the public character of the river or way obstructed. It has been conceded on behalf of the petitioner that if on a notice under S. 133 a party appears before the Magistrate and admits that the way or river which he is said to have obstructed is a public way or river and does not deny the existence of a public right over it but says that he has not put an obstruction in the public way or river but has built upon his own land, S. 139-A does not apply. The present case does not seem to be in any way different from the case I have just put. The question therefore left to the Magistrate for decision is not the existence or non-existence of a public right in the river obstructed but to determine if the obstruction was made in the river. The object with which S. 139-A was enacted seems to be that where the existence of the public right is denied the Magistrate has to make an enquiry. If it is not denied, then the section hardly seems to apply. But it may be said that the dispute between the parties is whether the land over which the obstruction is made is part of a public river and thus attracts the application of S. 139-A. Even if it be so, when the petitioner appeared before the Magistrate and denied that it was part of the public river, there was no necessity for putting a formal question to him and the subsequent procedure followed by the Magistrate was as indicated in the Cl. 2 of that section, and the final order passed was U/S. 137 since the obstruction was admitted. The omission at the most is an irregularity which is covered by S. 537, Criminal P. C.

The second ground relied upon by the petitioner is that the order of the Magistrate is vague and incapable of being carried out. The Magistrate passed an order for removal of the obstruction from a particular settlement *dag*, namely, *dag* No. 2,573 which is well-defined in the settlement record; and when notice was served upon the petitioner to show cause under S. 133, Criminal P. C., he did not object on the ground of vagueness of the notice. This ground is suggested by certain remarks made by the learned Sessions Judge to whom an application was made by the petitioner under S. 435, Criminal P. C. The learned Judge suggested that in cases like the present the best procedure was to appoint

an ameen to relay the site which would give clear indication to the opposite party as to the extent and nature of the obstruction. This was merely a piece of advice given to the trial Court which might help it in enforcing its order, if necessary. There does not seem to be any vagueness in the order passed in this case and both the grounds having failed, in my opinion this rule shall be discharged.

**Graham, J.**—I agree.

K.N./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 508

SUHRWARDY AND GRAHAM, JJ.

*Nawsher (Ali) Pramanik*—Petitioner.

v.

*Hazratulla Pramanik* — Opposite Party.

Criminal Revn. No. 1209 of 1928, Decided on 28th February 1929.

(a) Criminal P. C., S. 203—Accused discharged—Notice to accused before ordering further enquiry is not necessary—Criminal P. C., S. 436.

Where after the dismissal of a case under S. 203 further enquiry is ordered, the accused need not be given notice before further enquiry is ordered against him as he has no *locus standi* and it cannot be said that it is desirable to issue a notice upon an accused person in every case where an order is passed against him. [P 509 C 1]

(b) Criminal P. C., S. 203 — Further enquiry after discharge—Accused has no right to appear — Magistrate allowing him to appear is illegality which cannot entitle him to appear at every subsequent stage.

When the order is passed, after an order under S. 203, directing further enquiry the accused has no right under the law to appear either before the trial Court or before the revision Court. And if the Magistrate allowed the accused to appear before the trial Court to cross-examine the witnesses he acted illegally and this illegal act of the Magistrate does not create a right in the accused to appear at every stage of the proceeding: 21 C. W. N. 127; A. I. R. 1923 Cal. 198, *Ref.* [P 509 C 1, 2]

(c) Practice—Duty of Court—Court cannot legislate.

Courts have no right to legislate however desirable that legislation may be on principle. [P 509 C 2]

*Suresh Chandra Taluqdar and Radhika Ranjan Guha*—for Petitioner.

**Suhrawardy, J.**—This rule is directed against an order of the District Magistrate of Bogra ordering further enquiry into the complaint preferred by the opposite party before the Sub-Divisional Officer of Bogra. It appears that the Sub-Divisional Officer on receipt of



the complaint ordered an enquiry by the Local President. On receipt of the report of the President he examined two witnesses for the prosecution and disbelieving the complainant's story dismissed the case under S. 203, Criminal P. C. The complainant moved the District Magistrate and he passed the following order :

"I think there should be a further enquiry into the complaint. Further enquiry ordered and the papers sent to Sub-Divisional Officer for favour of dealing with it according to law."

In support of this rule Mr. Talukdar has raised several grounds. The first is that the accused should have been given notice before further enquiry was ordered against him. This contention he has not been able to support on the law as laid down in S. 436, Criminal P. C. But he has invoked the desirability of issuing a notice upon an accused person in every case where an order is passed against him. We do not think that we should accede to such a proposition of law. S. 436 as it stands by the amending act of 1923 clearly makes a distinction between a case in which a complaint is dismissed under S. 203 and the case in which the accused is discharged under S. 253 or some other section. In the latter case it is now provided in accordance with the general opinion of all the High Courts that notice should be given to the accused as he was present at the trial Court and no order ought to be passed in his absence by the Court in revision. But when the order is passed under S. 203 not only has the accused no right under the law to appear either before the trial Court or before the revision Court but it has been held in several cases that the accused should not be allowed to appear at that stage. *Balai Lal v. Pasupati* (1) and *Chandi Charan v. Manindra Chandra* (2).

In this case we are told that the accused has appeared at the trial Court. There is no other on the record that he did as no vakalatnama was filed on his behalf. But it appears from an examination of the witnesses of the complainant that they were cross-examined, it does not appear by whom. If the Magistrate allowed the accused to appear at that stage to cross-examine the witnesses he acted illegally and this illegal act of the Magistrate does not create a right in the accused to

appear at every stage of the proceeding. In some cases no doubt it has been held that even if in a case where the complaint is dismissed under S. 203 it is desirable to allow the accused to appear before an order is passed under S. 436. But these cases were decided before the amendment of the section ; and as has been rightly observed by Sir John Woodroffe in his well-known edition of the Criminal Procedure Code that the Court in this case as in some other case has legislated in view of certain general principles. I do not think that they have any right to legislate however desirable it may be on principle. This ground must fail. Some argument has been advanced to us on the merits. But I do not think that I ought to interfere at present on that ground.

I should have preferred that the District Magistrate gave his reasons for ordering a further enquiry. But on reading the order passed by him it appears that he was right in passing the order because the trial Court had not tried the case according to law which may mean that it had wrongly allowed the accused to appear before it. The learned District Magistrate has submitted an explanation in which he has given reasons for ordering an enquiry into the matter. This rule is discharged.

**Graham, J.**—I agree that the rule should be discharged. In my opinion there is no substance in the contention which has been put forward on behalf of the petitioner. It is well-settled that at such an enquiry the accused has no locus standi, and he certainly cannot claim to be entitled as of right to notice where an application is made for further enquiry. That this is so, is plain inter alia from the terms of the proviso to S. 436, Criminal P. C. That proviso was added by Act 18 of 1923 and it expressly provides that in the case of discharge such notice shall be given. By implication it seems to be reasonably clear that in case of further enquiry no such notice is required. If the legislature had intended to provide for such notice it would presumably have said so in clear terms.

M.N./R.K.

*Rule discharged.*

(1) [1916] 25 O.L.J. 606=35 I.C. 828=21 C. W.N. 127.

(2) A.I.R. 1923 Cal. 198.



**A. I. R. 1929 Calcutta 510**

MUKERJI AND MITTER, JJ.

*E. I. Ry. Co.*—Defendant—Appellant.

v.

*Janakidas Marwari and another*—  
Plaintiffs—Respondents.

Appeal No. 965 of 1927, Decided on 3rd May 1929, against appellate decree of Dist. Judge, Birbhum, D/- 10th January 1927.

(a) Railways Act, S. 72—Word 'loss' in risk-notes—Explained.

The word 'loss' as used in a risk-note means loss of the goods by the railway company while in transit and occurs whenever the railway company involuntarily or through inadvertance loses possession of the goods and for the time being is unable to trace them.

[P 510 C 2]

(b) Railways Act, S. 72—'Loss' due to theft by servants of railway—Risk-note does not absolve railway company.

Even where the railway company succeeds in proving that there was 'loss' the provisions of the risk-note will not absolve the railway company from liability if it is once proved that the loss was due to theft by the servants of the company.

[P 511 C 1]

(c) Railways Act, S. 72—Risk-note is out of way—Case will have to be tried under terms of S. 72 and it must be shown that company took reasonable care of consignment.

If it be found that the risk-note is out of the way then the case will have to be tried on the footing of the liability of the railway company under the provisions of S. 72 and then it would be necessary to consider whether in point of fact the company have succeeded in showing that they took as much care of the consignment as a man of ordinary prudence would do in the circumstances of the case : *A. I. R. 1928 Cal. 491, Ref.*

[P 511 C 2]

*Ambica Pada Choudhuri*—for Appellant.

*D. N. Bagchi and Gour Mohan Dutt*—for Respondent.

**Judgment.**—This appeal has arisen out of a suit which was instituted by the plaintiff for recovery of compensation for loss of 24 tins of ghee weighing 11 mds. 10 seers and also of one md. 10 seers of ghee abstracted from out of 20 tins of ghee the said 44 tins forming part of a consignment which had been despatched from Sangli station on the M. & S. M. Ry. to Dubrajpur on E. I. Ry. The trial Court decreed the suit in part against defendant 1 only, namely, E. I. Ry. The decree was in respect of 24 tins of ghee and not in respect of one md. 10 seers. On appeal this decree was affirmed by the District Judge. Defendant 1, the E. I. Ry. Co. have then pre-

ferred this second appeal. The findings of the learned District Judge appeared to be the following : that the consignment was covered by risk-note H, that the plaintiff by virtue of the contract embodied in the said risk-note cannot recover unless he is able to show that one or more complete packages have been lost due either to the wilful neglect of the railway administration or to the theft by or to the wilful neglect of its servants, transport agents or carriers, provided that the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen events or accidents. The learned Judge was not prepared to hold that there was any admission on behalf of the plaintiff to the effect that there was any loss. He further held that it had not been satisfactorily proved that there was loss. He went on further and observed in his judgment :

"Admitting for the sake of argument that the goods are really lost the evidence seems clearly to point to the conclusion that the contents were stolen by the company's servants at Ondal station."

He referred to several circumstances which supported the conclusion at which he so arrived. The arguments before us have been directed in the first place to establishing that the loss had been admitted on the side of the plaintiff in the plaint which they had filed. It may be conceded that the learned Judge perhaps took a rather extreme view in holding that the defendants had failed to make out that there was loss. In the letter which the Traffic Manager of the E. I. Ry. wrote to the plaintiff it was stated within a few days after the occurrence to which the present case relates that the consignment was loaded in wagon No. 13335 and proceeded correctly as far as Ondal where the seal of the wagon was found to have been broken into by thieves and contents stolen. There is no reason to suppose that at that time the defendant company invented a story of loss in order to account for the non-delivery of the 24 tins of ghee. The word 'loss' as used in the risk-note means loss of the goods by the railway company while in transit and occurs whenever the railway company involuntarily or through inadvertance loses possession of the goods and for the time being is unable to trace them. For the purpose of the present appeal, therefore, I do not think it would



be necessary for us to go so far as to hold that loss has not been proved. But then the question that arises for consideration is whether upon the facts that have been found, the mere fact that the defendant company succeeded in proving that there was loss would absolve them from liability by virtue of the provisions of the risk-note. The circumstances upon which the learned Judge has relied for the purpose of coming to the conclusion that the contents were stolen by the company's servants at Ondal station are mainly these. The train carrying this consignment arrived at the station at about 10-15 A. M., and within five quarters, this is to say, at about 11-30 A. M. information was given to an officer of the company who was examined in the case and who went and found that there was no seal and that the goods were missing. The evidence that has been given in the present case shows that there are about 60 men who guard the station premises by day and night and it must be remembered that there were 24 tins of ghee which were removed and so the removal must have taken a fairly considerable time. The evidence further is that under the rules the guard-in-charge of the train has got to look after the train until the wagons are checked and the train is put into the yard. In this particular case there is no evidence whatsoever to show that between 10-15 A. M. when the train arrived and 11-30 A. M. when in point of fact the wagons were checked the guard was looking after the train. These are circumstances from which it is not at all unreasonable to come to the conclusion as the learned Judge appears to have come to that it was a case of theft and that the servants of the company were responsible for or at any rate concerned in it. The case, therefore, in our opinion, is one which is not protected by the risk-note which covers the consignment. Because once it is proved that the loss was due to theft by the servants of the company the risk-note will not absolve the defendant.

It has next been argued before us that if it be found that the risk-note is out of the way then the case will have to be tried on the footing of the liability of the company under the provisions of S. 72, Railways Act. In support of this contention reliance has been placed upon the decision of this Court in the case of

*E. I. Ry. Co. v. Shewbux Roy Ghana-shayamdas* (1). In that case it has been laid down :

"That the risk-note is merely a contract absolving the Railway Administration in all cases excepting a few cases specified and with regard to the cases so excepted the risk-note itself, apart from the general law, does not create a liability and the effect of it is not that when a case comes within the exception the rights and liabilities of the parties such as they are under the general law are to be regarded as in any way limited, extended or qualified by the risk-note. The effect of that is not that once a case comes within the exception nothing else need be investigated and under the terms of the risk-note itself the Railway Administration becomes liable. A contrary view would militate against the provisions of S. 72, sub-S. 2, Railways Act to which statutory provision risk-notes owe their origin."

Looking at the case from this point of view it would be necessary to consider whether in point of fact the defendant company have succeeded in showing that they took as much care of the consignment as a man of ordinary prudence would do in the circumstances of the case. In this respect it appears to us that no attempt whatsoever was made by the company to establish anything which might absolve them from liability. The learned District Judge has referred to the fact that neither the guard of the train nor the choukidar who informed the checking clerk nor the police officer who was informed by him and who is alleged to have held an enquiry were examined in this case. We have looked into the evidence of the only witness who was examined on behalf of the company and we find that, if anything, that evidence suggests that there was no care taken by the company in respect of this consignment or at any rate that the rules which have got to be obeyed and which if followed would perhaps afford a check upon occurrences of this nature were not adhered to in the present case. For these reasons, we are of opinion that the decree passed by the learned District Judge is correct and that this appeal must be dismissed with costs.

S.N./R.K.

*Appeal dismissed.*

(1) A. I. R. 1928 Cal. 491.



## \* A. I. R. 1929 Calcutta 512

B. B. GHOSE AND PANTON, JJ.

*Radharani Debi*—Appellant.

v.

*Nibaran Chandra Mukerji*—Respondent.

Appeal No. 341 of 1927, Decided on 26th April 1929, against order of Dist. Judge, Birbhum, D/- 12th May 1927.

\* Lunacy Act (1912), S. 62—District Court, within whose jurisdiction lunatic is permanent resident, has jurisdiction to direct inquisition under S. 62, notwithstanding that he temporarily resides in mental hospital outside that district.

Where a lunatic is a permanent resident within the jurisdiction of a particular District Court and has properties in that district and his wife applies to the District Court for the appointment of a person as manager of his properties, that District Judge has jurisdiction to take cognizance of the application, and to direct inquisition under S. 62, notwithstanding the fact that the lunatic temporarily resides in a mental hospital outside the jurisdiction of that Court. [P 512 C 1, 2]

*Gopendra Krishna Banerjee*—for Appellants.

**Judgment.**—In this case there is sufficient material on the record to show that the alleged lunatic Nibaran Chandra Mukerji has been sent to the Ranchi Mental Hospital and is confined there as a criminal lunatic. His wife, the appellant before us applied to the District Judge for appointment as manager of his properties and did not desire to be appointed guardian of his person as the alleged lunatic was confined in the Mental Hospital. In the course of the proceedings before the lower Court a post card said to have been in answer to a letter written by the pleader for the wife to the Superintendent of the Ranchi Mental Hospital was placed before the learned Judge. That post card according to the view of the learned Judge was ambiguous and as he was told that the alleged lunatic was residing at Ranchi beyond the jurisdiction of his Court he held that he could not order an inquisition under S. 62, of the Act and in that view he rejected the application. It is beyond question that the alleged lunatic is a permanent resident within the jurisdiction of the Court of Birbhum. He has properties in that district and his wife seeks for being appointed guardian of his properties for the purpose of protecting those properties from being

sold in execution of decrees obtained by creditors. It is true that the lunatic is at present confined in the Mental Hospital at Ranchi and for that purpose he may be held to be residing at Ranchi which is beyond the jurisdiction of this Court, but a person may have two residences. Because under certain circumstances he has been placed in the Mental Hospital at Ranchi, it cannot be said that he has abandoned his residence within the district of Birbhum. So he must be held to be a resident within the district of Birbhum notwithstanding the fact that he is temporarily residing at Ranchi. The District Judge has, therefore, jurisdiction to take cognizance of the application and to direct an inquisition under S. 62, Lunacy Act of 1912. In our opinion, it would be quite within the competence of the District Judge to direct an inquisition to the Superintendent of the Mental Hospital for the purpose of ascertaining whether Nibaran Chandra Mukerji is a person of unsound mind and incapable of managing himself and his affairs. On the receipt of the report of the Superintendent of the Mental Hospital the learned District Judge would be in a position to pass proper orders. We, therefore, set aside the order of rejection of the application by the learned Judge and send the case back for hearing in the manner stated above. We request the learned District Judge to take up the matter at his earliest convenience as this matter has been pending for quite a long time and it is absolutely necessary that it should be disposed of as quickly as possible, having regard to the fact that the properties belonging to the alleged lunatic require to be preserved. The costs of this appeal as well as of the application in the lower Court will be paid out of the estate provided the learned Judge finds upon such inquisition as directed that Nibaran Ch. Mukerji is a lunatic. Hearing fee 3 gold mohurs.

S.N./R.K.

*Order set aside.*



## A. I. R. 1929 Calcutta 513

B. B. GHOSE, J.

*Khitish Chandra Chatterjee and another*—Petitioners.

v.

*Nagendra Nath Mandal and others*—Opposite Parties.

Civil Revn. No. 1455 of 1928, Decided on 20th February 1929, against order of Munsif, 1st Court, Khulna.

(a) Civil P. C., O. 47, R. 1—Fraud discovered after decree or order is new and important matter.

Fraud practised upon the Court or upon the party may be discovered after the order complained of is made and may be new and important matter which could not be within the knowledge of the applicant at the time when the decree was passed or the order made and an application for review on the ground of such fraud must be considered on merits. A decree vitiated by fraud may be set aside by (i) suit and (ii) by review of judgment, the latter being the more regular procedure: 10 Cal. 612; 2 C. L. J. 503, *Foll. A. I. R. 1922 P. C. 112, Dist.* [P 513 C 2]

(b) Civil P. C., S. 115—Other remedy open—In case of clear refusal of jurisdiction, High Court should intervene.

Where the lower Court has refused to exercise jurisdiction by refusing to entertain an application for review based on the ground of fraud, the High Court will interfere in revision notwithstanding the existence of another remedy. [P 513 C 2]

*Pramatha Nath Mitra*—for Petitioners.*Bhudar Halder*—for Opposite Parties.

**Judgment.**—In this case the learned Munsif has clearly refused jurisdiction in not entertaining the application for review under O. 47, R. 1, Civil P. C., and in holding that the petition was not maintainable. The application was made for review of the order on the ground that fraud was practised upon the petitioner. It has been held in the case of *Aushootosh Chandra v. Tara Prasanna Roy* (1) that in such a case as this:

"there are two available modes of procedure for setting aside a decree on the ground of fraud; (1) by suit and (2) by a review of the judgment sought to be set aside, and the latter is the more regular mode of procedure."

That was laid down in 1884 by Mr. Justice Wilson. This case has been followed by Chief Justice Maclean in 1905 in the case of *Ram Gopal Mazumdar v. Prasanna Kumar Sanyal* (2). The law as understood by this Court has

(1) [1884] 10 Cal. 612.

(2) [1905] 2 C. L. J. 503=10 C. W. N. 523.

been uniform during all these years. Of course, if the plaintiff pursued one remedy, he cannot, being unsuccessful, again have recourse to the other. But, as it has been held that an application for review is a more regular procedure than a suit, I do not think the Munsif was right in throwing out the application without deciding it on the merits.

The learned Munsif has relied on some cases reported in the *Indian cases*. One of these cases of Allahabad was pointed out to me by the learned advocate for the opposite party. That is a case where the party pleaded that he had entered into a compromise by reason of coercion and undue influence. That circumstance may not be a ground for review, because it would not fall within the phrase "new and important matter." But fraud practised upon the Court or upon the party may be discovered after the order is made and it may be a new and important matter which could not be within the knowledge of the applicant at the time when the decree was passed or the order made. The Munsif is also wrong in holding that the Privy Council case of *Chhajju Ram v. Neki* (3) has any application to this matter. That case decided that "any other sufficient reason" as contemplated in O. 47, R. 1, Civil P. C., must be of the same nature as the discovery of new and important matter or evidence. Here the applicant did not ask for a review on the basis of "any other sufficient reason" but upon the ground of discovery of a new and important matter. It is not the practice of this Court, as a rule, to interfere in revision where the petitioner has another remedy which he can pursue in order to gain his end. But where the Court has actually refused jurisdiction to entertain an application, I think it is right that we should set aside the order of the lower Court by which he refused jurisdiction and direct it to try the cases on the merits.

This rule is accordingly made absolute and the case sent back to the lower Court for decision on the merits. The petitioner is entitled to his costs which are assessed at one gold mohur.

P.R./R.K.

*Rule made absolute.*

(3) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P.C.).



**A. I. R. 1929 Calcutta 514 (1)**

CAMMIADE AND S. K. GHOSE, JJ.

*Jitendra Nath Roy*—Plaintiff—Appellant.

v.

*Rai Charan Biswas*—Defendant—Respondent.

Appeal No. 1912 of 1926, Decided on 9th August 1928, against decree of Addl. Dist. Judge, Jessore, D/- 26th April 1926.

Bengal Tenancy Act, S. 5 and 103-B—Tenancy exceeding 100 bighas and recorded in Record-of-Rights as tenure—Kabuliyat expressly stating tenancy to be raiyati and all its incidents as given in kabuliyat also being those of raiyati holding—Presumption under Ss. 5 and 103-B being rebutted by kabuliyat, tenancy was held only raiyati one.

A tenancy exceeded 100 bighas in area and was recorded in Record-of-Rights as a tenure. The lease was a confirmatory lease. But the kabuliyat expressly stated that the tenancy was a raiyati tenancy. Further all the incidents of the tenancy as mentioned in the kabuliyat, such as prohibition of sale, of erection of permanent structures, of digging tanks etc., were those of a raiyati holding.

*Held* : that the presumption under Ss. 5 and 103-B was rebutted by the kabuliyat, and so the tenancy was only a raiyati one. [P 514 C 2]

*Hemendra Chandra Sen*—for Appellant.*Bijan Kumar Mukherji*—for Respondent.

**Judgment.**—This is an appeal by the plaintiff against the dismissal of his suit which is for recovery of possession from the defendant after notice of annulment under S. 167, Ben. Ten. Act. The tenancy in question exceeds 100 bighas in area and it was recorded in the Record-of-Rights as a tenure but the first Court found on a reading of the kabuliyat, in which the terms on which the lands were held are recorded that the tenancy that was brought to sale was a rayati tenancy. The learned Additional District Judge reversed this finding relying on the Record-of-Rights and on the presumption under S. 5, Ben. Ten. Act that tenancies exceeding 100 bighas in area are tenures. The learned Additional District Judge was in error in refusing to treat the kabuliyat as conclusive of the nature of the tenancy. He says that the lease is a confirmatory one. This is perfectly immaterial. Even if it is a confirmatory lease, that fact would not assist the respondent because the tenancy referred to in the kabuliyat is a rayati tenancy and if

the lease be a confirmatory lease it would follow that the tenancy that previously existed was also a rayati tenancy. However, that is beside the point. It is also open to the parties to enter into a fresh contract; and this is a contract embodied in the registered deed. It expressly states that the tenancy is a rayati tenancy. It prohibits the sale of the tenancy by the tenants. It prohibits the erection of permanent structures, the digging of tank or ditches and the cutting of trees, and it further prohibits the tenants from sub-letting the lands permanently. All these incidents are incidents of rayati holdings and not of tenures. The kabuliyat, as it expressly states, and as its terms prove, was for a rayati tenancy. Therefore, the purchaser of that tenancy at a rent execution sale under the provisions of Chap. 14, Ben. Ten. Act, was entitled to annul the tenancy of the under-tenants.

The appeal, therefore, succeeds. The judgment and decree of the Court of appeal below are set aside and those of the Munsif are restored with costs in this Court and in the Court of appeal below.

S N./R.K.

*Decree set aside.***A. I. R. 1929 Calcutta 514 (2)**

PEARSON AND MALLIK, JJ.

*Satiranjjan Bonerjee and others*—Petitioners.

v.

*Corporation of Calcutta*—Opposite Party.

Criminal Revn. No. 290 of 1929, Decided on 7th May 1929, against order of Municipal Magistrate, Calcutta.

**Jurisdiction—Objection to—Magistrate ordering demolition of a structure—Receiver of that property made a party without leave of the Court appointing him—Defect may be cured by application to the necessary Court specially if the receiver had been actively participating in the proceedings.**

The Municipal Magistrate of Calcutta passed an order of demolition of a certain structure and made the receiver of the premises in question a party to the proceedings. The point raised was that the order ought to be set aside as the Receiver was made a party without the leave of the Court appointing him.

*Held* : however as the proceedings had gone on till the final order was passed without any such point of jurisdiction having been raised and as the Receiver had actively participated in the proceedings, the Opposite Party



should be given an opportunity of rectifying the mistake by an application to the necessary Court and the order need not be set aside: 15 C. W. N. 925, *Rel. on*; 30 Cal. 721, *Ref.*

[P 515 C 1, 3]

*N.K. Bose, and Pares Nath Mukherji*—for Petitioners.

*Probodh Chandra Chatterjee and Gopendra Krishna Banerjee*—for Opposite Party.

**Judgment.**—This matter has been brought up from the Court of the Municipal Magistrate of Calcutta who passed an order for demolition with regard to a certain structure against the petitioners in these proceedings. The fifth petitioner is the receiver of the premises in question along with various other properties which were the subject-matter of a partition suit before the Subordinate Judge of 24 Parganas. The ground that has been the subject-matter for argument before us is ground No. 5 of the petition which states that the proceeding is without jurisdiction inasmuch as no leave was obtained from the Court which appointed the receiver. It is not exactly a question of jurisdiction but reliance has been placed upon the principle that before a receiver is made a party to a proceeding the leave of the Court appointing him should be taken. Reference has been made to the case of *W. R. Fink v. Corporation of Calcutta* (1) which was also the case of an order made by the Municipal Magistrate against a receiver where leave had not been taken and it was held that the order was bad. In the present case leave has not been taken although it appears that the original proceedings brought against petitioners 1 to 4 only were withdrawn on the ground that the property was in the possession of the receiver and would, therefore have expected that the opposite party would have been diligent enough in the course of the proceeding to see that the record was in order and to obtain the necessary leave of the Court, to make the receiver a party to the proceedings. On the other hand, these proceedings had gone on until the final order was made without any point of this kind having been raised before the learned Magistrate and the receiver actively participated in the proceedings that were held. Had the point been taken in the lower Court, the

defect would have been at once rectified by an application being made to the Court appointing the receiver. The question now is whether the order should be set aside now on this ground or whether the opposite party should still be allowed an opportunity of putting the matter right by making an application. We have been referred to the case of *Sarat Chandra Banerjee v. Apurba Krishna Roy* (2) which although not a case of demolition proceedings under the Municipal Act is an authority which goes to show that even at this stage of the proceedings an opportunity may be given to the opposite party to rectify the defect which now appears and although that was a case only of rateable distribution, we think that the present is a case where this procedure ought to be followed.

Let the application, therefore, stand over for a fortnight to enable the opposite party to take this step and subject to that being done let the matter come up on the list after the lapse of that period. The Court will then be in a position to see what has been done. It will be open to the petitioners to urge the other ground on which this Rule was granted.

P.R./R.K.

*Revision allowed.*

(2) [1911] 15 C. W. N. 925=11 I. C. 187=14 C. L. J. 55.

### A. I. R. 1929 Calcutta 515

CAMMIADE AND S. K. GHOSE, JJ.

*Sthira Hari Bhattacharjee*—Plaintiff—Appellant.

v.

*Sasadhar Karmakar and others*—Defendants—Respondents.

Appeal No. 2646 of 1925, Decided on 23rd May 1928, against appellate decree of Sub-Judge, Nadia, D/- 30 June 1925.

Civil P. C., S. 11—Plaintiff claiming rent at Rs. 16—Record-of-Rights in 1918 in plaintiff's favour—Cess-return filed in 1912 showing jama to be Rs. 5-2-5—Plaintiff having previously in 1917 sued for rent at Rs. 16 and obtained full decree *ex parte*—Suit in 1917 was *res judicata* and presumption under Record-of-Rights was not rebutted by cess-return.

Plaintiff in a rent suit claimed rent at the rate of Rs. 16 and the entry in the Record-of-Rights of 1918 was in his favour. But in a cess-return filed in 1912 under the Cess Act the jama was Rs. 5-2-5 gandas. The plaintiff

(1) [1903] 30 Cal. 721=7 C. W. N. 706.



in 1917 had sued for rent at the rate of Rs. 16 and had obtained an ex parte decree in full.

*Held*: that the suit in 1917 was res judicata and the entry in the Record-of-rights was not rebutted by the cess-return of 1912. [P 516 C 1]

*Sarat Chandra Bose, Tarakeswar Pal Choudhury and Jnan Chandra Roy*—for Appellant.

*Khitindra Nath Bose for Rupendra Kumar Mitra*—for Respondents.

**S. K. Ghose, J.**—This is an appeal by the plaintiff in a suit for rent. The plaintiff claims rent at the rate of Rs. 16 a year. The defence is that the jama is Rs. 5-2-5 gandas. In the trial Court the suit was decreed. The lower appellate Court held that the presumption of correctness of the Record-of-Rights, which is in favour of the plaintiff, had been rebutted and decreed the suit at the rate admitted by the defendants. The plaintiff appeals.

The point in this appeal is whether the lower appellate Court was justified in holding that the presumption of correctness of the Record-of-Rights had been fully rebutted. In coming to his decision the learned Subordinate Judge has relied on a cess-return Ex. 4. It appears that this was filed by the plaintiff as there was an issue whether he got his name registered and lodged cess-return. In Ex. 4 the rate of rent mentioned is Rs. 5-2 5 gandas. The learned Subordinate Judge thinks that under S. 20, Cl. (b), Cess Act, the plaintiff is precluded for claiming rent at a higher rate. Under the Cess Act, returns are filed only at certain times in compliance with notices served by the Collectorate. Ex. 4 was filed in 1912. But in 1917 the plaintiff brought a suit for rent claiming rent at the rate of Rs. 16 and obtained an ex parte decree. Subsequently, the defendants paid up the entire decretal amount and filed a petition alleging full satisfaction. It is contended that this is not res judicata. But that is not the point. The result of the rent suit of 1917 shows that the rent which was mentioned in the previous cess-return had been varied and that for the period in suit the rate of rent was Rs. 16 as now claimed by the plaintiff. Then comes the Record-of-Rights which was finally published in 1918. In this state of the evidence it is wrong to say that the presumption of correctness of the Record-of-Rights has been fully rebutted.

The result is that the decree of the

lower appellate Court is set aside and that of the trial Court restored with costs in all Courts.

**Cammiade, J.**—I agree.

S.N./R.K.

*Decree set aside.*

## A. I. R. 1929 Calcutta 516

MITTER, J.

*Mahim Chandra Banikya and others*—Plaintiffs—Appellants.

v.

*Karamali and others*—Defendants—Respondents.

Appeal No. 2361 of 1921, Decided on 10th September 1923, against appellate decree of Sub-Judge, Third Court, Dacca, D/- 24th June 1927.

**Landlord and Tenant—Rent fixed in lump—Tenant not given possession or dispossessed of part of tenancy—Whole rent can be suspended.**

The doctrine of suspension of rent depends solely upon this that the rent due is an entire sum in respect of the land demised. Where, therefore, the rent is fixed in a lump there would be suspension of rent on the grounds of dispossession of the tenant by the landlord from a part of the demised premises. So also, if a tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent and unless he has a right or some equity to an apportionment he can recover nothing on the contract: *A. I. R. 1925 P. C. 97, Expl. and Foll.*; *A. I. R. 1927 Cal. 737, not Foll.*; *A. I. R. 1928 Cal. 579, Foll.* [P 519 C 1]

*Phanibhusan Chakravarti*—for Appellants.

*Bhagirath Chandra Das*—for Respondents.

**Judgment.**—This is an appeal by the plaintiffs and arises out of a suit commenced by them for recovery of rent in kind for the years 1328 to 1331 B. S.

The defence of defendant 2 to the suit is that there ought to be a suspension of rent as he has been dispossessed from a portion of the holding by some of the landlords. The Munsif who tried the suit disbelieved the story of dispossession and gave judgment for the plaintiffs. On appeal the lower appellate Court remanded the suit

“so far as it relates to the claim in respect of the years 1329-31, for fresh trial after a local enquiry by a Commissioner, as to whether any part of C. S. dag 1066 has been in possession of the plaintiffs or their cosharers, as alleged by defendant 2.”

A Pleader Commissioner was appointed to investigate if the plaintiffs had en-



encroached on a portion of the holding and he found that the tenant defendants have been dispossessed from 1 katha 1 dhur out of their holding; the Commissioner also found that the defendants dispossessed the plaintiffs from a portion of their own land. The Munsif after remand held that there had been a dispossession of the defendants from a very small area and he decreed the suit in part.

An appeal was taken to the Court of the Subordinate Judge of Dacca and he found that the plaintiffs admitted before the Commissioner that defendant 2 was in possession up to the line joining stations Nos. 1 and 2. He further found that the plaintiffs have erected a privy on a portion of the land coloured yellow in the Commissioner's map and that they throw refuse matter on the land and night soil from the privy comes over a portion of the defendant's land. The Subordinate Judge said:

"as I am satisfied on the evidence on the record that the defendants have been dispossessed from a portion of the holding I hold that the rent should be suspended till the tenants are restored to the possession of the land upon the principle clearly defined in *Dwijendra Nath Roy v. Aftabuddin Sardar* (1)."

The evidence of the defendants shows that defendants have been dispossessed from an area which may be either one-fourth of a kani or half of a kani which is said to be approximately equivalent to a bigha. The defendants also deposed that the plaintiffs throw refuse on that portion thereby rendering cultivation absolutely impossible. The Subordinate Judge after arriving at the findings to which I have referred dismissed plaintiff's suit for rent.

The plaintiffs have appealed to this Court. It has been contended on behalf of the appellant that there has been no proper reversal by the lower appellate Court of the finding of the trial Court that there has been no dispossession by the plaintiffs. It has also been urged that the dispossession by the plaintiffs was not of such character or extent as to attract the principle of entire suspension of rent. It is not disputed in this case that the rental was a lump rental and not at so much Aris of paddy per bigha. Plaintiffs who are cosharer landlords to the extent of six annas share (remaining ten annas share belonging to the

other pro forma defendants) allege that their collections are separate and that the defendant tenants did not deliver paddy which was due to be delivered to them in their share. With regard to the ground urged viz. that there has been no proper reversal of the finding of the first Court on the question of dispossession I think there is no substance in it for the lower appellate Court has found on an examination of the evidence that the defendants had been dispossessed from a portion of the holding. That finding is binding on me in second appeal. The evidence shows that the dispossession has been from at least  $\frac{1}{4}$ th of a kani i. e., nearly 5 kattahs in a holding which is said to be about 2 bighas in area. This is a substantial dispossession and as the rental was a lump rental the principle laid down by their Lordships of the Judicial Committee in *Katyayini Debi v. Uday Kumar* (2) applies. In that case their Lordships of the Judicial Committee said:

"The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha."

As I read this case where there is lump rental and there has been a dispossession from a part of the holding it is the view of their Lordships that the entire rent must be suspended.

The Munsif agreeing with the Commissioner found that there has been dispossession of defendants from about 1 cottah 1 dhur of land of dag 1066 which was leased to the defendant. But the Commissioner found that the defendant encroached on some other plot of plaintiff's land to the extent of 1 cottah and from this the Commissioner and the Munsif thought that the encroachment on the demised premises was only to the extent of  $\frac{1}{20}$ th dhur. The Subordinate Judge was right in pointing out that the question of encroachment by the defendant on some other land of the plaintiff was not raised by the plaintiff and the Munsif and the Commissioner made a new case for the plaintiff in considering this act of the defendant in

(1) [1917] 25 C. L. J. 53=39 I. C. 209=21 C. W. N. 492.

(2) A. I. R. 1925 P. C. 97=52 Cal. 417=52 I. A. 160. *Adyapone High Court*



encroaching on some other land of the plaintiff as having a bearing on the question of plaintiff's dispossession from the demised premises. Indeed it seems to me that the question of encroachment by the tenant on some other land of the landlord is foreign to and is not relevant to the controversy as to the extent of dispossession of the defendant by the plaintiff from the demised premises. The Subordinate Judge did not accept the Commissioner's boundary line between plaintiff's dag 976 and defendants' dag 1066. He found the ridge dividing the two plots to be the boundary between the two plots and that the plaintiffs admitted that the defendants were in possession up to the line joining stations 1 and 2. He found on the evidence that the dispossession was from a portion of the holding and the evidence shows that the dispossession was  $\frac{1}{4}$  kani in an area of  $1\frac{1}{4}$  kani. I think this was dispossession of such a substantial portion of the disputed area as entitled the defendant to suspension of rent in a case where the rent was a lump rental of 3 aris (each ari—2 mds) of paddy.

The learned advocate for the appellants argued that there ought to be proportionate abatement of rent. It has, however been held in this Court for a long series of years that in the case of lump rental, there ought to be suspension and not proportionate abatement of rent. On 14th May 1869 Sir Barnes Peacock, C. J. referred to the following statement of the law in Bacon's Abridgment Tit, Rent (M)

"Where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry, and it seems to be the better opinion and the settled law at this day that the tenant is discharged from payment of the whole rent till he is restored to the whole possession, that no man may be encouraged to injure or disturb the tenant in his possession whom, by the policy of the law, he ought to protect and defend."

The principles to be gathered from the earlier cases is that if even the landlord dispossesses the tenant from a portion of the demised premises there should be no apportionment of rent, the whole rent being equally chargeable on every part of the land, demised. See *Dhunput v. Mahomed Bazim* (3). In the case of *Harro Kumari v. Purna*

*Chandra* (4), Sir Francis Maclean, C.J. and Banerjee, J. extended the principle of suspension of rent to a case where the tenure was held under a lease which reserved rent at a certain rate per bigha applying the principles laid down in the English and Indian cases referred to in the case in *Dhunput v. Mahomed Kazim* (3). In view of the decisions in *Uday v. Katyani* (2) to which I have referred, this decision cannot be held to be good law now. In *Ananda Prasad v. Mathura* (5), Chitty, J., for the first time questioned how far the technicalities to be found in English law should be allowed to affect the relations of landlord and tenant in this country. Even in 1919 in the case of *Manindra Chandra v. Narendra Chandra* (6), Fletcher, J., with whom Cuming, J., concurred held following the case of *Neale v. Mackenzie* (7), that where the landlord having let out a portion of a land to an earlier lessee lets it out again to a subsequent lessee and fails to deliver to the subsequent lessee possession of the entire land leased to him the entire rent is suspended. Fletcher, J., pointed out in that case that the case of *Neale v. Mackenzie* (7) has always been considered good law and with reference to the argument that the decision of the English Court should not be applied to the system of law in this country observed as follows:

"But the rule that rent is suspended on account of the dispossession of the tenant by the landlord from a portion of the holding has been recognized in a number of cases in this Court and, in my opinion it is not open to question now."

It was in this state of the authorities that the matter came up for consideration before their Lordships of the Judicial Committee in *Katyani v. Uday* (2), and their Lordships said in the passage already quoted that:

"the doctrine of suspension of payment of rent where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject."

In my opinion these observations recognize the rule laid down by the Indian

(4) [1901] 28 Cal. 188.

(5) [1909] 13 C.W.N. 702=2 I.C. 123=9 C.L.J. 585.

(6) [1919] 46 Cal. 956=52 I.C. 13=23 C.W.N. 585.

(7) [1836] 1 M. & W. 747=2 Gale 174=6 L.J. Ex. 263.

(3) [1897] 24 Cal. 296.



decisions that where the rent is fixed in a lump there would be suspension of rent on the ground of dispossession of the tenant by the landlord from a part of the demised premises. In the case of *Sushil Kumar v. Rajani Kanta* (8), B. B. Ghose and Roy, JJ., thought that these observations of their Lordships were no authority for the proposition that there should not be any apportionment in any case of dispossession by the landlord of the tenant from a part of the demised premises, where the rent is a lump rental. With great respect to the learned Judges I am unable so to read the decision of their Lordships of the Judicial Committee. As I read the judgment their Lordships intended to lay down that the rule of suspension of rent would apply in the case where the rent was a lump rental and not to a case where the rent was so much per bigha. Besides the observations of B. B. Ghose and Roy, JJ., are obiter as they were made in a case where the rent stipulated was at the rate of Re. 1-10-0 per bigha. It is also to be noticed that B. B. Ghose in an earlier case *Bisweswar v. Kali Charan* (9) expressed himself thus :

"It is true the rule of suspension of rent on account of eviction by the landlord of the tenant from a portion of the demised premises has been adopted in this Court in a series of cases and it is too late to question the adoption of that rule in our Court now."

The true rule is laid down in the case of *Sajjed Ahamad v. Trailokya Nath* (10) a decision to which I was a party where the learned Chief Justice said

"But the doctrine of suspension of rent depends solely upon this that the rent due is an entire sum in respect of the land demised. If, therefore, the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent and unless he has a right or some equity to an apportionment he can recover nothing on the contract. But the whole basis of the doctrine is that rent due is one entire sum."

I can find no right or equity in this case in favour of plaintiffs so as to entitle them to an apportioned rent.

I think the lower appellate Court has taken the right view and this appeal must be dismissed with costs.

P.R./R.K.

*Appeal dismissed.*

## \* \* A. I. R. 1929 Calcutta 519

RANKIN, C. J., AND MUKERJI, J.

*Hari Charan Moulik and others—*  
Plaintiffs—Appellants.

v.

*Kalipada Chakravarty and others—*  
Defendants—Respondents.

Appeal No. 1840 of 1926, Decided on 3rd August 1928, against appellate decree of Addl. Dist. Judge, Jessore, D/- 24th April 1926.

\* (a) Civil P. C., O. 41, R. 33—Suit for ejectment dismissed — Pending appeal one plaintiff dying and his representative not brought on record — Although other plaintiffs have no absolute right to go on with appeal, still, in proper cases, Court should allow amendment of plaint so as to pray for joint possession instead of khas possession and should go on with appeal — Civil P. C., O. 6, R. 17.

Where a suit for ejectment is dismissed and pending the appeal from the trial Court's decree, one of the plaintiffs-appellants dies and his representative is not brought on record, the other plaintiffs-appellants have not an absolute right to go on with the appeal, but the Court, in a proper case, should give liberty to them to amend their plaint by seeking for joint possession only instead of khas possession ; for the difference between relief of khas possession claimed and the relief of joint possession subsequently sought is not in itself sufficient to debar the Court from permitting the plaint to be amended, if that would enable the appellants to go on. [P 520 C 2]

\* \* (b) Civil P. C., O. 22, R. 3—Appeal from simple dismissal of suit—One appellant dying—His representative not brought on record—Appeal cannot abate because decision with reference to deceased plaintiff would not be so contradictory to decision as regards other plaintiffs if appeal would succeed as would make it impossible to proceed with appeal.

Where one of the plaintiffs-appellants died pending the appeal from a simple dismissal of the suit, the appeal cannot abate on the ground that the decision with reference to the deceased plaintiff in the trial Court would be contradictory to the decision as regards the other plaintiffs if the appeal should succeed. For what is determined as regards the deceased plaintiff is that he is not one of the persons entitled to the relief claimed and there would be no such contradiction as would make it impossible to proceed with the appeal : 7 Cal. 414, Ref. ; 24 C. W. N. 44 ; A. I. R. 1926 Cal. 335 ; A. I. R. 1926 Cal. 893 ; 11 C. W. N. 504, Dist. ; A. I. R. 1928 Cal. 184, Ref. [P 521 C 1]

(c) Practice—Appeal should not be held incompetent unless there is sound reason in principle.

It is not necessary or desirable that the law should regard an appeal as incompetent

(8) A.I.R. 1927 Cal. 737.

(9) A.I.R. 1926 Cal. 908.

(10) A.I.R. 1928 Cal. 479=55 Cal. 464.



unless there is sound reason in principle.

[P 521 C 1]

*Bijan Kumar Mukherji* for *Rupendra Coomar Mitter* and *Parmananda Lahiri*—for Appellants.

*Tarakeswar Pal Choudhuri* and *Nirmal Kumar Sen*—for Respondents.

**Rankin, C. J.**—In this case, three plaintiffs brought a suit in ejectment against certain defendants making the case that the defendants were occupying the land in suit by erection of huts and living therein by permission of the plaintiffs, that they had been in the plaintiffs' employ but that the defendants had procured an entry to be made in the Record-of-Rights in which they were recorded as tenants of defendant 3. Accordingly, it appears that the permission for continuing the occupation had been determined and the plaintiffs brought their suit for ejectment of defendants 1 and 2. The first Court dismissed the plaintiffs' suit holding that the defendants had been in possession adversely for a sufficiently long period to bar the plaintiffs' claim. An appeal was taken by all the three plaintiffs to the lower appellate Court and then one of the plaintiffs died. No steps were, however, taken by the other plaintiffs-appellants to have the representatives of the deceased plaintiff added as parties appellants. In these circumstances, time having elapsed so that the appeal as regards the deceased plaintiff had abated, a question arose in the lower appellate Court whether the whole appeal had become incompetent; and the learned Additional District Judge of Jessore being of opinion that the whole appeal had become incompetent dismissed it without entering into the merits.

In this appeal, it is argued before us that the whole appeal had not become incompetent and that it was possible for the surviving plaintiffs to proceed with the appeal in order that they might in the appellate Court obtain a decree for being put in possession jointly with the defendants of the land in suit. The main principle on which they rely is the principle laid down by Sir Richard Garth in the case of *Radha Prosad Wasti v. Esuf* (1). On the other hand, it has been contended on behalf of the respondents that the cases of *Kali Dayat v. Nagen-*

*dra Nath* (2), *Manindra Chandra Nandi v. Bhagabati Debi* (3), *Naimuddin Biswas v. Maniruddin Lashkar* (4), *Mindapur Zemindari Co. v. Amulya Nath Roy* (5), as also the earlier case of *Dharanjit Narayan Singh v. Chandeshwar Prosad Narain Singh* (6), show that this appeal had become incompetent and for two reasons, first of all, because the suit as framed would have been defective in the absence of the deceased plaintiff and secondly, because, if the judgment of the trial Court must stand so far as regards the deceased plaintiff, then should this appeal be entertained and be successful, there would be conflicting and contradictory decisions in the same suit about the same subject-matter.

The question is one which is likely to arise in many cases and it is necessary to decide the matter on principle. It appears to me to be strictly speaking true that the suit as framed would have been defective in the absence of the deceased plaintiff. That is because it was a suit in ejectment and the joint title of the three plaintiffs and the right of the three plaintiffs to possess were clearly not vested in two of them alone. On the other hand, it is to be remembered that in a suit for ejectment by two out of three persons entitled remedy may be given by a decree for joint possession. It often happens that a plaintiff sues for khas possession and gets a decree for joint possession, particularly, where it is possible to specify the share. I think, however, that it is clear that, in the absence of the deceased plaintiff's representatives, the other plaintiffs had not an absolute right to go on with the appeal. They could only go on with the appeal, if it seemed fit to the Court to allow them to go on to get a somewhat different form of relief to that which they originally claimed. I see no difficulty in the matter. I do not think that mere difference as regards the relief claimed in the plaint and the relief now sought, the difference between khas possession and joint possession, is in itself sufficient to debar the Court in a proper case from permitting the plaint to be amended, if that would enable the appellant to go on.

(2) [1920] 21 C.W.N. 44=54 I.C. 822=30 C.L.J. 217.

(3) A.I.R. 1926 Cal. 335.

(4) A.I.R. 1923 Cal. 184.

(5) A.I.R. 1926 Cal. 893=53 Cal. 752.

(6) [1907] 11 C.W.N. 504=5 C.L.J. 393.

(1) [1881] 7 Cal. 414=9 C.L.R. 76.



It is said, however, that there is another reason why the appeal could not be entertained. That is because the decision with reference to the deceased plaintiff in the trial Court would be contradictory to the decision as regards the other plaintiffs if this appeal should succeed. I am not impressed with that argument. It appears to me that this is a case where the claim has simply been dismissed. What has been determined as regards the deceased plaintiff is that he is not one of three persons entitled to eject the defendants. In my opinion, this is not a case where there would be such a contradiction as would make it impossible to proceed with the appeal. It is a different matter when the suit is for a declaration that a certain entry in the Record-of-Rights should be corrected from one thing to another. In that case, it may well be that much anomaly would be produced by endeavouring to prove one state of things for one purpose and another state of things for another purpose. All that happened here was that, as the result of the trial Court's decision, the deceased plaintiff was held entitled to no relief at all as against the defendants. I see no practical reason why this appeal should not go on.

It will be observed from the cases referred to above that not one of them is a case where one of the plaintiffs appellants died pending the appeal from a decree of simple dismissal of the suit. It is a very different matter when complaint has to be made that the party has not impleaded one of his adversaries. In all the cases to which I have referred, except, I think, in the case reported in 32 *Calcutta Weekly Notes* 299, the defendants were appealing and one of the plaintiffs-respondents had died without his heirs being substituted. In my judgment, it is not necessary or desirable that the law should regard the appeal as incompetent unless there is sound reason in principle.

In this case, it seems to me that the correct order would be to give liberty to the appellants to amend their plaint by seeking for joint possession only and to do that on terms that they must pay costs in all the Courts including this Court. On these terms, it seems to me that there is no reason why the appeal should not be allowed to proceed as an appeal in a case where the claim is for joint possession. I do not think that the

mere fact that there has been no enquiry as to the extent of the surviving plaintiff's share would be any difficulty. The plaintiffs may, if they succeed, be given joint possession and then it will be a matter of no great difficulty if it becomes necessary to bring a partition suit to ascertain that share. I think this appeal should be disposed of in that way. The case will be sent back to the lower appellate Court with these observations. The appellants will have a month's time from the date of the arrival of the record in the lower appellate Court to pay the costs. In the event of their not paying the costs within the time limited, this appeal will stand dismissed with costs.

**Mukerji, J.**—I agree.

S.N./R.K.

*Case remanded.*

### A. I. R. 1929 Calcutta 521

RANKIN, C. J., AND BUCKLAND, J.

*Ramjan Ali*—Applicant.

v.

*Moolji Seeka & Co.*—Opposite Party.

Application in Appeal No. 65 of 1928, Decided on 3rd January 1929, against judgment and order of Page, J., D/- 14th August 1928.

(a) Criminal P. C. (5 of 1898), Ss. 476, 476-B—Complaint made by a single Judge of the High Court—Appeal lies to Division Bench under S. 476 B.

An appeal against an order made by a Judge exercising the original jurisdiction of the Court to a Division Bench of the Court lies under S. 476-B: *A. I. R. 1923 Mad. 136* and *A. I. R. 1922 Bom. 455, Foll.* [P 523 C 1]

(b) Criminal P. C. (5 of 1898). S. 476—In case of appeal under S. 476-B against a complaint under S. 476—Limitation runs from the date of complaint.

In case of a complaint under S. 476, limitation must be held to run from the date of the complaint, for the words of the section make it clear that it is only on the refusal to make a complaint or on a complaint being made that an appeal is possible: *A. I. R. 1927 Lah. 54* and *A. I. R. 1923 Bom. 64, Foll.* [P 523 C 1]

*B. C. Mitter* and *N. C. Chatterjee* and *Roy*—for Applicant.

*N. Sircar*—for Opposite Party.

**Buckland, J.**—This is an application to admit an appeal which it is sought to prefer against the judgment and order of Page, J., dated 14th August 1928, whereby he recorded a finding that it was expedient in the interests of justice that an enquiry should be made into



certain offences specified by him and ordered that a complaint thereof be made in writing signed by himself and forwarded to the Chief Presidency Magistrate, Calcutta.

The Registrar has endorsed upon the memorandum of appeal :

"I am unable to admit this appeal. It is open to appellant to apply to the appeal Court."

The reason given for this is that the requisition for office copy was given after the expiry of 20 days. Prima facie the registrar would appear to be right and to have correctly applied the well known rule applicable, but this application does not depend on any such consideration and no useful purpose would be served by reciting the several dates upon which the various steps customary between the making of an order and the presentation of an appeal were taken.

The learned Judge on 30th August, pursuant to his finding and order of 14th August, signed the complaint which he had ordered to be made. That document, of which we have been shown a copy, recites the suit in which the alleged offence took place, the fact that it was heard and determined before him, the application made to him under S. 476, Civil P. C., in circumstances and based upon materials which the complaint sets out in detail, his order thereon, and concludes as follows :

"Now I being the Judge who heard and determined the said suit No. 2178 of 1927 do make a complaint against the said Ramjan Ali pursuant to S. 476, Criminal P. C., that he the said Ramjan Ali has committed the said above mentioned offences ; and I annex to this complaint a certified copy of the judgment which was delivered by me in the said suit, and which is marked Ex. A."

In his procedure and the terms of his order and complaint the learned Judge has been careful to observe the provisions and language of the section and no exception can be taken to the course which he has followed.

An appeal is allowed by S. 476-B, Criminal P. C., which provides :

"Any person on whose application any civil, revenue or criminal Court has refused to make a complaint under S. 476 or S. 476-A or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-S. (3)."

The arguments submitted by learned counsel on either side turn upon the question whether an appeal against an

order made by a Judge exercising the original jurisdiction of the Court to a Division Bench of the Court, lies under S. 476-B or under Cl. 15 of the Letters Patent. If the latter, it is submitted that nothing in the terms of S. 476-B can avail the applicant to save limitation, for Art. 151, Lim. Act would apply and time would run from 14th August, the date of the order appealed against. If on the other hand the appeal is under S. 476-B, the section furnishes a starting point for limitation in the date of the complaint, for until a complaint has been made no appeal can be preferred under the section. In that case a further point arises, whether the article of the Limitation Act applicable is Art. 151 or Art. 155, for while the contention advanced on behalf of Mr. Sircar's client leaves no room for any such question, that advanced on behalf of the applicant leaves it still open.

These two views depend upon the interpretation to be placed upon the words "may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-S. (3)."

The sub-section there referred to provides that a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court. Ordinarily appeals lie from a single Judge of the Court to a Division Bench, but as the language of S. 476-B and S. 195(3) contemplates two Courts it is contended that they have no application. No doubt both a Judge sitting singly and a Division Bench both exercise the jurisdiction of the same Court, though the one exercises the original and the other the appellate jurisdiction of the Court. But it would be entirely contrary to the spirit of the Act to hold that by reason of this the sections are inapplicable. The definition of subordination is an arbitrary or conventional definition intended in my opinion to meet all cases where the Court of first instance is not subordinate to the appellate Court in the ordinary sense of the word, and it must, therefore, be taken to comprise the case in point. To hold otherwise would lead to a most anomalous position. Though, if Mr. Sircar's contention is correct, it would be open to a Judge exercising original jurisdiction to make an order, as Page, J.,



has done, under S. 476 in respect of one of the offences specified in S. 195, the Bench which heard an appeal from the judgment and decree made in the suit would have no power to do so.

Authority on the point is not, however, lacking for it arose in *Munisamy Mudaliar v. Rajaratham Pillai* (1). In that case a single Judge on the Original Side of the High Court, under S. 195, Criminal P. C., granted sanction to prosecute in respect of an offence specified in that section. An appeal was preferred and it was contended that under S. 195, Sub-Ss. (6) and (7), which for the immediate purpose are indistinguishable from S. 195 (3) of the Code as since amended, no appeal lay to the Division Bench of the High Court. A Full Bench of the Madras High Court, though the learned Judges guarded themselves against expressing any opinion as to whether a single Judge is subordinate to a Bench in any other sense, decided that as appeals ordinarily lie to a Division Bench from a Judge sitting alone the Division Bench of the Appellate Side of the Court had power to revoke the sanction. The same test of subordination was applied by the Bombay High Court in *Abdul Latiff v. Haji Tar Mahomed* (2) and it was decided that an appeal lay to a Division Bench from an order made by a single Judge on the Original Side granting or refusing sanction to prosecute.

In my judgment the view taken by the Madras and Bombay High Courts is correct and the appeal lies under S. 476-B, Criminal P. C. The question whether any appeal would lie under Cl. 15, Letters Patent does not arise and indeed, in the present state of the law, it is difficult to see how it ever could arise.

In this view it becomes apparent that limitation must be held to run from the date of the complaint, for the words of the section make it clear that it is only on the refusal to make a complaint or on a complaint being made that an appeal is possible. But for this it would undoubtedly be open to argument that time ran from the date of the finding and order that a complaint should be made. As it is, though the order to be appealed against is that directing a complaint to be made, in this case the order of 14th

August, nevertheless, for the reasons stated and contrary to the usual rule, time does not begin to run until the complaint has actually been made. It was suggested that time did not run until the complaint reached the Magistrate to whom it was directed to be sent under S. 476, on the ground that until it reached him there was no complaint, but this cannot be the case because S. 476 says that ;

"such Court may . . . . . make a complaint . . . . . and shall forward the same to a Magistrate . . . . ."

On this point also there is authority. For the same reasons as I have given already the Lahore High Court in *Fitzholmes v. Emperor* (3) held that time runs from the date of the making of the complaint. This was followed by the Bombay High Court in *Emperor v. Daga Devji Patil* (4) in which Fawcett, J., observed that until the order, being the finding under S. 476, is supplemented or completed by an actual complaint it is for the purpose of S. 476-B incomplete.

This brings me to the final point, viz., the period of limitation applicable. Both Arts. 151 and 155 have been referred to, the two periods of limitation prescribed being 20 and 60 days, respectively. The order to be appealed against is dated 14th August, but the complaint is dated 30th August. The Court closed for the vacation on 14th September and as the Memorandum of appeal was presented on the day upon which the Court reopened it was presented within time whichever may be the Article applicable. The question, which is by no means free from difficulty, need not, therefore, be decided on this application. If as has been held *Nasaruddin Khan v. Emperor* (5) the procedure relating to appeals under S. 476-B is governed by the Civil and not the Criminal Procedure Code, the point is one which cannot be determined exclusively upon the wording of the two Arts and as it has not been argued fully, though we were referred to *Budhu Lal v. Chattu Gope* (6) and *Chunder Kumar Sen v. Mathuria Debya* (7), I express no opinion in regard to it.

(3) A. I. R. 1927 Lah. 54=7 Lah. 77.

(4) A. I. R. 1928 Bom. 64=52 Bom. 164.

(5) A. I. R. 1927 Cal. 98=53 Cal. 827.

(6) [1917] 44 Cal. 804=21 C. W. N. 269=39 I. C. 465=25 C. L. J. 193.

(7) A. I. R. 1925 Cal. 1228=52 Cal. 1009.

(1) A. I. R. 1923 Mad. 136=45 Mad. 928 (F.B.).

(2) A. I. R. 1922 Bom. 455=47 Bom. 270.



In my judgment the appeal must be admitted as it is within time and the respondents must pay the costs of this application, but I desire to add a few observations as to the practice. S. 476 requires a finding and complaint. I have known, indeed I have done it myself, a direction given that the judgment in the suit out of which the matter arises shall be treated as the complaint, in which case a copy of the judgment has been signed by the Judge and sent by the registrar to the Magistrate. Unless the judgment has been framed with that end in view, this may lead to a want of precision and ambiguity which should be avoided at all times, but especially in a criminal matter. The example set by Page, J., of a separate order containing the requisite finding, setting out in detail specific matters extracted from the proceedings, and directing a complaint to be made in respect thereof, this being followed by the complaint which conforms to the terms of the previous order, is greatly to be preferred. Such a course avoids the possibility of any mistakes as to what is intended. In a matter which recently came to my notice when one of a Division Bench it appeared that another Division Bench of the Court when deciding an appeal under S. 476-B directed that a complaint should be made against a particular individual. The case then went back to the Chief Presidency Magistrate who himself made a complaint after a lapse of time. This was certainly wrong. The Division Bench had intended that their judgment should take the place of the complaint. In the circumstances of that case no one was ultimately prejudiced, but the case affords an illustration of the advantage to be gained by a procedure such as Page, J., adopted in the present case.

**Rankin, C. J.**—I agree.

P.R./R.K.

*Appeal admitted.*

## **\* \* A. I. R. 1929 Calcutta 524**

**B. B. GHOSE AND PANTON, JJ.**

*Haran Chandra Chakravarti*—Applt.  
v.

*Joychand and others*—Respondents.

Appeal No. 28 of 1928, Decided on 5th March 1929, against original order of Dist. Judge, Rajshahi, D/- 20th September 1927.

**\* (a) Civil P. C., O. 21, R. 63—Effect of setting aside order under O. 21, R. 60—Attachment revives.**

When on account of the claim being allowed under O. 21, R. 60, a property is released from attachment and the decree-holder brings a suit as provided under O. 21, R. 63, and that suit is decided in his favour the result is that the attachment is revived although the property was released from attachment: 23 Cal. 829; 33 Cal. 1158; A. I. R. 1921 Cal. 101; A. I. R. 1922 Mad. 176, *Foll.* [P 525 C 2]

**(b) Civil P. C., S. 64—Effect of attachment—Attaching creditor must be classed with unsecured creditors—Provincial Insolvency Act, (1920), S. 51.**

Attachment does not create any title in favour of the attaching creditor. It merely prevents private alienations.

The position of the attaching creditor does not confer any title upon him in the property in question and he is only entitled to be classed with other creditors all of whom are entitled to rateable distribution of the assets in the hands of the receiver. Such creditor has no higher right than that of any other unsecured creditor and he is not entitled to have his decree satisfied in full out of the sale proceeds of the property attached by him.

[P 525 C 2]

**\* (c) Provincial Insolvency Act (1920), S. 52—Section contemplates both moveable and immovable properties attached.**

The opening words of S. 52 refer to attachment of any kind of property which is saleable and need not be confined to moveable properties alone. Where immovable property is attached in execution of a decree it is commonly stated that the property is in custody of the Court and there is no reason to suppose that the legislature meant that the attaching decree-holder would have a charge for his costs where moveable property is attached but he would be entitled to no such relief if immovable property is attached by him although the proceedings relating to the attachment of the property are taken at considerable cost of money, and trouble. The true construction is that S. 52, refers to the case of attachment of all kinds of property and is not confined to moveable property alone.

[P 526 C 1, 2]

**\* \* (d) Provincial Insolvency Act (1920), S. 52—"Costs of execution" include costs for suit under O. 21, R. 63.**

Where attachment has been revived under O. 21, R. 63, Civil P. C., the proceedings in suit which led to the order of attachment should be considered as proceedings in furtherance of execution and the expression "costs of the execution" should have a liberal interpretation so as to include the costs of the suit brought under O. 21, R. 63 of the Code in which the creditor succeeded in having the order under R. 60 releasing the property from attachment set aside.

[P 526 C 2]

*Sarat Chandra Roy Choudhuri, Bireswar Bagchi, and Jatindra Mohan Choudhuri*—for Appellant.

*Jogesh Chandra Roy, Dinesh Chandra Roy and Girija Mohan Sanyal*—for Respondents.



**B. B. Ghose, J.**—This is an appeal by a creditor who is described as creditor No. 4 against the order of the District Judge of Rajshahi dated 20th September 1927, made in an insolvency proceeding. The appellant had obtained a decree for over Rs. 5,000 on 16th July 1914. In 1915 he attached a house as belonging to his judgment-debtor, since adjudicated insolvent. Four claim cases were started by the sons of the judgment-debtor who alleged that the property attached did not belong to the judgment-debtor but to themselves. Those claims were allowed on 23rd August 1915 and the property released from attachment.

On 18th May 1916 the appellant brought a suit as provided under O. 21, R. 63, Civil P. C. for a declaration that the property belonged to his judgment-debtor and not to the claimants. In this suit the claimants and the judgment-debtor were made defendants. The suit was decreed in the trial Court on 30th September 1921. The claimants appealed against that decree to this Court and the final decree of this Court was made on 22nd March 1924. In the meantime on 5th November 1921, the judgment-debtor was adjudicated insolvent and a receiver was appointed of his properties. The property which was the subject-matter of the suit brought by the appellant was not included in the schedule of the properties of the insolvent. The receiver did not take possession of the property nor did he take any interest in the litigation relating to that property. After the decree of the High Court setting aside the order releasing the property from attachment and declaring that the appellant could proceed in execution against the property in suit as belonging to his judgment-debtor, the insolvent judgment-debtor applied in the insolvency proceeding on 30th July 1924, for including the property in question in his schedule. After that date the receiver took possession of the property and proceeded to sell it. The present appeal arises out of an application made by the appellant that the whole of his decretal amount should be paid first out of the assets realized by sale of the disputed property on the ground that as the property was made available for the creditors of the judgment-debtor at his instance he was entitled to a first charge on the property. The argument was based upon the fact

that the result of the decree in the suit brought by him was that the attachment that was effected in 1915 in execution of the appellant's decree was revived and it should be considered as having continued throughout and this attachment constituted a charge on the property. He is therefore entitled to preference to other creditors. The learned Judge rejected that contention holding it to be wholly untenable and that the appellant must rank equally with other unsecured creditors in the distribution of the assets. The appeal is against that order and the appellant claims that the whole of his dues should be paid first out of the assets realised by the sale of the property in question.

It is true that when on account of a claim being allowed under O. 21, R. 60, Civil P. C., a property is released from attachment if the decree-holder brings a suit as provided under O. 21, R. 63, and that suit is decided in his favour, the result is according to the authorities that the attachment is revived, although the property was released from attachment under R. 60. The authority for this proposition is to be found in the cases of *Bonomali Rai v. Prosonno Narain Choudhury* (1), *Ram Chandra Marwari v. Mudheswar Singh* (2), *Protap Chandra Gope v. Sarat Chandra Gangopadhyaya* (3) and *Anthaya v. Manjaiya* (4). It may, therefore, be held that the property was subject to attachment at the time when it was included in his schedule by the insolvent on 31st July 1924 and when the receiver took possession of it. But the effect of this attachment is surely not what appellant claims it to be. Attachment does not create any title in favour of the attaching creditor. It merely prevents private alienation: see the cases of *Moti Lal v. Karrab-ul-din* (5) and *Raghunath Das v. Sundar Das* (6). The position of the appellant as an attaching creditor did not, therefore, confer any title upon him in the property in question and he is only entitled to be classed with other

(1) [1896] 23 Cal. 829.

(2) [1906] 33 Cal. 1158=10 C. W. N. 978.

(3) A. I. R. 1921 Cal. 101.

(4) A. I. R. 1922 Mad. 176=45 Mad. 84.

(5) [1897] 25 Cal. 179=24 I. A. 170=1 C. W. N. 639=7 Sar. 222 (P.C.).

(6) A. I. R. 1914 P. C. 129=42 Cal. 72=41 I. A. 251.



creditors all of whom are entitled to reteable distribution of the assets in the hands of the receiver. The rights of an executing creditor are defined in S. 51, Provincial Insolvency Act, which provides that where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. The appellant, therefore, has no higher right than that of any other unsecured creditor, and he is not entitled to have his decree satisfied in full out of the sale proceeds of the property attached by him.

It is, however, contended on behalf of the appellant that under S. 52, Provincial Insolvency Act, he is at any rate entitled to the costs awarded to him in the suit in which the decree was made and to the costs of the execution. His contention is that the release of the property from attachment under O. 21, R. 60, Civil P. C., and the period during the continuance of his suit and the appeal in the High Court should be considered as one proceeding in attachment and as under the authorities referred to above the attachment that was made in 1915 should be considered to have revived, he is entitled to all the costs under S. 52 of the Act. It is contended on the other hand on behalf of the respondents who are the other creditors of the insolvent, that S. 52, Provincial Insolvency Act, applied only to cases where the attachment is of moveable properties and the contention is based upon the words

"the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the Receiver."

As immovable property attached by the Court cannot be said to be in the possession of the Court which could be delivered to the Receiver, this section must be confined to cases of moveable properties which were taken possession of by the Court in attachment. I do not agree with this contention. The opening words of S. 52 refers to attachment of any kind of property which is saleable and the words on which the respondents rely need not be confined to moveable property alone. Where immovable property is attached in execu-

tion of a decree, it is commonly stated that the property is in the custody of the Court and there is no reason to suppose that the legislature meant that the attaching decree-holder would have a charge for his costs where moveable property is attached but he would be entitled to no such relief if immovable property is attached by him although, as in the present case, the proceedings relating to the attachment of the property are taken at considerable cost of money and trouble. The true construction, therefore, in my opinion is that S. 52 refers to the case of attachment of all kinds of property and is not confined to moveable property alone.

The next contention on behalf of the respondents is that if the appellant is held to be entitled to any costs as first charge then it must be confined to the costs in the decree for money and those of the execution proceedings which led to the release of the property from attachment; or in other words, the costs incurred by him up to the 23rd August 1915 and not the costs of the subsequent proceedings in the suit which he brought in order to substantiate his right to attach the property as belonging to his judgment-debtor. That argument does not seem to me to be acceptable. The object of the suit under O. 21, R. 63, is to maintain the attachment and get rid of the order of release (*Bonomali's* case) (1). If it is held that the result of the subsequent suit was that the attachment was revived as it must be held in accordance with the cases cited above, it seems to me difficult to avoid the conclusion that the proceedings in the suit which led to the revival of the attachment should be considered as proceedings in furtherance of execution, and I think that the expression "costs of the execution" should have a liberal interpretation so as to include the costs of the suit brought under O. 21, R. 63 of the Code in which the appellant succeeded in having the order under R. 60 releasing the property from attachment set aside. In *Phul Kumari v. Ghanshyam* (7) their Lordships expressed an opinion that such a suit is the only mode of obtaining a review of the order in such cases and also as if it were "simply a form of appeal." Having regard to the

(7) [1903] 35 Cal. 202=35 I. A. 22=12 O. W. N. 169 (P.C.).



fact that it was only after the appellant succeeded in his suit finally, the insolvent included the property in his schedule and the Receiver took possession it is only just and proper that the appellant should get all the costs as a first charge on the property. It is by reason of the effort of the appellant that this property has been made available to the entire body of creditors. The Receiver never stirred to take possession of the property as belonging to the insolvent. Having saved the property for the benefit of the creditors as against the claims of third persons, it seems to be wrong that he should not be allowed to claim a charge for the expenses incurred by him on the property.

The order of the learned Judge, therefore, should be varied to this extent that the appellant shall have a first charge on the property for the costs of the suit in which the decree was made and of the execution proceedings including the costs of the suit brought under O. 21, R. 63, Civil P. C. in the trial Court and in the appellate Court and after the charge is satisfied, the balance of the assets realized will be distributed rateably amongst the several creditors including the appellant for the rest of his claim. Having regard to the fact that the success has been divided, there will be no order as to costs of this appeal.

**Panton, J.**—I agree.

V.B./R.K.

*Order varied.*

### \* A. I. R. 1929 Calcutta 527

JACK AND MITTER, JJ.

*Noai Chowkidar and others*—Petitioners.

v.

*Official Trustee of Bengal*—Opposite Party.

Civil Revn. Case No. 526 of 1928, Decided on 22nd February 1929, against order of Dist. Judge, Khulna, D/- 30th January 1928.

\* Civil P. C., O. 22, R. 9—Decree in favour of dead person is not nullity.

An order passed against a dead person would be a nullity; but where an order was passed in favour of a dead person it is not altogether and in all circumstances a nullity.

If a party is dead the records stand good so far as the living parties are concerned and that any disposal of the case notwithstanding

the death of one of the parties will be valid subject to its being vacated at the instance of the legal representatives of the person who had died.

A sale in favour of *R*, the decree-holder, was set aside but the sale was confirmed on appeal. The objector to the sale petitioned to the High Court in revision. The rule was pressed on the ground that the decree of the appellate Court was a nullity inasmuch as *R* was dead before the date of judgment. The Official Trustee of Bengal was substituted in *R*'s place.

*Held*: that decree of the lower appellate Court was not a nullity and rule was discharged: 39 *Mad.* 386; *Duke v. Davies*, 2 Q. B. 260, *Foll.*; 33 *Mad.* 167 and 38 *Mad.* 682, *Ref.* [P 528 C 2; P 529 C 1]

*Nurul Huq*—for Petitioners.

*Satindra Nath Mukerjee*—for Opposite Party.

**Judgment.**—This is a rule calling on the opposite party to show cause why the order of the lower appellate Court complained of should not be reversed and the sale set aside as prayed for in the petition. The rule was prayed for on two grounds. But neither of them has been urged before us now. The only ground on which the rule is pressed is that the order of the lower appellate Court was passed in favour of a dead person, namely, Major Raily who died in England on 1st January 1928 and that, therefore, it is a nullity. The rule was obtained on 27th April 1928 against Major Raily of whose death neither party was aware and also against another person. There is no doubt that an order passed against a dead person would be a nullity, but there are authorities showing that where an order was passed in favour of a dead person, it is not altogether and in all circumstances a nullity. In the case of *Vellayan Chetty v. Jothi Mahalinga Aiyar* (1), the practice in England on which our law is based is referred to. The learned Judges who decided that case in referring to the decision of Bowen, L. J., in *Duke v. Davies* (2) stated as follows:

"The learned Lord Justice points out that if a party is dead, the records stand good so far as the living parties are concerned; and that any disposal of the case notwithstanding the death of one of the parties will be valid subject to its being vacated at the instance of the legal representatives of the person who had died."

(1) [1915] 39 *Mad.* 386=23 *M. L. J.* 138=2 *M. L. W.* 166=23 *I. C.* 83=(1915) *M. W. N.* 201.

(2) [1898] 2 Q. B. 260=62 *L. J. Q. B.* 549=41 *W. R.* 673=69 *L. T.* 490.



This view also receives support from the rulings in *Goda Cooperamier v. Soondarammal* (3) and *Subramania Aiyar v. Vaithinatha Aiyar* (4). The rule is, therefore, discharged with costs to the official trustee who alone has entered appearance—hearing fee one gold mohur.

V.B./R.K.

*Rule discharged.*

(3) [1909] 33 Mad. 167=3 I. C. 739=6 M. L. T. 271.

(4) [1915] 38 Mad. 682=31 I. C. 198.

## A. I. R. 1929 Calcutta 528

LORT-WILLIAMS, J.

*Re : Bilasroy Serowgee.*

Insolvency Jurisdiction No. 98 of 1928, Decided on 24th January 1929.

(a) **Presidency Towns Insolvency Act, Ss. 36, 37—S. 132, Civil P. C., does not apply to examinations under S. 36 of the Act—S. 37 is discretionary.**

Section 132 (1), Civil P. C., does not apply to examinations under S. 33 (1), Presidency Towns Insolvency Act, and the Court in a suitable case may summon before it a pardanashin lady who is known or suspected to have in her possession any property belonging to the Insolvent. S. 37 gives the Court power, if it thinks fit, instead of summoning such a pardanashin lady to Court, to issue commissions or letters of request. That power is discretionary. [P 528 C 1, 2]

(b) **Civil P. C., S. 132—Scope and Interpretation of.**

The correct meaning of S. 132 (1), is that a lady who according to the customs and manners of this country ought not to be compelled to appear in public shall be exempt from personal appearance in Court, that is, from being exposed to the public gaze—Such a person is exempt not from attendance in Court but from appearance in Court. "Appearance" means that she shall not be compelled to come forth into view or become visible to the public gaze. [P 528 C 2]

*K. P. Khaitan.*—in support of the application.

*H C. Mazumdar*—for Ganpati Bhagabati.

*Buldeo Das*—for the mother of Bireswarlal.

**Judgment.**—In my opinion S. 132 (1), Civil P. C., does not apply to examinations under S. 36 (1), Presidency Towns Insolvency Act and that the Court in a suitable case may summon before it a pardanashin lady who is known or suspected to have in her possession any property belonging to the insolvent. S. 37 gives the Court power, if it thinks fit, instead of summoning

such a pardanashin lady to Court, to issue commissions or letters of request. That power is discretionary. Further, I am of opinion that the correct meaning of S. 132 (1), Civil P. C., that a lady who according to the customs and manners of this country ought not to be compelled to appear in public shall be exempt from personal appearance in Court that is, from being exposed to the public gaze, such a person is exempt not from attendance in Court but from appearance in Court. I think "appearance" means that she shall not be compelled to come forth into view or become visible to the public gaze. A method is provided in this country by which such ladies can be moved from place to place, in a palki, and in my opinion they may be compelled to come to Court in a palki so long as they do not become visible to the public gaze. It follows therefore, that if the examination of the ladies be taken by the registrar in his private room, the public being excluded therefrom, and they being concealed from the gaze of the registrar the parties and the solicitors and counsel appearing in the enquiry their feelings and sentiments will be considered sufficiently. Therefore, I order that these ladies be examined in the manner which I have indicated.

With regard to the question of costs, I have dealt with this matter on the footing that these ladies are not in contempt but in my opinion they are in contempt. The order was made properly by the registrar for their attendance. They have taken no steps to set that aside or to appeal from it. The result is that they are in disobedience to an order properly made and are in contempt. I believe that those who have advised them have misconstrued the provisions of these sections. Therefore, I do not inflict any penalty upon them for their contempt but they must pay the costs of this application. I certify for counsel.

P.R./R.K.

*Order accordingly.*



**A. I. R. 1929 Calcutta 529**

B. B. GHOSE AND PANTON, JJ.

*Dwarka Nath Chakravarty* — Judgment-debtor—Appellant.

v.

*Imperial Bank of India*—Decree-holder—Respondent

Appeals Nos. 161 and 162 of 1928 and Revn. No. 513 of 1928, Decided on 25th February 1929, against original orders of Sub-Judge, 24 Parganas, D/- 11th and 19th April 1928.

Civil P. C., S. 39 (1), Cl. (a)—Scope.

The Court passing a decree can send it for execution to another Court within the jurisdiction of which the judgment-debtor resides, irrespective of the mode in which the decree is sought to be executed and it would be necessary for the decree-holder to satisfy the Court that the judgment-debtor has not sufficient property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy the decree.

[P 529 C 2]

*Sarat Ch. Roy Chowdhury, Benode Mitter and Sitaram Banerji*—for Appellant.

*N. N. Sircar, T. Ameer Ali and Ambica Pado Chowdhury*—for Respondent.

**B. B. Ghose, J.**—This is an appeal by the judgment-debtor against an order of the Subordinate Judge dated 11th April 1928, rejecting the objection of the judgment-debtor to the execution of the decree which was transferred from the original side of this Court to the Court of the Subordinate Judge. The objection of the judgment-debtor in the Court below was this: The decree-holders had attached certain properties consisting of shares in some companies which they allege belong to the judgment-debtor in execution of the decree under an order of the High Court. They asked for transfer of the decree in the Alipur Court under S. 39, Civil P. C. The decree-holders gave an undertaking to the High Court that the properties attached by that Court shall not be sold until the properties attached by the Alipur Court have been sold. The objection of the judgment-debtor was that the High Court had no jurisdiction to send the decree for execution to the Alipur Court under the provisions of S. 39, Civil P. C. His contention was that under Cl. (b), sub-S. (1), S. 39 Civil P. C., the decree-holders could only ask for the decree being sent for execution to another Court, if

the judgment-debtor had no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree. The Subordinate Judge rejected that contention on the ground that under Cl. (a), S. 39, sub-S. 1 of the Code, the Court which passed the decree was entitled to send it for execution to the Alipore Court as the judgment-debtor actually and voluntarily resided within the jurisdiction of the Alipore Court. The contention before the Subordinate Judge and also before us was that Cl. (a) only applies if the execution of the decree is sought to be made by personal arrest of the judgment-debtor and not as against his property. In our opinion, this contention is not sound. When the decree-holder asks for sending the decree for execution to another Court, it is not necessary for him to specify the manner in which the decree is intended to be executed either by arrest of the person of the judgment-debtor or by attachment and sale of his properties, moveable or immovable. It is sufficient for him to satisfy the Court that the application falls within one or other of the clauses of sub-S. (1), S. 39, Civil P. C. If a decree-holder satisfies the Court which passed the decree that the judgment-debtor resides within the local limits of the jurisdiction of another Court he may ask for sending the decree for execution to that Court without stating anything more in his application and under such circumstances the Court which passed the decree has jurisdiction to transfer it for execution to that other Court. This contention, therefore, on behalf of the appellant cannot in our opinion, be accepted.

It was next urged that a decree cannot be sent for execution to another Court unless all the properties attached by the Court which passed the decree are sold in satisfaction of the decree. It was pointed out that in the two cases referred to in the judgment of the Subordinate Judge, viz., the cases of *Sarada Prosad Mullick v. Luckmeeput Singh Doogar* (1) and *Krishto Kishore Dutt v. Ruplal Das* (2), the properties within the jurisdiction of the Court which passed the decree had either actually been sold or

(1) [1870] 14 M. I. A. 523=17 W. R. 289=2 Suther 560=3 Sar. 77 (P.C.).

(2) [1892] 8 Cal. 687=10 C. L. R. 609.



were shown to be not sufficient to satisfy the decree. Under those circumstances only it was held that simultaneous execution could be had in several Courts. It was contended that simultaneous execution can be had in several Courts if there is no execution pending in the Court which passed the decree or in other words no execution can be levied simultaneously in the Court which passed the decree and other Courts. If simultaneous execution in different Courts is allowed we do not see on what principle it can be said that simultaneous execution in the Court which passed the decree and the Court within the local limits of which the judgment-debtor resided is illegal. We are of opinion that under Cl. (a), S. 39 (1) the decree may be sent for execution to a Court within the local limits of which the judgment-debtor resides. No doubt under Cl. (b) if the decree is sought to be sent to a Court within the jurisdiction of which the judgment-debtor does not reside it would be necessary for the decree-holder to satisfy the Court that the judgment-debtor has not sufficient property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy the decree. We, therefore, agree with the decision of the Subordinate Judge that the High Court was quite competent to transfer the decree for execution to the Court below.

We are however of opinion that the procedure adopted by the decree-holders in this case calculated to work oppressively and the reason for our thinking so is this: Suppose the judgment-debtor has properties of sufficient value within the local limits of the jurisdiction of the Court which passed the decree. The decree-holders have attached those properties the result of which is that the judgment-debtor cannot sell them and pay off the decree-holders. The decree-holders have undertaken not to sell those properties till properties within the jurisdiction of the Court below are sold. The decree-holders desire to execute the decree there by attachment of moveable properties or it may be by arrest of the judgment-debtor. The judgment-debtor is prevented from selling his properties by the sale of which he could probably pay off the decree-holders by reason of the attachment. The decree-holders also do not proceed to sell those properties. The result of this

procedure would be that although the judgment-debtor may have sufficient properties within the jurisdiction of the Court which passed the decree by the sale of which the decree might be satisfied, he may be put into trouble by execution of the decree at the place where he resides while his properties remain under attachment. Such a situation should be avoided, if possible. We, therefore, direct, while dismissing the appeal, that the lower Court will not proceed with the execution of the decree unless the decree-holders produce an order from the Court which passed the decree that all the properties which had been attached by the decree-holders within the jurisdiction of that Court have been sold and the decree remains unsatisfied or that those properties have been released from attachment. Only under those circumstances the decree-holders would be allowed to proceed with the execution of the decree within the jurisdiction of the Alipore Court.

With regard to Appeal No. 162 of 1928, it is not necessary for us to say anything in detail. It seems that although the words of the application are "stay of proceedings", the application was simply for adjournment of the execution of the decree till the decision of the question of adjustment of the decree. The Subordinate Judge refused to allow adjournment on the grounds stated by him. Having regard to the nature of the order, we do not think that there is an appeal against such an order. The question whether we could interfere under S. 115 or not is now purely academic because there has been as a matter of fact stay of proceedings up to this date. This appeal is dismissed and we direct that the Subordinate Judge should take up the question of adjustment as soon as practicable and dispose of the matter.

As we have given the judgment-debtor some relief in Appeal No. 161 of 1928, we make no order as to costs of these appeals. No order is necessary on the application for revision which is also dismissed without costs.

Let the records be sent down without delay.

**Panton, J.**—I agree.

P.R./R.K.

*Appeal dismissed.*



## A. I. R. 1929 Calcutta 531

MITTER, J.

*Bidu Bhusan Das Majumdar and others*—Plaintiffs—Appellants.

v.

*Ghenu Nasya*—Defendant—Respondent.

Appeals Nos. 2314 and 2315 of 1926, Decided on 17th April 1928, against appellate decrees of Sub-Judge, Dinajpore, D/- 17th May 1926.

Bengal Tenancy Act, S. 29—Limit of two annas for enhancement of rent cannot be exceeded even where the excess is very small and can for all practical purposes be disregarded.

The principle embodied in the maxim *De minimis non curat lex* cannot be applied to a case where the statute (such as S. 29, Ben. Ten. Act) has laid down a mandatory provision fixing the limit of the enhancement of rent. And so the limit of two annas laid down in S. 29 cannot be exceeded, although the excess might be a very small one and for all practical purposes might be disregarded.

[P 531 C 2]

*Girija Prasanno Sanyal and Indu Prokash Chatterjea*—for Appellants.

*Dinesh Ch. Roy and Radhika Ranjan Guha*—for Respondent.

**Judgment.**—In these two appeals by the plaintiffs landlords, the only question which has been raised is as to whether Courts below were right in refusing to grant the plaintiffs a decree at the enhanced rate, because the enhancement contravened the provisions of S. 29, Ben. Ten. Act. In the suit out of which S. A. 2314 has arisen, the enhancement is 9/80th of a pie and in the suit out of which S. A. 2315 has arisen, the enhancement is 3/16th of a pie. It is argued by Mr. Sanyal the learned advocate who has appeared for the plaintiffs appellants that the enhancement is so small that it might be disregarded, having regard to the well-known maxim of law *De minimis non curat lex*. It is argued that the enhancement is so small that it is not capable of realization and that, consequently, for all practical purposes, the enhancement must be regarded as falling within the limits of two annas in the rupee. I have already stated that in the two cases respectively the enhancement exceeds two annas by 9/80th of a pie and 3/16th of a pie. It is argued on behalf of the respondent, however, that although the amount for one year is very small when the rent for four years

for which the suit has been instituted is taken into account, it swells into an amount which is capable of being realized. What I have to consider is the language of S. 29, Ben. Ten. Act. S. 29, Cl. (b) runs as follows :

"The money rent of an occupancy-raiyat may be enhanced by contract, subject to the condition that the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat."

There can be no doubt that the enhancement in these two cases exceeds more than two annas in the rupee, although the excess might be a very small one and, for all practical purposes, might be disregarded. The maxim *De minimis non curat lex* has been held to justify Courts of justice not to take trifling and immaterial matters into account, except under peculiar circumstances, such as the trial of a right or where personal character is involved. It has been applied also to cases where trifling irregularities or even infractions of the strict letter of the law are brought under the notice of the Court. It has been applied to support a rate in the assessment of which there were some comparatively trifling omissions of established forms. It has been applied with reference to proceedings for an infringement of the revenue laws. My attention has been drawn to a remark made by a learned English Judge that :

"the Court is not bound to a strictness at once harsh and pedantic in the application of statutes, and that the law permits the qualification implied in the ancient maxim, *de minimis non curat lex*."

I have not been given reference to any case where the law in the interests of the tenant states that the enhancement shall in no case exceed more than two annas in the rupee that even a slight variation could be permitted. Once a departure is made from the strict language of the statute it may be difficult to draw the line. The question as to what is a negligible variation may vary according to the different circumstances of each case. In this state of facts it would be difficult to make any departure from the strict language of the statute and to apply the principle embodied in the maxim to which I have referred, to a case where the statute has laid down a mandatory provision fixing the limit of the enhancement of rent. I think the view taken by the Court below is right. The ap-



peals, therefore, fail and must be dismissed with costs.

S.N./R.K.

*Appeals dismissed.*

### A. I. R. 1929 Calcutta 532 (1)

PEARSON AND MALLIK, JJ.

*Samru and others* — Accused — Petitioners.

v.

*Bansari Burmani* — Complainant — Opposite Party.

Criminal Revn. Case No. 211 of 1929, Decided on 24th May 1929, against order of District Magistrate, Dinajpur.

**Criminal Trial**—Where defence is disclosed on behalf of accused, appellate Court should deal with defence case in the same way as in the case of prosecution.

In a case where the defence is disclosed on behalf of the accused it should be stated as such by the appellate Court and the evidence if any upon which it is founded is to be discussed and a conclusion is to be arrived at by the appellate Court in the same way as in the case for the prosecution. It is not enough to say that the prosecution has been proved and that, therefore, it is unnecessary to deal with the defence case. [P 532 C 2]

*Sures Chandra Taluqdar and Radhica Ranjan Guha*—for Petitioners.

**Judgment.**—This Rule is directed against an order of the District Magistrate of Dinajpur whereby the conviction of the petitioners was maintained. The petitioners were charged under Ss. 456, 352, 354 and 447, I. P. C. The complaint in the case was made on 5th September 1928 alleging that accused 1 Samru entered into a neighbour's house and attempted to outrage the modesty of the complainant. She cried out and various people came to the scene and the other accused participated in rescuing the first accused from the hands of the people who had already seized him. The learned Magistrate on appeal has dealt with the case in a manner which is all right so far as it goes. But it is said that he has not dealt with the case of the defence and it is quite true to say that reading the judgment of the lower appellate Court we do not gather either what the defence was or that it was supported by any witnesses. In fact, however, it appears that the defence case was that on 3rd September that is two days before the occurrence, there had been something of a dispute between the first accused and the com-

plainant's husband over a matter of some land, which resulted in an assault upon Samru who thereupon actually lodged a complaint in a criminal Court. It appears further that this case was in a measure spoken to as being substantiated by the evidence of the three witnesses who were called for the defence, one of whom was an eye-witness of the occurrence and who if believed might lead to the failure of the prosecution case. So far as the judgment of the lower appellate Court is concerned it appears that there is really no explanation forthcoming and it is only necessary for us to say that in such a case as the present where the defence is disclosed on behalf of the accused it should be stated as such by the lower appellate Court and the evidence if any upon which it is founded is to be discussed and a conclusion is to be arrived at by the lower appellate Court in the same way as in the case for the prosecution. It is not enough to say that the prosecution has been proved and that, therefore, it is unnecessary to deal with the defence case. For these reasons we make the Rule absolute and send back the case so that the appeal may be reheard by a Sessions Judge if there is no other Magistrate in the district. The petitioners will remain on the same bail pending the rehearing of the appeal.

S.N./R.K.

*Rule made absolute.*

### \* A. I. R. 1929 Calcutta 532 (2)

B. B. GHOSE AND PANTON, JJ.

*Akkas Mia and others*—Defendants—Appellants.

v.

*Abdul Aziz Bepari*—Plaintiff—Respondent.

Appeal No. 267 of 1923, Decided on 6th March 1929, against original order of Addl. Sub-Judge. First Court, Naokhali, D/- 30th March 1928.

\* (a) Civil P. C., O. 22, R. 9—Order under O. 22, R. 9 in appeal is not appealable.

There is no appeal against an order under O. 22, R. 9 refusing to set aside an abatement of an appeal. [P 533 C 2]

\* (b) Civil P. C., O. 43, R. 1 (k)—'Suit'.

Word 'suit' in O. 43, R. 1 (k) does not include an appeal. [P 533 C 1]

*Bhagirath Chandra Das*—for Appellants.

*Hem Kumar Bose*—for Respondent.



**Judgment.**—This is an appeal by the heirs of the appellant in the Court of appeal below against the order passed by that Court under O. 22, R. 9, Civil P. C., refusing to set aside the abatement of the appeal pending in that Court. The original suit was for some money valued at less than 500 and the decree was passed against the appellant in the trial Court. Against that decree there was an appeal to the lower appellate Court. During the pendency of the appeal the original appellant died and the appeal abated under the provisions of O. 22, R. 11, Civil P. C., which provides that R. 4 of that order should apply in the case of an appeal. A preliminary objection has been taken as to the maintainability of the appeal on behalf of the respondents on two grounds. It is first urged that there would have been no appeal against the final decree made by the lower appellate Court, if the appeal itself had been heard, under S. 102, Civil P. C. There should therefore be no appeal against an order passed by the lower appellate Court. It is next urged that under O. 43, R. 1 (k) an appeal is allowed against an order under R. 9, O. 22 refusing to set aside the abatement of a suit.

There is no provision under the Code for an appeal against an order refusing to set aside the abatement of an appeal made by the Court in the exercise of its appellate jurisdiction. The learned advocate for the appellants argues that the expression 'suit' in R. 1 (k), O. 43 includes an appeal and reference is made to the provisions of O. 22, R. 11, Civil P. C., which provides that in the application of O. 22 to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal; and he contends that as in that rule the word "suit" is said to include an appeal, the same construction should be put to the word 'suit' in the rule of O. 43. We do not think that this contention is sound. O. 22, R. 11 only provides for the application of that order to appeals and in doing so states that the word 'suit' shall be held to include an appeal. There is nothing in O. 43 (1) (k) which enables us to apply the word 'suit' to an appeal. Moreover, by reference to S. 105, sub-S. (1) of the Code it would appear that no appeal is allowed against an order such as this made by

the Court in its appellate jurisdiction : That subsection runs as follows :

"Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction"

Nothing has been shown to us which can be considered as an express provision that an order such as this made by a Court in its appellate jurisdiction is appealable. It is argued on behalf of the appellants that if the lower appellate Court makes an order refusing to set aside an abatement in an appeal, the party against whom the order is made if not allowed an appeal from it would be left absolutely without a remedy ; but the remedy is provided in the last part of sub-S. (1), S. 105, Civil P. C., where any order affecting the decision of the case may be attacked by an appeal from the decree. As we are of opinion that there is no appeal against the order made by the lower appellate Court, this appeal must stand dismissed with costs; hearing fee, two gold mohurs.

P.N./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 533

RANKIN, C. J., AND MUKERJI, J.

*Busoid and others—Plaintiffs—Appellants.*

v.

*Newaj Ahmed Khan—Defendant—Respondent.*

Appeal No. 1618 of 1926, Decided on 3rd September 1928, against appellate decree of Dist. Judge, 24 Parganas, D/- 27th March 1926.

(a) **Mahomedan Law—Wakf Property—In deciding if a property is wakf, evidence of facts and circumstances leading to an inference "user and reputation" is more important.**

Direct evidence of user in wakf property, e. g., using the water of the tank or plucking and appropriating the fruits of the trees is necessarily of very little value as being equally consistent with user by permission or license as with user by right on the part of members of the Mahomedan public in property forming an adjunct to a mosque and a part of the endowment itself. On the question of user, therefore, what must be of greater value is not direct evidence, but evidence of facts and circumstances as leading to the inference, one way or the other, whether and to what extent the property has been treated as wakf property during the long period that has elapsed. [P 535 C 2]

(b) **Evidence Act, S. 32—Admissibility of ante litem motam declarations of dead per-**



sons on questions of general interest are admissible.

Declarations made *ante litem motam* by persons who are now dead in respect of a question relating to a matter of general or public interest, even if they be no more than evidence of reputation or hearsay evidence, are admissible. [P 536 C 1]

(c) Mahomedan Law — Wakf property — To decide title by user, physical features of the property ought to be considered.

In cases of user of wakf property physical features may be taken into consideration in order to determine whether different parcels may be deemed parts of one waste or common, so as to make evidence of user of one part, evidence of title to the whole: *Deo v. Kemp*, 2 Bing. (N. C.) 102; 9 Mad. 285; 15 Mad. 101 (P.C.), Foll. [P 538 C 1]

*Sarat Chandra Roy Choudhuri* and *Abdul Ali*—for Appellants.

*Braja Lal Chakrabarti* and *Prokas Chandra Majumdar*—for Respondent.

**Mukerji, J.**—This appeal has arisen out of a suit which was instituted by three persons as plaintiffs under the provisions of O. 1, R. 9, Civil P. C. as members of, and for and on behalf of, the local Mahomedan Community.

The subject-matter of the suit is described in the plaint as a plot of land about 3 bighas 10 cottas in area. On this land stands a mosque, close to which there is a large tank with some sort of masonry structures and steps leading up to it, and the rest of the land is said to be a quantity of garden land with some fruit trees standing thereon, and it is also said that there are pucca godowns etc., erected on a portion. The entire area is, or rather was, enclosed on all sides by a compound wall with an opening for gates. The wall is now more or less in ruins and on the east side has been completely demolished. There is some sort of an out-house standing near about the opening. The defendant *Munshi Newaz Ahmed Khan* is, according to the plaintiffs, the Khatib of the mosque. The entire property is alleged, on behalf of the plaintiffs, to have been made a wakf by one *Misri Begum*, a lady of the Mysore family, long ago. A strip of land, out of the premises, on the side of the road on the east having been acquired by the Corporation of Calcutta for the purpose of 'Set back' in connexion with the said adjoining road of Rs. 1,200 was awarded as compensation and was still in deposit. The defendant had claimed the money as his own personal property and had also been of late

setting up a title hostile to the endowment in respect of the remainder of the lands. The plaintiffs accordingly instituted this suit for a declaration that the entire property including the sum of Rs. 1,200 belongs to the wakf of *Misri Begum*.

The defence, in substance, was that the lands belonged not to *Misri Begum* but to the defendant's ancestor, one *Faizulla Jemadar*, that the mosque was constructed by the said *Faizulla Jemadar* with the aid of contributions received from the public including *Misri Begum*, and that the said *Faizulla Jemadar* and after him one *Ghasi Khan* (a brother of the defendant) and after him the defendant himself were mutwallis of the mosque, but that the lands and tank etc., were never used as wakf and on the other hand continued to be secular property and have ultimately devolved on the defendant in his personal right.

The suit was decreed by the Subordinate Judge. He declared the entire property in suit including the amount of Rs. 1,200 deposited with the Calcutta Corporation, as wakf property. The District Judge has, on appeal, reversed this decision and dismissed the suit. Hence this second appeal by the plaintiffs.

One of the grounds on which the District Judge has dismissed the suit is that the suit being for a mere declaration when consequential reliefs were available was not maintainable. On the facts of the case this ground is not well-founded and indeed the respondent has not sought to support the decree on this ground.

From the pleadings already set forth it would appear that the parties were at variance upon the following points: The plaintiffs' case was to the effect that the lands belonged to *Misri Begum*, that she erected the mosque, excavated the tank, planted the trees, built the compound wall and created the wakf, that *Ghasi Khan* was appointed Khatib of the mosque and that after *Ghasi Khan* the defendant succeeded to the office. The defendant's case on the other hand was that the lands belonged to *Faizulla Jemadar* and not to *Misri Begum* that *Misri Begum* as well as the Mahomedan public helped *Faizulla Jemadar* with contributions to build the mosque, that after the mosque had been built the remaining lands continued to be secular and remained the personal property of *Faizulla*



Jemadar and that the compound wall was built partly by Faizulla Jemadar and partly by Ghasi Khan. The defendant claimed that he and his ancestors had rights higher than that of a mere Khatib and asserted that they were all mutwallis which pre-supposes that there was a wakf. It is an admitted fact in the case that the Mahomedan public of the vicinity have a right to go to and say their prayers in the mosque. That some lands were dedicated for the purposes of the mosque or of a wakf is therefore an admitted fact in the case. Even if the plaintiffs fail to prove that the lands belonged to Misri Begum and even if the defendant succeeds in proving the lands belonged to his ancestor Faizulla Khan, the plaintiffs would still be entitled to a declaration that the property is wakf property, provided a dedication thereof for the purposes of a wakf is established. The mosque was erected, and the wakf was created, whatever the exact nature thereof may have been, and whatever the quantity of lands it may have comprised, close upon 80 years ago or perhaps even earlier. There was no deed. Not much direct evidence of the creation is available. What little has been produced, is, in the opinion of the District Judge of not much worth. His view is final on this question. He has held

"that it is very probable that the lady contributed largely towards the cost of the erection of the mosque, but that it is not proved, nor likely that the mosque was erected or dedicated by any member of the Mysore family, nor that the lady was the owner of the surrounding lands or had dedicated them to the service of the mosque."

These findings need not be disputed, but the real question that remains, and has still to be considered is whether the property in suit is wakf property. The issue that was framed on this point—and that, in my opinion, is the right form in which the issue should have been framed, was

"Is the property in suit or any portion of the same, or the money in the hands of the Calcutta Municipality, wakf property?" (Issue No. 9).

The Subordinate Judge was able to find that Misri Begum created the wakf. The District Judge has held otherwise but has not gone into the broader question which the issue involves. This question evidently has to be determined before the suit can be disposed of. I

cannot see my way to agree in the contention urged on behalf of the respondent that for the determination of this issue a further opportunity should be given to him to adduce further evidence.

The plaintiff has mainly relied upon a number of facts and circumstances, as establishing, by what is alleged in the plaint as "user and reputation," that the property in suit is wakf property. Direct evidence of user in a property of this nature, e.g., using the water of the tank or plucking and appropriating the fruits of the trees is necessarily of very little value as being equally consistent with user by permission or license as with user by right on the part of members of the Mahomedan public in property forming an adjunct to a mosque and a part of the endowment itself. On the question of user, therefore, what must be of greater value is not direct evidence, but evidence of facts and circumstances as leading to the inference, one way or the other, whether and to what extent the property has been treated as wakf property during the long period that has elapsed.

The evidence which the plaintiffs adduced, excluding that which is no longer of any importance, may be conveniently grouped under six heads: 1st, Deeds relating to transactions in respect of neighbouring lands; 2nd, Documents relating to the property itself showing how the lands in suit have been treated; 3rd, Evidence afforded by a certain tablet which is said to have been on the wall near the main door of the mosque and of the existence of four metal guns which were on the premises; 4th, Direct evidence of user of the lands; 5th, Admission made by defendant 1 himself; and 6th, The physical features of the lands.

*Item 1.* The documents under this head are Exs. 6, 5, 7, 9 and 10. These documents relate to plots of land lying on the boundary of the lands in suit. In Ex. 6 dated 1845 the lands are described as the "land of Misri Begum;" and in Ex. 5 dated 1878 and Ex. 7 dated 1887 the premises are described as the "Maijidbari of Shahjadi Misri Begum" and in the former of these two documents the compound wall is described as the "Wall of Shahjadi Misri Begum's Musjidbari." Exs. 8, 9 and 10 are of more recent dates and perhaps not ante litem motam, but the older documents contain



declarations made *ante litem motam* by persons who are dead (vide the judgment of the Subordinate Judge as regards the ages of the executants of Exs. 5 and 7 at the dates of these documents.) The learned District Judge has disposed of these document in these words :

"These deeds are sought to be made relevant on the ground that they contain expressions of opinions regarding a matter of public interest by persons having knowledge of the matter. It is impossible to say what knowledge the executants of these deeds had. The mosque was undoubtedly known as Misri Begum's mosque ; and by speaking of the lands surrounding the mosque, and enclosed within a wall, as Misri Begum's mosque the executants of these deeds were not necessarily expressing their belief that the lands were part of the dedicated property. The description was intelligible and that was all that was needed."

He has thus treated the documents as more or less irrelevant. Now whatever may be said as regards Ex. 6 and the knowledge of the executant thereof as regards the right or Misri Begum to the lands, there can be no question that Ex. 5 and Ex. 7 contain declarations made *ante litem motam* by persons who are now dead in respect of a question relating to a matter of general or public interest, and that such declaration even if they be no more than evidence of reputation or hearsay evidence are admissible. (Halsbury's Laws of England, Vol. 3, "Boundaries" p. 284). It is urged on behalf of the respondent that the documents merely say that the premises were the musjidbari of an individual and, therefore, the statement does not relate to a matter of general or public interest. With this contention I am unable to agree as it is the common case of both parties that the Mahomedan public of vicinity have the right to use the mosque. It is said in the passage above referred to that such evidence is admissible on the question of boundaries between a reputed manor and land belonging to a private individual [*Doe Molesworth v. Sleeman* (1), or between old and new land in manor (*Barnes v. Mawson* (2), per Lord Ellenborough, C. J. at p. 81)]. The reason of this exception in favour of hearsay evidence is partly necessity since without such evidence ancient rights could rarely be established and partly that the public nature of the rights minimises the risk of mis-statement. As Mr. Taylor has

put it in his Law of Evidence, where the matter is of public concernment, all the Queen's subjects are presumed to have knowledge of it (Taylor Ss. 546 and 811). The Evidence Act follows the English rule of Evidence in this respect and has enacted it in S. 32, sub-S. 4. In treating these documents as irrelevant the learned District Judge has been in error and the statements contained in these documents and referred to above must in my judgment, be taken into consideration in dealing with the case.

*Item 2.* In the Municipal Assessment registers for 26 years from 1880 to 1906 the lands were recorded under one entry viz., Premises No. 11 Mayarpur Road which described the property as mosque, tank, and garden, the recorded owner being Misri Begum and as property exempted from municipal rates and taxes. In 1906, the holding was divided into 2 parts No. 12 was the number given to a part which was described as mosque, tank and garden with an annual value of Rs. 514 and remained exempted, while a part was numbered as 12/1 and described as Bustee land and made into a separate holding with an annual value of Rs. 28 and was assessed to rates and taxes. The defendant was recorded as owner in the Municipal Assessment Register as regards No. 12/1 in 1906 and as regards No. 12 in 1908. The annual values aforesaid were increased in 1914, to Rs. 557 and 43 respectively. The property was thus divided into 2 parts one consisting of the mosque, tank and garden, and the other a piece of Bustee land bearing a small annual value. This division, as far as may be gathered, has continued upto the present. The District Judge seems to have misapprehended the situation. He does not seem to have appreciated that what was exempted from municipal rates and taxes in 1906, 1908 or 1914 was not merely the mosque but the mosque with tank and garden, and what was assessed was not the tank and garden but only a small piece of Bustee land constituted into a separate holding with a fresh No. 12/1, and carved out of a No. 12 which was formerly No. 11. The District Judge evidently was under the impression that all that the assessment register proved was that though exempted till 1906, the entire property with the exception of the mosque was assessed

(1) [1846] 9 Q. B. 298.

(2) [1813] 1 M. & S. 77.



in that year. It is this misconception which made him feel disinclined to draw an inference adverse to the defendant.

The defendant has succeeded in proving that he and his ancestors have been paying rent to certain landlords in respect of a plot of about three bighas of land in the vicinity of these premises. The documents that he has filed, notably the thokas dating from 1275 and the rent receipts dating from 1297, establish this fact. The important question however, is whether this plot of land constitutes or at least forms a part of these premises. On this point there are only three items of evidence, besides of course the oral testimony of the defendant himself. One such piece of evidence is to the effect that the defendant has only one plot of land in the locality. This may be accepted as true. The other two pieces of evidence are Ex. G and Ex. M. Ex. G shows that during the survey of the added area which began in 1903 and was completed in 1907, in premises bearing Municipal No. 12 Mayerpur Road the defendant was a maurashi tenant in respect of a quantity of rented land about three bighas in area. Ex. M is the decision of the Superintendent of Survey of the added area in a case of 1905 relating to premises No. 12, Mayerpur Road which in the opinion of the District Judge showed that a strip of land lying to the north of a culvert and by the side of premises No. 12 formed a part of the defendant's maurashi tenancy. Now we have no evidence when No. 11 was altered to No. 12; all that we know is in the assessment register what was shown as No. 11 in 1880 appeared as No. 12 in 1906. Moreover we have no evidence where the culvert was in those days. In this state of the evidence I am far from satisfied that the premises we are concerned with in this suit have been proved to be a part of the defendant's maurashi tenancy. Assuming however that the finding of the District Judge on this point is correct, namely that some part of the tenancy was within the wall, the finding does not assist the defendant in the matter of the issue as to whether or not the premises in suit are wakf property. I am not at all impressed with the argument that no wakf may be made of rent-paying lands or that a masjid may not be built thereon, because even upon the defendants' case the

mosque stands upon Faizulla's land which was a part of this tenancy.

*Item 3.* The plaintiff's case was that there was a tablet near the main door of the mosque bearing an inscription showing that the property was the waqf of Misri Begum, and that it had been removed after the institution of the suit. Evidence was also given of the fact that there were four guns on the premises, which would indicate that the property was waqf as such guns are invariably placed in the more important waqf mosques of the Mysore family. The learned District Judge has not considered this item of evidence at all, though upon it the trial Court had come to a finding in plaintiffs' favour.

*Item 4.* This evidence ordinarily, as I have already said, is not likely to be of much value, and if the learned District Judge was not impressed with it the appellant can hardly complain in second appeal.

*Item 5.* This item of evidence has not been referred to at all by the learned District Judge, while the Subordinate Judge appears to have relied upon it. The evidence, relating as it does to an admission made by the defendant against his own interest, is important and, if true, certainly deserves consideration.

*Item 6.* This item of evidence appears to have been specially brought to the notice of the learned District Judge because he has observed thus :

"The plaintiffs also rely on the fact that the lands in dispute including the mosque, are surrounded by a wall."

They argue from that the entire property must be dedicated property. He however does not appear to have given any consideration to the matter at all. The plaintiff's argument was that it was exceedingly unlikely that a whole area surrounded by a compound wall on all four sides and one gate should be the subject of two conflicting interests and that a tank with a pucca ghat adjoining the mosque and a paved way between the ghat and the steps of the mosque are necessary adjuncts of a mosque, that out-houses of the description that there are on the premises are also the usual appurtenances for the accommodation of the Khatib, etc. and that the ornamental work on the back of the mosque pointed to the lands situate on that side as being appurtenant thereto. The argu-



ment was dealt with very fully by and found favour with the learned Subordinate Judge. The District Judge, it is true, was entitled to take a different view, but not ignore it altogether as he has done. The real question is one of boundary of the dedicated property. That in such cases physical features may be taken into consideration in order to determine whether different parcels may be deemed parts of one waste or common, so as to make evidence of user of one part evidence of title to the whole is a proposition that cannot be disputed. Lord Denman, C. J. in *Deo v. Kemp* (3) said,

"But the case is very different with respect to these parcels, which from their local situation may be deemed parts of one waste or common, as acts of ownership in one part of the same field are evidence of title to the whole."

Whether a large tract of land, where there is no safe guide to determine the boundaries, should or should not be recognized as a whole for inferring existence of unity of title would depend upon circumstances: for instance, in *Stanley v. White* (4), this recognizable whole consisted of the woody belt surrounding a large tract. There is no evidence in the present case of distinct enjoyment of the different parts, except within recent times by acts which are challenged in this suit as being in violation of the wakf. In *Jones v. Williams* (5), at p. 331 Parke, B. said.

"In ordinary cases, to prove his title to a close the claimant may give in evidence acts of ownership in any part of the same enclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person though it by no means follows as a necessary consequence, for different persons may have bulks of land in the same enclosure; but this is a fact to be submitted to the jury."

Moreover if the entire premises can upon its various physical features, be regarded as one whole lying within the compound wall and if the evidence suggests the inference that the members of the Mahomedan public have exercised acts on parts of it in assertion of their right to the whole as forming the endowment, the defendant's original rights whatever they may have been must be held to have been extinguished. This

principle will be found discussed in the case of *Siva Subramaniya v. Secy. of State* (6) which was affirmed on appeal by the Judicial Committee in the case of the *Secy. of State v. Nellakutti Siva Subramaniya* (7). As I have already said, this aspect of the case has not at all been considered. The aspect is all the more important as upon the defendant's case it was his predecessor Ghasi Khan, a mutawali had enclosed the whole premises by this compound wall.

On the whole I am clearly of opinion that in dealing with this case the learned District Judge, apart from the other errors that I have attempted to point out has taken each fact separated from the rest of the facts and has proceeded to demonstrate that it is consistent with the position that the property was not Misri Begum's or with the position that it was not dedicated by her and has arrived at his conclusion by this process of reasoning. This being a case depending largely on the inference to be drawn from circumstances, the method adopted was in my judgment erroneous and in such a case, to quote the dictum of the Judicial Committee,

"it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole."

The defects pointed out above have rendered it necessary for us to go into the facts which are on the record as bearing upon issue 9. Having heard the parties fully upon the evidence I have come to the conclusion that the plaintiffs have succeeded in making out that the property involved in this suit is a wakf and not the personal property of the defendant, and that though some of the findings recorded by the Subordinate Judge especially the finding that it was Misri Begum who created the wakf are not fit to be upheld, there was no good reason for the learned District Judge to reverse the decree passed by the trial Court.

I would allow the appeal and reversing the decree of the lower appellate Court restore that of the trial Court with costs in this Court and in the lower appellate Court.

**Rankin, C. J.**—I agree.

P.R./R.K.

*Appeal allowed.*

(3) 2 Bing (N. C.) 102=4 L. J. Ex. 331=1 Hodges 231=2 Scott 9.

(4) [1811] 14 East 332.

(5) [1837] 2 M. & W. 326=6 L. J. Ex. 107.

(6) [1886] 9 Mad. 285.

(7) [1892] 15 Mad. 101=18 I. A. 149=6 Sar. 74 (P. C.).



**A. I. R. 1929 Calcutta 539****RANKIN, C. J. AND BUCKLAND, J.***Ambar Ali and others* — Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 748 of 1928, Decided on 1st February 1929.

(a) Evidence Act, S. 21—Distinction between "Admission" and "Confession" enunciated — Admission in civil suit about genuineness of document is not confession of forgery—Penal Code S. 465.

Admission is usually applied to a civil transaction, and to those matters in criminal cases which do not involve a criminal intent. While the term confession is usually used in criminal Court as denoting an acknowledgment of guilt. Admission in a civil suit that a document is genuine cannot in the forgery case be regarded as confession at all: 37 Cal. 467, Ref. [P 540 C 2, P 541 C 1]

(b) Evidence Act, S. 24—Question of admissibility of confession comes when statement is made to police officer or while in police custody.

The question whether or not a statement is to be regarded as admissible as being a confession or not usually arises in the case of a statement made to a police officer or in the case of statement made to a man while in custody of the police. [P 540 C 2]

(c) Criminal Trial—Evidence—Value of—Evidence by accused in civil Court as to genuineness has high evidentiary value to jury as evincing intention of conspiracy—Evidence Act, S. 14.

The accused in a case of forgery and conspiracy had previously given evidence in a civil Court as to the genuineness of the document.

*Held*: that though the statement could not be admitted as confession, the jury if independently satisfied that the documents are not genuine, the evidence is to be regarded as having high evidentiary value upon the question of intention whether or not they are in conspiracy. [P 541 C 1]

(d) Criminal P. C., S. 195 (1) (c)—Application.

Section 195 (1) (c) applies only to forgery when committed or alleged to have been committed by a party to the proceedings before the civil Court. [P 541 C 2]

(e) Penal Code, S. 467—Person attesting forged document with knowledge of its character is guilty of forgery.

If a person falsely puts his name down as an attesting witness to the signature of somebody who he knows has never signed at all, he is guilty of forgery just as well as the scribe. The persons attesting like the above must be put on their trial on a charge under S. 467 read with S. 120-B. [P 542 C 1]

*Probodh Chandra Chatterjee* and *Priya Nath Dutt*—for Accused.

*Khondkar*—for the Crown.

**Rankin, C. J.**—In this case the four accused were put upon their trial in connexion with a charge of forgery. The instrument charged as forged is a kabuliati (Ex. 1) dated 21st September 1921, which purports to have been executed by Md. Sabdar the complainant and his brother Md. Malik recently deceased and to be a conveyance of one Malaem of five annas share of land near Malaem's house.

The first accused Ambar Ali was charged with forgery of the document, he being the scribe of the document. The other three accused Bidyananda Das, Har Mohan Das and Abdul Hakim were committed by the Magistrate on a charge of forgery but were charged before the Sessions Court with abetment of forgery under S. 467/109, I. P. C. These three accused purport to have been witnesses to the document.

The signature of Sabdar on the document purports to have been put by accused 1 as scribe. The signature "Md. Malik" in the document purports to have been written by Md. Malik himself.

The complainant's case as to the land in question would appear to have been fully proved by the documents and it is as follows: that the five annas share which as the kobala the subject of this charge purports to transfer was the share which Sabdar and Malik had inherited from their father, that there was another five annas share which had belonged to one Noaz whose representatives, that is to say, son and grandson are Md. Fakir and Abdul Hashim, that this five annas share had been transferred in the lifetime of Noaz to the complainants' father so that the complainant Sabdar and his brother Malik owned at the time in question not five annas share, that as regards the remaining six annas that had belonged at one time to a man called Abbas who appears to be a brother-in-law of accused 1 but Abbas had sold it to Niamatulla and this man Niamatulla appears to have taken a lease of the share of Sabdar and Malik and in addition to his own charge possessed the land as a whole.

The complainant denies that he ever executed the document, that he can sign his own name and he does sign his own name. He says that his brother Malik is illiterate and cannot sign his name. He gives evidence that he has plenty of land and was in no need to sell this land



and it is quite clear that from the moment this kobala came to his notice he objected at once and registration was never made. These facts sufficiently explain the circumstances that against all the four appellants the jury brought in a unanimous verdict of guilty; and we have to consider whether the learned Judge's charge is one which enables this Court to uphold that verdict.

As part of the history of the case I will mention this point, that when the complainant discovered that this kobala had been brought into existence, he at the same time discovered that another kobala had been brought into existence purporting to be dated on the previous day. This second kobala is Ex. 11 and that kobala purports to have been made by accused 1 as the scribe and to be witnessed by the other accused with the exception of accused 3. That Kobala is one by which Fakir and Abdul Hashim the representatives of Noaz purport to have transferred to Molaem the five annas of this land, which as already explained, Noaz had in 1910 parted with in favour of the complainant's father.

These two documents being discovered registration was opposed. The registration appeal resulted in two suits before the Munsif. These two suits were tried together, one set of evidence being given with reference to both, and all the accused gave evidence for the plaintiff in those suits. They describe (how at Fakir's house the first document, (Ex. 11 was executed), how the complainant Sabdar had come along and said "what about selling my land" and how, in consequence, on the next day Sabdar and Malik entered this kobala transferring their share to Molaem.

In this appeal Mr. Chatterjee for the accused persons says that the course taken is open to objection. The course taken was first of all that the deposition of each of those persons was put in evidence for the prosecution. Not only so but Abdul Hashim was called to deny that Ex. 11 was a genuine document or had been executed by the alleged executants.

The story as regards the forgery of Ex. 11 was put before the Jury and the learned Judge told the Jury that if they had reason to believe that there was a conspiracy on the part of all these accused to forge the kobala Ex. 1 then they could

use the evidence given in the Munsiff's Court by one of the accused against the other. The defence of the accused in the case was that this kobala was genuine and under S. 342 of the Code one and all of them said that the evidence which they had given before the Munsiff was true.

The first point that is taken for the accused in this appeal is that the depositions before the Munsiff were not admissible evidence for the prosecution in this case. The question is why are they not admissible evidence for the prosecution in this criminal case? The argument as I understand it is that these depositions are really confessions and it is said that as they were given before a Court of law they were not really voluntary and for those reasons the depositions are not evidence. The Evidence Act proceeds to my mind upon a principle which has often been referred to before now that the term "admission" is usually applied to a civil transaction and to those matters in criminal cases which do not involve a criminal intent, while the term "confession" is usually used in a criminal Court as denoting an acknowledgment of guilt. From time to time it has been contended—and I understood Mr. Chatterjee to contend that for the purposes of criminal law "admission" and "confession" are much the same thing, and there are no doubt, as the cases show, circumstances in which it is difficult to say whether or not a statement is to be regarded as admissible as being a confession or not. That question usually arises in the case of a statement made to a police officer or in the case of a statement made by a man while in custody of the police.

Then it becomes important to see whether the statement is to be regarded as a confession or may be proved in evidence on the footing that it is not a confession but is an admission. In my judgment, there can be no doubt at all that the idea that the criminal law as regards evidence makes no difference between a "confession" and "admission" is erroneous. Any such doctrine is much too broad and I will refer in this connexion to the judgment of Carnduff, J., in the well-known case of *Barindra Kumar Ghosh v. Emperor* (1). In the present

(1) [1910] 37 Cal. 467=7 I. C. 359=14 C. W. N. 1114.



case it would to my mind be almost extravagant to say that these statements are confessions, if only for the reason that every one of these accused as his defence has said that these statements are true, they constitute his defence. I have no doubt further that, as the story told by these people is a story which means that they are honest and the document is genuine, it cannot in a forgery case be said to be a confession at all. I need not therefore enquire into the question whether evidence given before a Court of law is evidence of such a character that it is not voluntary so as to make a document which is a confession, inadmissible under S. 24. That question does not arise.

Again, these depositions may be considered from the point of view of admission. It may be said that these depositions are put in to show that these people did make these documents between them. That is an important fact for the prosecution to prove, and these documents are therefore admissible. On that view, it appears to me that these documents are admissible as admission, but in point of fact these documents are really admissible or inadmissible in this case from another point of view altogether.

There is ample evidence that these people made the documents, took part in the making of the documents, and that was not contested before the Sessions Judge. But the real use of these documents to show conduct on the part of the accused persons from which conduct, as matter of fact, the jury are enlightened as to what happened at the time these documents were brought about. Here you have four people purporting to take part in the making of the documents. You find them afterwards insisting before a Munsif that the documents are genuine telling the same story and doing their best to act as if the documents are genuine. That in some respect tells in their favour. In other respects, if the jury are independently satisfied that the documents are not genuine, this conduct on their part has a high evidentiary value upon the question of intention, upon the question whether or not they are in conspiracy. I have no doubt, therefore, that these documents were rightly exhibited by the prosecution as evidence in the case.

The next objection taken is that no complaint by the Munsif has been made in respect of any of these four accused who gave evidence before him. As to that I cannot find that there is any necessity in this case, on a charge of forgery or abetment of forgery, to get a complaint from the Munsif. As a matter of fact, the Munsif has taken the view that S. 195 (1) (c), Criminal P. C. applies only to forgery when committed or alleged to have been committed by a party to the proceedings before him. That view is, in my opinion, correct and it is nothing to the point to say that these people might have been accused of something else, namely, under S. 193 of the Code, and that then it would have been necessary to get a complaint from the Munsif. For the purpose of this charge, no complaint from the Munsif is necessary.

The third point is that it is said that it was not admissible for the prosecution to give evidence with reference to the kobala Ex. 11 of the previous day, that is to say, the kobala which purports to be a conveyance by Md. Fakir and Abdul Hashim of the other five-annas in the land. If that were a just criticism it would indeed be one which would have rendered it almost impossible to set before the jury the facts with reference to the kobala Ex. 1 at all. I find, for example, that in the evidence of the main accused Ambar Ali, accused 1, the two things are throughout treated together "I wrote these two documents executed by the defendants in this suit," and the whole story given before the Munsif is a story which affects both and cannot be cut into branches. In the present case it makes all the difference whether or not Molaem who is said to be taking 5-annas from the complainant and his brother was a person who already had 5-annas share or was a person who had not 5-annas share. The execution of these two kobalas, if it was done as alleged and as the jury have believed, points to two steps towards the same end, and the one is closely connected with the other. Nobody supposes that the law would permit a jury to infer that Ambar forged Ex. 1 merely because there is reason to suppose that on the previous day he had forged something else. But that is not the case with reference to this matter. These two documents are so connected that it was necessary and right, in my judgment.



that the whole story should be put before the jury.

It is said, however, that there is in the charge of the learned Judge a direction to the effect that if they had reason to believe that the accused were conspiring together, the evidence of one before the Munsif would be evidence against the other; and on that it is pointed out that there was no charge of conspiracy at all. I certainly think, though it may be not without some room for argument, that if person falsely puts his name down as an attesting witness to the signature of somebody who he knows has never signed at all he is guilty of forgery just as well as the scribe. There may be room for argument, but I should have thought that these persons ought to have been put on their trial on a charge under S. 467 and also on charges under S. 467 read with S. 120-B. However they were not. Three of the accused, however, were put upon their trial under S. 467 read with S. 109 and that certainly includes, as S. 107, I. P. C. plainly says, a charge that they were engaged with one or more persons in a conspiracy for doing an illegal thing. So far as those three accused—accused 2, 3 and 4 are concerned I cannot see that there is any objection to the direction which the learned Judge gave to the jury. The only difficulty is as regards accused 1. He may say:

"I was charged under S. 467. I knew that the other accused were charged with having conspired with me because they were charged under S. 103, but I did not know that I was charged with having conspired with them."

That is not a very sensible objection, but, in point of fact, in this case one finds, when one looks at the evidence before the Munsif, that the main story is told by Ambar Ali accused 1 himself, and that even if it be supposed that it was a wrong direction to tell the jury that what the other three people had said was evidence against Ambar Ali it is quite clear that so long as his own evidence given before the Munsif was evidence against him in the Sessions trial there is no reasonable possibility that that can have resulted in any prejudice at all.

For these reasons it appears to me that the conviction can be sustained and, in my opinion, this appeal must be dismissed.

**Buckland, J.**—I agree.

V.B./R.K.

*Appeal dismissed.*

## A. I. R. 1929 Calcutta 542

CUMING AND MALLIK, JJ.

*Siti Kanta Pal and another*—Defendants—Appellants.

v.

*Radha Gobinda Sen and others*—Plaintiffs—Respondents.

Appeals Nos. 2587 of 1926 and 229 of 1927, Decided on 21st December 1928.

(a) Limitation Act, S. 26—Right of easement by prescription not made absolute till brought in question in some suit—Easements Act, S. 15.

A title to easement is not complete merely upon the effluxion of the period mentioned in the statute, viz., 20 years and however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until it is so brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question, the enjoyment relied on, must be an enjoyment for 20 years up to within two years of the institution of the suit. [P 543 C 1]

(b) Easements Act, S. 15—Long user does not prove enjoyment as of right.

Long user is not sufficient for a finding of an enjoyment as of right. [P 543 C 2]

*Bankim Chandra Mukherji, Baidya Nath Banerji and Purna Chandra Chatterji* for *Durgadas Roy*—for Appellants.

*Dwarka Nath Chakravarti and Kali Kinkar Chakrawarti*—for Respondents.

**Mallik, J.**—These two appeals are against the same judgment. They arise out of a suit for a declaration of title and issue of a permanent injunction—a declaration that the defendants have no right to irrigate their lands with the water of a certain tank known as Chata tank and an injunction restraining the defendants from drawing water from this tank for that purpose. There were two sets of defendants the Dubey defendants who are defendants 1 to 5 and the Pal defendants who are defendants 6 and 7. Plaintiffs' claim was resisted by the defendants on the allegation that the defendants had acquired a right of easement by prescription as also from a lost grant. The Court of first instance found that all the defendants had acquired a right of easement and on that finding dismissed the plaintiffs' suit. On appeal by the plaintiffs, the lower appellate Court modified the decision of the trial Judge and holding that while the Pal defendants had not acquired any right of easement, the Dubey defendants had acquired such a right, decreed the plaintiffs' suit in part. Against this decision, the Pal defendant as well as the plaintiffs have appealed to this Court



the Pal defendants in Appeal No. 2587 of 1926 and the plaintiffs in Appeal No. 229 of 1927.

It appears that the lower appellate Court found as a fact that all the defendants, the Pals and the Dubey, had been using the water of the tank for the purpose of irrigating their lands for a very long time. But finding that this user was not peaceable from 1925 which was more than two years before the institution of the suit, the learned District Judge held that there could be no acquisition of a right of easement by prescription under S. 26, Lim. Act. Mr. Mukherji for the Pal defendants contended that the learned District Judge was wrong in holding that the user must be for 20 years, up to within two years of the suit. This contention, in my opinion, is not tenable. Para. 2, S. 26, sub-S. 1, Lim. Act, lays down that the period of 20 years required for creating a right of easement shall be taken to be a period ending within two years next before the institution of the suit, wherein the claim to which such period relates is contested. Mr. Mukherji in support of his contention drew our attention to the concluding portion of the para. 1, S. 26 (1) where it is stated that where there is a user for 20 years, the right shall be absolute and indefeasible. But para. 1, of the subsection, where the absolute and indefeasible character of the right is mentioned, seems to be clearly controlled by the provisions of para. 2 of the subsection because the latter does nothing but explain how the period of 20 years necessary under the para. 1, is to be computed. It has been authoritatively held that a title to easement is not complete merely upon the effluxion of the period mentioned in the Statute viz. 20 years and that however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question, the enjoyment relied on, must be an enjoyment for 20 years up to within 2 years of the institution of the suit. I am therefore, of opinion that the learned District Judge was perfectly right in holding, on the fact found by him, viz. that the long user had not been peaceable from 1925, that the defendants had

not acquired any right of easement by prescription under S. 26, Lim. Act.

The finding of the lower appellate Court that the user had not been peaceable from 1925 was also assailed before us. Whether the user had been peaceable or not is a pure question of fact and I do not think, the correctness of the finding that it was peaceable can be questioned before us in second appeal.

The contention of Mr. Mukherji that the finding of the lower appellate Court that there had been user for a very long time was sufficient for an easement by prescription, is untenable on another ground. For the creation of a right of easement by prescription, there must not only be a peaceable and open enjoyment without interruption for 20 years, but that enjoyment must be an enjoyment as of right. In the present case, there is no finding that the enjoyment was of that character. It was contended on behalf of the Pal defendants that long user was sufficient for a finding of an enjoyment as of right. This is a proposition of law to which I am unable to accede. Whether an enjoyment is as of right or not, is, in my opinion, a pure question of fact—and enjoyment as of right cannot be inferred as a matter of course from a finding of user only.

Mr. Mukherji next contended that the lower appellate Court should have dismissed the plaintiffs' case against the Pal defendants, when there was a finding in their favour on the question of a lost grant. But as I read his judgment, the District Judge's finding on the question of lost grant refers to the Dubey defendant only and the learned District Judge never found the point in favour of the Pal defendants as well. In view of what I have stated above, the judgment and decree of the lower appellate Court, so far as the Pal defendants are concerned, cannot, in my opinion, be successfully assailed.

I come now to appeal No. 229 of 1927 the appeal which the plaintiff has filed against that portion of the decree of the District Judge, whereby the learned District Judge dismissed the plaintiff's case as against the Dubey.

The District Judge has found that the Dubey, although they failed to substantiate their title to an easement by prescription, succeeded in establishing it on a lost grant. Mr. Chakravarti, for



the plaintiff appellant, contended that long user was, by itself, not sufficient for a finding of lost grant. That may or may not be so. But a long user was not the only evidence on the point, so far as the Dubeyas were concerned. There was in their case the further fact that the land of the Dubeyas as also the Chatta tank were held under the same landlords, the Bannerjees of Ajodhya. The question whether there was lost grant or not is a question of fact and the lower appellate Court in the present case on a consideration of the fact of long user, coupled with the fact that the lands of the Dubeyas and the tank are held under the same landlords came to the conclusion that so far as the Dubeyas are concerned the story of a lost grant had been established.

In view of the aforesaid observations, both the appeals, in my opinion, must fail. They are accordingly both dismissed with costs.

**Cuming, J.**—I agree.

P.R./R.K. *Appeals dismissed.*

#### A. I. R. 1929 Calcutta 544

RANKIN, C. J., AND C. C. GHOSE, J.

*Pulin Krishna Roy*—Appellant.

v.

*Nanda Lal Roy and others*—Respondents.

Appeal No. 5 of 1929, Decided on 12th April 1929.

Civil P. C., O. 34, R. 2—Co-mortgagee refusing to join in suit for money recovery, but made defendant—His costs are to be provided for just as plaintiff's.

Where in a suit for recovery of mortgage money a co-mortgagee has not joined as plaintiff, but has been joined as a defendant, the rule is that his costs should be provided for out of the security just as the plaintiff's costs: *Davenport v. James*, (1848) 7 Hare 249, Foll. [P 544 C 2]

**P. C. Basu**—for Appellant.

**S. Chowdhuri**—for Respondents.

**Rankin, C. J.**—In this case it appears that there were two mortgagees each of whom appears to have lent a sum of Rs. 12,500 on the security and the plaintiff Nanda Lal Roy brought the suit for enforcement of his mortgage. He impleaded as defendant his co-mortgagee Pulin Krishna Roy on the allegation that he had asked him to join as a plaintiff, but that he refused to do so. The co-mortgagee in his written statement appears to have admitted that he was asked to join as plaintiff, but that

for various reasons he refused to do so. The suit was not contested before the learned Judge and the mortgage was proved. Thereupon the learned Judge considered the question as to costs against the absent mortgagor. He considered the English case of *Davenport v. James* (1) and came to the conclusion that that case was an unsatisfactory authority as it did not give the reasons for its decision and would not apply to the present case because he thought that the co-mortgagee should have reasonably joined as a plaintiff and should not have put the mortgagor to unnecessary expense by his being joined as a defendant. We have had the authorities examined before us and it does appear to me that the appellant by his learned counsel has made good his point that in a case of this sort he is not bound to join as plaintiff. He need not sue until he wants to sue. The law is that where the co-mortgagee has not joined as plaintiff, but has been joined as a defendant his costs should be provided for out of the security just as the plaintiff's costs. The learned Judge was wrong in not following the case of *Davenport v. James* (1) on principle. That case has been referred to and approved by authorities in various text books on mortgage, namely, Fisher on Mortgage, Coote on Mortgage, Vol. II. and Ghose on Mortgage, Edn. 4, Vol. 1, and we find that it has more than once been followed in Indian Courts. In the circumstances, I am of opinion that on a question of principle it cannot be said that a failure on the part of the co-mortgagee defendant to join as plaintiff should deprive him of the costs which he has in fact incurred. That being so, the appeal must be allowed and the appellant will be given costs in the Court below. As regards the costs in this appeal, although the mortgagor is not responsible for the appellant having to come to this Court, I do not see how the appellant can be deprived of his costs against the mortgagor. His costs in this appeal will also be added to his security.

There will be no order for costs of this appeal in favour of the plaintiff.

**C. C. Ghose, J.**—I agree.

P.R./R.K.

*Appeal allowed.*

(1) [1848] 7 Hare 249=12 Jur. 827.



**A. I. R. 1929 Calcutta 545**

RANKIN, C. J. AND C. C. GHOSE, J.

*Nani Lal Mandal*—Defendant—Appellant.

v.

*Priya Nath Roy and another*—Plaintiff and Defendant—Respondents.

Appeal No. 635 of 1927, Decided on 22nd February 1929, against appellate decree of 1st Addl. Dist. Judge, 24-Per-ganas, D/- 10th January 1927.

**Bengal Tenancy Act (8 of 1885), S. 193—Land let for residential or other non-agricultural function coupled with fishing—S. 193 does not apply.**

If looking at a letting it is found that it was a letting for residential purposes of certain land coupled with letting of a right to fishery with single rent reserved for both the cases it would not come within the purview of S. 193. In the same way if it was open to the tenant to use the embankment for non-agricultural purposes paying a consolidated rent for the whole thing, it would not come under S. 193. But where the right created in the soil refers to the user of land and water for the purpose of fishing or if it refers to liability undertaken by the grantee to repair the embankment in the interest of fishing the case is covered by the expression "right over fisheries" to be found in S. 193. [P 546 C 2]

*Rishindra Nath Sircar, Nasim Ali, and Diptendra Mohan Ghose*—for Appellant.

*Bijan Kumar Mukherjee*—for Respondents.

**Rankin, C. J.**—In this case the question is whether the claim by the plaintiff must be deemed to be subject to the special rule of limitation laid down by the Bengal Tenancy Act. That rule of limitation gives three years only for the bringing of the plaintiff's claim. Now the claim is in respect of rent of a jalkar. But the question before us depends to some extent on whether that description is adequate and sufficient and we have to turn in this case to the language of the memorandum of agreement between the parties. That agreement is an agreement in writing dated 4th January 1918, and according to the English translation before us it is called a memorandum of agreement for lease for a term of three years in respect of the right to fishery over two pieces of bheri land. The first of these two pieces of bheri land is described as Gobardanga bheri surrounded on all sides by embankment. The second piece of Bheri land is described as Santi-

ram Nashkar bheri land surrounded on all sides by embankment. The document goes on to describe the two pieces of land as bheri jami jalkar and it recites that these two pieces of bheri land jalkar are in the possession and enjoyment of the grantees under a previous lease. Then it recites that a proposal has been made for granting a lease of the said bheri land jalkar and the terms of the agreement are these: that for the right to fishery over the first bheri Rs. 500 shall be paid in advance as selami and the rent shall be fixed at Rs. 3,000 per annum and that for the right to fishery over the other bheri land Rs. 500 shall be paid in advance as selami and the rent shall be fixed at Rs. 1,500 per annum. In this way the total annual rent of the said two pieces of bheri land jalkar is fixed at Rs. 4,500. It then recites:

"On the aforesaid understanding we take lease of the said two pieces of bheri land jalkar running from a certain month and having the right of possession over the said two pieces of bheri land jalkar as nij-jote execute this kabuliat."

in terms therein described. The document then recites:

"We shall at our own cost make necessary and regular repairs of the sluices and the embankments surrounding the bheri during the term of the lease and we shall make other necessary expenses. We will be in possession by growing fish and catching them."

There are various provisions as to the payment of rent. The grantees further covenant in these terms:

"We shall keep intact the boundary and shall make regular repairs of the embankment on all sides to keep them as strong and durable as they were previous to our taking the lease."

Now we have to consider whether the provisions of S. 193, Ben. Ten. Act, are applicable to the claim by the plaintiff for rent contracted for in this agreement. The language of the Act we have to deal with is this:

"The provisions of this Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest rights, rights over fisheries and the like."

Now the first thing that is argued before us by the learned advocate for the respondent is that the general principle of the matter is this that jalkar rights do not come under the Ben. Ten. Act unless they are part of agricultural holdings. That principle I shall for the purposes of this case accept. Then we have



the particular provision in S. 193. The argument on that section is not that we have to read into this section a provision that the section shall apply in respect of rights of pasturage, forest rights, rights over fisheries "being parts of agricultural holdings" but that in order to come within this section the rights over fishery must be pure incorporeal rights and that if for any purpose there is any right in the land itself whether it is purely ancillary to the purpose of fishing or not the section does not apply. It is said that if we apply the section to a case of this sort we would be violating a principle governing these matters, and making the Bengal Tenancy Act applicable to cases where certain rights are granted in the land which are not rights granted for agricultural purposes. In my opinion, that is not the way in which this section is to be looked at or to be considered for the purposes of the present case. The learned Additional District Judge has held that S. 193, Ben. Ten. Act does not apply to this case because the tenant was expressly given certain rights in respect of the embankments, outlets, etc. He says:

"This to my mind created some sort of right in the soil and in the attached land (the embankments) although the right be confined to the raising of it or repairing of it according to the necessity of the tenants and although the same was to be restored in its original condition to the lessor on expiry of the term of the lease."

In other words it is stated that if there is any right given in the land then S. 193 cannot possibly be applied. In support of that contention the case of *Krishnalal Choudhury v. Salim Muhammad Choudhury* (1) is cited to us. It appears that there it was contended that the lease not merely conferred a right over fishery but also created an interest in the land and that accordingly it did not come within the purview of the Bengal Tenancy Act. In that particular case the Court was in no difficulty in finding an answer to the contention because on an examination of the lease it turned out that it did not convey any interest in land over and above the mere grant of a right to fishery and on that view it was not necessary to struggle with any difficulty at all. We have also been referred

to the case of *Mahananda Chakravarti v. Mongala Keotani* (2), where for reasons which do not appear to be very cogent to me it was argued that because the rent was a definite rent per annum the tenant taking the risk of being able to get enough fish from the tank, the letting was not the letting of a mere jalkar. On looking at the agreement before me it appears to me that it is a question of fishery and nothing but fishery throughout. The language of the section is not right of fishery but rights over fisheries and that expression comes after such special rights as pasturage and forest rights and is succeeded by the general phrase "and the like." I have to refer to this document to see whether this is a case of rights over fishery or something more.

I need not say that I quite agree that if you look at a letting and find that it is a letting for residential purposes of certain land coupled with a letting of a right to fishery with a single rent reserved for both, the case would not come within the purview of S. 193. In the same way if in this case it was open to the tenant to use the embankment for non-agricultural purposes with no reference to fishery e. g., for industrial purposes, paying a consolidated rent for the whole thing, it would not come under S. 193. When I come to the agreement in this case it appears to me perfectly true as the learned Additional District Judge says that some sort of right in the soil may be created by the grant. But what sort of right in the soil? If it refers to the right of user of the land and water for the purpose of fishing, or if it refers to the liability undertaken by the grantee to repair the embankment in the interest of fishing, it does not seem to me that it in any way conflicts with principle to hold that the case is covered by the expression "rights over fisheries" to be found in S. 193. One of the conditions upon which the considerable amount of rent was agreed to for the right of fishing over this water was that the grantee should be entitled to use the embankment for the purposes of growing fish or catching them and also to use the embankment for the purpose of keeping their obligation to repair the embankment in order that their fishing rights might not be affected. There is no suggestion in

(1) [1915] 19 C. W. N. 514=27 I. C. 614.

(2) [1904] 31 Cal. 937=8 C. W. N. 804.



this document of the grantee having a right to use the embankment for purposes unconnected with fishing and unconnected with agriculture.

I, therefore, think that the special rule of limitation does apply to this case and that this appeal must be allowed and that the suit must be dismissed with costs in this Court and in the Courts below.

**C. C. Ghose, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 547

PAGE AND MALLICK, JJ.

*Soorath Nath, Banerjee*—Defendant—Appellant.

v.

*Bhabasankar Goswami and others*—Plaintiff and Defendants—Respondents.

Appeal No. 2215 of 1926, Decided on 15th August 1928, against appellate decree of Sub-Judge, Asansole, D/- 23rd August 1926.

(a) Contract Act, S. 20—Mining lease for plot of 100 bighas—Plot actually less than 100 bighas—No common mistake held to exist.

Where in a suit to recover rent due under a mining lease the mistake alleged by the defendant was that whereas under the patta the subject-matter of the lease was a plot of land measuring by reputation one hundred bighas while it turned out that it was actually less.

*Held* : that the exact area of 100 bighas more or less was not essential for the colliery purpose for which the agreement was arrived at and that there was no common mistake with regard to an essential fact. [P 548 C 1]

(b) Practice—New Plea—Entirely different and inconsistent defence in second appeal is not sustainable.

Where the defence in the lower Court was fraudulent misrepresentation as to the area concerned and in second appeal S. 20, Contract Act, was pleaded for the first time, the defence was held to be unsustainable as the plea was inconsistent. [P 548 C 2]

*N. Sarkar, Bankim Chandra Mukerji, and Kanai Dhon Dutt*—for Appellant.

*S. C. Bose, Jyotish Chandra Sarkar, Panchanan Ghose & Batuk Nath Bhatta-charji*—for Respondents.

**Page, J.**—This is a suit brought to recover royalties or rent due under a mining lease. The defence which was urged before us in this appeal was that the lease was void under S. 20, Contract Act, which reads as follows :

“ Where both the parties to an agreement are under a mistake as to a matter of fact essential to an agreement the agreement is void. ”

The question that falls for determination is whether having regard to the facts proved in this case, the defendant could sustain such a defence. It appears from the evidence of the defendant himself that he had acquired possession of certain plots in this mauza with a view to being in a position to enable an assignee from him to carry on mining operations. There is no finding and it does not appear from the terms of the patta that it was intended by the parties to the patta that the colliery should actually be situate on the land which was the subject-matter of the lease and under the terms of the lease, if the defendant at any time so selected, he could surrender the lease on giving six months' notice and liquidating the dues that had accrued up to the date of surrender. The lease was effected in 1920 and uptill August 1923 and so far as we are aware, up to the present time the defendant has not surrendered the holding. That would have been an easy way in which he could have got out of any difficulty that he felt in having under the lease obtained possession of the lesser area than he could profitably use for colliery purposes. I have asked myself why did not he surrender this holding under the terms of the patta, if he felt that it had imposed upon him grievous obligations without commensurate compensation. I think the answer may well be that as the defendant himself admitted in the course of his evidence that he was proposing to resell this land and to assign the benefit which he could obtain under the patta to some other person the reason why the defendant has retained possession of the land under the patta was because he was waiting to see whether the market might not turn in his favour and he was not prepared either to surrender the holding or after two years to pay rent because the coal industry had become in a less satisfactory condition. I cannot help believing that if there had been a boom in the coal trade, there would have been no necessity for this suit to have been launched. Now, in order to bring the case within S. 20 it was incumbent upon the defendant to prove inter alia that there was a common mistake of facts and that that common mis-



take was with respect to a fact essential to the agreement. The common mistake which is alleged before us is that whereas under the potta the subject-matter of the lease was "a plot of land measuring by reputation one hundred bighas" it turns out that it measures considerably less than 100 bighas. According to one estimate it measures 20 bighas and odd, according to the Settlement Khatian it measures 66 bighas and a gentleman employed in the coal trade called as a witness stated that on the 20 bighas it was not feasible to erect a colliery. Now, what was this plot of land which was the subject-matter of the potta? It is stated in the lease to be: a plot of land measuring by reputation one hundred bighas commonly known as the field of Kayattala in touzi No. 3522 of the Collectorate of Burdwan in the village of Mouja Kumardihi included in Pergannah Shergarh Police Station Ondal Sub-Registry Raneegange Chowki Asansole in the Collectorate District of Burdwan and in the recent settlement it has been recorded in our name from dag No. 1 to Reg. No. 9."

and later it is described as a plot: "which has been presently measured from dag No. 1 to dag No. 9 in the recent settlement."

Now what this land consisted of could have been ascertained by any body who elected to take the trouble to make the necessary inquiries from the office of the collectorate. But the complaint of the defendant is that he knew nothing about this, he never measured it and he made no enquiries for 3 years. Why not, if he really was placing reliance upon the exact measurement being 100 bighas? To that question no satisfactory answer has been given. In those circumstances I approach the issue whether there was a mutual mistake as to the fact essential to the agreement. I am not satisfied that the exact area of 100 bighas more or less was essential for the colliery purposes for which the agreement was arrived at. But be that as it may, until the suit was argued in second appeal before this Court, there had never been any allegation or suggestion on that the agreement was void upon the ground of the mutual mistake of the parties as to the extent of area leased. Mutual mistake is not a ground set out in the memorandum of appeal, and not only has it never been the case presented on behalf of the defendant in the lower Courts, but it is inconsistent

with the case upon which he sought to defeat the plaintiff's claim for rent, for in the lower Courts the defendant contended that he was the innocent victim of a fraudulent misrepresentation as to the area on the part of the plaintiff. Both the Courts have negatived the charge of misrepresentation, fraudulent or otherwise, but such an allegation is inconsistent with the contention that both the plaintiff and the defendant were executing the potta under a common mistake of fact as to the extent of the area. In those circumstances, to my mind, the contention that the contract was void upon the ground of mutual mistake of fact essential to the agreement cannot be sustained and the defence fails. It was further contended that in any case the plaintiff was only entitled to a proportionate sum for royalty or rent in respect of those premises inasmuch as minimum royalty was Rs. 2,000 and that was based upon the area being 100 bighas at the rate of Rs. 20 a bigha.

For the reasons I have given I do not believe that the exact area leased was of the essence of the contract and from a perusal of the terms of the potta, in my opinion, a royalty of Rs. 2,000 was to be paid irrespective of whether the area in fact turned out to be 100 bighas or more or less than that area. In those circumstances, the claim for proportionate abatement also fails and, in my opinion, the defence which was presented before us was misconceived and the appeal must be dismissed with costs.

**Mallik, J.**—I agree.

P.R./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 548

SUHRAWARDY AND GARLICK, JJ.

*Sisir Kumar Mallik and others—Defendants—Appellants.*

v.

*Naran Chandra Mallik and others—Plaintiffs—Respondents.*

Appeal No. 1723 of 1926, Decided on 15th August 1928, against appellate decree of Sub-Judge, Hooghly, D/- 16th March 1926.

(a) Deed—Construction—Sale or mortgage—Where there is a conveyance and a promise



to reconvey, on receipt of purchase money, the transaction is a sale and not a mortgage.

Vendor executed a deed of sale of immovable property, simultaneously with an ekrarnama, by which the purchaser agreed to take back the agreement and return the deed on payment of purchase money by the vendor at any time. The heirs of the seller, brought a suit to redeem the property, before the expiry of the limitation period of sixty years, on the ground that the transaction was a mortgage.

*Held*: that the transaction was an absolute sale and not a mortgage: 12 *All.* 387 (P.C.), *Rel. on.* 22 *All.* 149 (P.C.), *Dist. A. I. R.* 1916 P.C. 49, *Ref.* [P 550 C 2]

**(b) Deed—Construction.**

After lapse of considerable period, cogent evidence is required to hold that an instrument is not what it purports to be. [P 553 C 2]

**(c) Evidence Act, S. 92 — Evidence as to circumstances themselves is inadmissible.**

In construing a document evidence so far as it relates to prove how the language of the document is related to the existing facts and surrounding circumstances is only admissible and not the circumstances themselves as elucidating the document: 22 *All.* 149 and *A. I. R.* 1917 P. C. 207, *Ref.* [P 553 C 1]

*Bijan Kumar Mukherjee*—for Appellants.

*Brojolal Chakravarty, Radha Benode Pal and Panchanan Ghose*—for Respondents.

**Garlick, J.**—The facts of the case are these. The plaintiff's grandfather Madu Sudan took Rs. 400 from his relatives Ratneswar Mallik and Guru Dayal Mallik and executed in their favour a deed of sale of about 24 bighas of land. The deed was executed in the name of their benamdar Gopi Nath Sarkar. At the same time Gopi Nath executed in favour of Madu Sudan an ekrarnama in which the fact of sale was recited and it was agreed that if Madu Sudan repaid Rs. 400 at any time the property would be reconveyed to him. In pursuance of this arrangement the purchaser had possession of the land for nearly sixty years. The document was executed in January 1862. In 1918 the plaintiffs claimed the right to redeem the property by repaying Rs. 400. The original parties to the transaction were all dead. Six of the descendants of the original purchasers consented to reconvey their shares of the property to the plaintiffs. Six others refused to do so. Defendants 7 to 12 are those who did execute a deed of reconveyance. Defendants 1 to 6 are those who refused to do so. The plaintiffs filed this redemption suit on 24th January 1922 which was about a week before the

sixty years period of limitation expired. It was contested by defendants 1 to 6. Both the lower Courts have held that as the two documents were executed at the same time they must have constituted one transaction and that that transaction was a mortgage by conditional sale. They have therefore allowed the plaintiffs to redeem by a repayment of the original money that was borrowed. Defendants 1 to 6 have appealed against that decision. They assert that the transaction was an out and out sale and that the agreement in the ekrar for reconveyance was a purely personal agreement between Madhu Sudan and the purchasers and was not binding on the purchaser's heirs. The kobala (Ex. A) taken by itself is a deed of out and out sale.

The ekrarnama also recites that the transaction was an out and out sale transferring to the purchaser absolute rights over the property including all powers of alienation. But the learned Subordinate Judge says that unless there was an intention to treat the transaction as a mortgage by conditional sale there was no object in executing the ekrarnama (Ex. 3) at all. He also found circumstantial evidence to show that the transaction was intended to be a mortgage. He pointed out that in 1901 the sons of Ratneswar and Guru Dayal in a transaction between themselves described the property in suit as bandaki. He also pointed out that in a cess return filed by the defendants' predecessors in 1905 this property was omitted. He mentioned again that the heirs of Ratneswar and Guru Dayal once tried to establish their independent right to this property by a suit for possession against a third person but they withdrew the suit. He points out again that the heirs of the purchasers have not produced any of their collection papers to show that the property was treated by them as their own. He comments on the fact that six of the heirs of the purchaser have recognized the transaction to be a mortgage and have reconveyed their shares in the property. Two other points in the plaintiff's favour were mentioned in the judgment of the Munsiff. He pointed out that the stamp of the kobala was paid for by Madhu Sudan and he expressed the opinion that the price of Rs. 400 for 24 bighas of land must have been inadequate even 60 years ago. But the learned Subordinate Judge does



not attach any importance to these last two points. He says that Madhusudan probably paid for the stamp of the kobala because he was in urgent need of the money and the stamp on the ekrar-nama was paid for by the purchaser. He says that it is impossible to say now whether Rs. 400 was an adequate price for 24 bighas of land 60 years ago or whether it was not.

In this Court the respondents' advocate has supported the judgment by urging other reasons also why the transaction must have been a mortgage and not an out and out sale. He argues that Madhusudan was in urgent need of money and took a temporary accommodation from his relatives and gave the land as security for the loan. As the money was advanced by his relatives no period was fixed for repayment of the loan and there was no provision for interest nor was there any bargaining over the price. He argues that all the circumstances show that the intention of the parties was that the property should be given back if the money was repaid.

The kobala taken by itself is a deed of out and out sale. It cannot be held to be a mortgage unless there is strong evidence that it was the intention of the parties that the transaction should be only a mortgage. The property was in the possession of the purchasers for nearly 60 years and the presumption from long possession is that it was their property. What was both nominally and in effect a sale cannot be lightly set aside after the death of the contracting parties on an assertion that the land was given as a mere security for the small sum borrowed. One would think that if 24 bighas were given as security for Rs. 400, the mortgagor would have redeemed the mortgage long ago. The learned advocate for the respondents quotes rulings in which it has been held that the Courts always lean strongly in favour of the persons who claim the right to redeem. The reason for this is historical. In England in the Courts of common law mortgages were not originally recognized at all. It was the Court of Chancery which compelled the mortgagee who had accepted land as security for a loan to give up the land when the money was repaid. The Courts are wont to lean in favour of persons who claim the right to redeem

because the common law gave them no such right and the Courts of Equity took upon themselves to protect them. But in this case there is no reason why the Court should lean strongly in favour of the plaintiffs who have waited 60 years before asserting their claim. They have not paid any interest for the money.

There seems to be no equity in their favour. If the transaction was a mortgage they could have redeemed the property any time within the last 60 years. The fact that they waited until a week before the expiry of 60 years before instituting a suit is a strong reason for suspecting that the transaction was not a mortgage. During the 60 years the heirs of the purchaser have been enjoying the profits of the property, have been paying the rent, have received no interest and have had the full right of alienation. They could have sold the property to some one else at any time during these two generations. We cannot treat the transaction as a mortgage unless there are clear signs of the existence of the relationship of the creditor and debtor between the parties. I do not find any signs of the existence of the relationship of debtor and creditor except the apparent admission by certain heirs of the purchaser which are mentioned by the lower appellate Court. An agreement which has not been asserted for 60 years must be strictly construed. In my opinion the agreement of the learned vakil for the appellants that the agreement in the ekrar for reconveyance was a purely personal argument between the purchaser and Madhusudan should be accepted. The kobala purports to be an out and out sale and the ekrar-nama taken by itself is a document for which no consideration at all was given. It must, therefore, be strictly construed. It describes the transaction as a sale which is to bind the heirs of both the parties and then it goes on to say that if Madhusudan repays the money at any time a reconveyance will be made in his favour. It says nothing about redemption by Madhusudan's heirs. If the document is strictly construed the right to redeem is confined to Madhusudan himself. And he is dead. In my opinion there is no reason whatever to disturb a transaction which ostensibly was an out and out sale and which has had all the effects of a sale for nearly 60



years. For these reasons I would allow the appeal and set aside the decree of the lower appellate Court with costs.

**Suhrawardy, J.**—I fully agree with the view expressed by my learned brother. I would only add a few words in order to explain the true nature of the transaction as evidenced by the two documents executed on 14th Magh 1268 B. S. (February 1862). The first is described as a deed of sale. It recites that on account of the expenses for the Sradh of the mother of the executant the vendor is in need of funds and, therefore, on receipt of Rs. 400 as purchase money he sells out the lands in suit. Then follows the usual term in a deed of sale that ;

"the purchaser, his heirs, etc., will be entitled to sell or make a gift of the lands without any objection by the executant or his heirs, etc. The purchaser and his heirs and successors shall enjoy and possess all the lands with all their appertenant rights by either cultivating the same or settling tenants on the lands."

It concludes by saying that on receipt of the consideration of Rs. 400 the kobala is executed in favour of the purchaser. The second document is headed ekrarnama or a deed of agreement. It is executed by the purchaser in favour of the vendor. It recites that on account of funds for the Sradh, the vendor has sold to the purchaser the lands and relinquished all right, title and interest in the said property.

"I have become entitled to sell the said properties and can enjoy with my sons and grandsons and possess the said properties either by cultivating the same in khas or by settling tenants on them. In that you or your heirs can never lay claim to it and if you do so that will be void and shall be refused."

This clause is followed by the following clause :

"In future if you pay the consideration money at any time I shall on acceptance of the same return to you the kobala and take back the agreement. Nobody will object to this."

Reading the two documents it is clear that the intention of the parties was to effect an absolute sale, the vendee promising to return the property on receipt of the purchase money and nothing more, i. e., a sale with option of repurchase. It is conceded by the learned advocate for the respondents that in every case where there is a conveyance and a promise to reconvey, it cannot be presumed that the transaction is not a sale but is

a mortgage. But the learned advocate has pointed out certain circumstances which he says show that the transaction was really a mortgage and not a sale. (1) That the vendor and the purchaser were near relations and that the vendor was in need of money at the time. I do not see how this fact goes to support the view that the transaction was a mortgage and not a sale, as it is as much consistent with the transaction being a sale. The parties were related, one of them was in need of money and the other probably in order to avoid the property going out of the family or to oblige his relative offered to purchase it. (2) In the ekrarnama there is a condition that on return of the purchase money the purchaser will return the kobala and take back the agreement. There is no condition that the purchaser should execute a reconveyance which must be necessary if the transaction was a sale. The absence of this condition does not necessarily signify that the transaction was anything but a sale. The parties might not have been so well versed in law as to invest the transaction with all legal character. It might also be that it was their idea that the return of the kobala executed by the vendor to him and the return of the agreement by the vendor to the vendee would constitute a good transfer. (3) It does not appear that there was any bargain for the price. A deed of sale does not ordinarily show that there was any bargain for the price. We do not know what happened at that time and there is no finding by any of the Courts below on this point.

Reference has been made to several cases which have dealt with the question as to whether a certain transaction was really a mortgage or a sale. It is not necessary to go into the cases decided by the Indian Courts for we have so many pronouncements of the Judicial Committee on this question that there can hardly be any difficulty in finding the real nature of a transaction like that in the present case. The earliest case which was referred to in this connexion is the case of *Bhagwan Sahai v. Bhagwan Din* (1). It seems to me that this case has the greatest resemblance with the case before us. The only difference between

(1) [1890] 12 All. 387=17 I. A. 98=5 Sar. 551 (P.C.).



that case and this is that in *Bhagwan Sahai's* case there was a stipulation that if the money was paid within a period of 10 years from the date of the deed the purchaser would accept it and "cancel this valid sale;" and also that in the agreement it was mentioned that as a matter of favour, grace and indulgence the purchaser should execute a deed on taking back the purchase money after 10 years. It is argued on behalf of the respondents that the absence of these two points in the present transaction distinguishes it from the case of *Bhagwan Sahai* (1). To my mind the distinction is very immaterial. Their Lordships relying upon certain features of that case which are also present in this case held that it was an out and out sale and not a mortgage. (1) there was no stipulation that the vendor should have the right to repurchase. (2) The right to repurchase was given on payment of the full amount of the purchase money and not what should be due at the date of the purchase. Their Lordships followed the English case of *Alderson v. White* (2) and quoted with approval the dictum of Lord Chancellor Cranworth laying down the rule which should be followed in construing cases of this nature:

"The rule of law on this subject is one dictated by common sense that prima facie an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase."

The next case is the case of *Bal Kishen Das v. Legge* (3). In that case there was a deed of sale accompanied by an agreement by which the purchaser promised to resell the property to the vendor on his paying him a certain amount by a certain date. In the circumstances of that case their Lordships held that there was sufficient indication that the transaction was really a mortgage and not a sale. The points upon which the case of *Bhagwan Sahai* was distinguished in *Bal Kishen's* case (3) are pointed out by the Judicial Committee in the case of *Jhenda Singh v. Whaid-Ud-din* (4). In that case too there was a deed of sale of immovable property and an agreement to

resell. Their Lordships held that there was nothing in the fact that these documents were simultaneously executed or one after another to indicate that the transaction was not a sale but a mortgage. *Bal Kishen's* case was distinguished on the ground that there the amount to be repaid was not the same amount for which the property was sold but an amount made up of the purchase money and some subsequent advances, and the fact that the debt was consolidated showed that it was not a case of out and out sale; and it was further remarked in *Jhenda Singh's* case (4) that the case of *Bhagwan Sahai* resembled the case before their Lordships more than any other case.

One of the facts on which the Judicial Committee were led to hold that the transaction was a mortgage in *Bal Kishen's* case (3) was that there was a stipulation that if the money for the repurchase was not accepted by the vendee the vendor would be entitled to deposit the money in Court. In *Jhenda Singh's* case (4) their Lordships held that the mere fact that in the event of the purchaser refusing to accept the money for repurchase it may be deposited in Court did not necessarily indicate that the transaction was a mortgage. Next we have the case of *Narasingerji Gyanagerji v. Panugenti Parthasaradhi* (5). In that case it was found that the price for which the property was purchased was absurdly low, less even than what the property would have realized upon a public sale and the vendor reserved to himself the sole right to the minerals and the mineral right including marble in the village and the right to repurchase the said village as per agreement executed on the same date as the deed of sale. In consideration of these facts and other clauses in the document the Judicial Committee came to the conclusion that the transaction was mortgage and not a sale. The most important term in that transaction which greatly influenced their Lordships was that the mineral right was reserved by the vendor. A case of absolute sale would be inconsistent with the reservation of any right above or below the surface. That case accordingly has no application, to the facts of this case.

(2) [1858] 2 De. G. & J. 105.

(3) [1900] 22 All. 149=27 I. A. 58=7 Sar. 601 (P.O.).

(4) A. I. R. 1916 P. C. 49=38 All. 570=43 I. A. 284 (P.O.).

(5) A. I. R. 1924 P. C. 226=47 Mad. 723=51 I. A. 305 (P.O.).



The learned Subordinate Judge referred to several circumstances and pieces of evidence in support of the view that the transaction was a mortgage. The circumstances which he points out are that in a certain document the sons of the original purchasers described this property as a mortgaged property; and that in certain road cess-returns this property was not mentioned as belonging to the family of the purchaser. It has been repeatedly held by the Judicial Committee that evidence so far as it relates to prove how the language of the document is related to the existing facts and surrounding circumstances is only admissible. This rule was forcibly stated in *Bal Kishen v. Legge* (3) and also in *Maungkyin v. Ma Shwe La* (6). But it is argued on the authority of the decision of their Lordships in *Bajinath Singh v. Hajee Vally Mahomed Hajee Abba* (7) that S. 92, Evidence Act does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. On an examination of that case it will appear that their Lordships did not go back on what they stated in *Bal Kishen's* case and in the *Burma* case above referred to. They have stuck to the rule that S. 92 does not preclude any evidence relating to the surrounding circumstances. In the case before their Lordships the transaction extended over a long period and in construing the document which was executed in 1912 their Lordships took into account certain other documents executed in 1913 as part of the original transaction. The case before us is very similar to the one that came up for consideration before the Bombay High Court *Vaman Trimbak v. Changi* (8). Under similar circumstances the learned Judges held that it was a deed of pure sale.

There is one other circumstance in this case which ought to debar the plaintiff from contending that the transaction was not a sale but a mortgage. The suit was brought just a few days before the completion of 60 years from the date of the transaction. It is impossible at this distant date to give evidence of facts and surrounding circumstances at the time

of the transaction. In *Bhagwan Sahai's* case their Lordships remarked:

"It does seem contrary to all principles of equity and good conscience that when it was stipulated that the money should be repaid within the period of 10 years from 1835 the representatives of the vendors could lie by until the year 1884 and then claim that they had a right which was not barred by limitation to redeem that which they call a mortgage at any time within the period of 60 years."

In *Jhenda Singh's* case the suit was brought 44 years after the period within which repurchase could have been effected. Their Lordships quoted the remark of Lord Cranworth in *Alderson v. White* (2).

"I think the Court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be."

It is needless to say that in the present case no evidence cogent or otherwise of the transaction at the time when it took place was given. On all these considerations I agree that the transaction should be held as an out and out sale and not a mortgage as contended for by the plaintiffs. In this view it is not necessary to consider whether the right of repurchase was a personal right given to the vendor or it was a right which could be claimed by his successors. Nor is it necessary to consider if the absence of mention of any time within which the right to repurchase should be exercised offends against the rule against perpetuity as the present suit is not a suit for specific performance of a contract. I agree that this appeal should be allowed, the decree of the Courts below set aside and the plaintiff's suit dismissed with costs in all the Courts.

P.R./R.K.

Appeal allowed.

### A. I. R. 1929 Calcutta 553

RANKIN, C. J. AND B. B. GHOSE, J.

*Solaiman Moosaji Asmal and others—*  
Defendants—Appellants.

v.

*Jatindra Nath Mondal and others—*  
Plaintiffs—Respondents.

Appeal No. 8 of 1927, Decided on 13th May 1929, from original decree of Sub-Judge, 3rd Court, 24 Parganas (Alipur), D/- 26th August 1926.

(a) Landlord and Tenant—Tenant renewing lease after purchasing share of joint pro-

(6) A. I. R. 1917 P. C. 207=45 Cal. 320=44 I. A. 236 (P.C.).

(7) A. I. R. 1925 P. C. 75=3 Rang. 106 (P.C.).

(8) A. I. R. 1926 Bom. 97=49 Bom. 862.



erty is tenant—On expiry unless definitely asking to change status he becomes tenant holding over—Transfer of Property Act, S. 116.

If a tenant who has been granted a lease of a portion of land held jointly by the owners of that portion and the remaining portion is subsequently purchased by him from the owners of the remaining portion, takes a kabuliati after he becomes a co-owner, he is definitely attorned to the lessors in respect of their share and notwithstanding that he is a co-owner his possession of the land is that of a tenant under the provisions of the lease and on expiry of the lease unless he informs the lessor to change his possession is that of a tenant holding over within the principles of S. 116 liable to be converted into tenant by mere assent of the lessors and not that of the co-owner in possession of the whole property.

[P 555 C 2; P 556 C 1]

(b) Cosharer—Partition—Mode of division—Improvements by cosharer—Improving cosharer should be allowed to reap advantage of his improvements—But he is not by right entitled to it.

Where a co-owner has expended money on the joint property and time comes for partition it is reasonable and right to endeavour to give him such an allotment as may enable him to reap the advantage of what he has expended upon improvements but it is not the prima facie right of such a co-owner who has improved the whole or greater portion of the joint land to have in one way or another recouped to him by his co-owners the value of improvements which the other co-owners get in the shares allotted to them; the improver in the latter case is a mere volunteer and cannot without consent of his co-owners lay foundation for charging them with the improvements.

[P 556 C 2]

(c) Civil P. C., O. 5, R. 20—Substituted service—Unbusinesslike and ridiculous use is prohibited.

Substituted service is not to be used in any way which is unbusinesslike and ridiculous.

[P 557 C 2]

*Hira Lal Chakravarti, Surendra Nath Bose II, Shyama Das Bhattacharjee and Hem Chandra Sen*—for Appellants.

*Surat Chunder Bose, Sarat Chunder Jana and Ramendra Mohan Majumdar*—for Respondents.

**Rankin, C. J.**—This is an appeal from a judgment and decree of the Subordinate Judge, Third Court of the 24 Parganas in a partition suit brought on 20th January 1920. It appears that the whole of the land with which we are concerned is about three bighas in area and, in 1893, a gentleman of the name Melosch took a lease for nine years of what was described as two bighas out of the three bighas and it was further said that the bigha which was not included was the share of Shyam Lal and Kishori

Lal Mandal. Melosch was minded to put up a rice-mill and he covenanted to erect a brick-built machine-room and rice and paddy godowns at his own expense upon this land. He further covenanted that he should have the right, on the expiry of the term, to remove the buildings at his own costs and that he should not be competent to claim any damages in respect of the removal from the lessors. There is a clause which seems to operate nothing :

"If it be necessary to sell the same, I shall sell the same to you at the market price."

The lessors under that lease were, speaking substantially, the plaintiffs in the present suit, and, when that lease came to an end in September 1902, the present defendant 1 whom I shall call Musaji executed a kabuliati on the same lines. The covenant ran as follows :

"In addition to the machine-room etc., standing on the said land which was purchased by me, I shall erect machine-rooms etc., according to requirements . . . . . On the expiry of the term within one month thereof, I shall remove the buildings etc., belonging to me at my own cost. I shall not be competent to claim any damages in respect of the same from you ; and if it be necessary to sell the same, I shall sell the same to you at the market price."

Now, that term lasted till 1912. In the meantime in 1904, Musaji, defendant 1, purchased a one third share of the entire property from two of the co-owners who had not been lessors to him. After that in December 1909, he entered into a fresh kabuliati with the plaintiffs excluding certain property :

"the share of your cosharer Babu Kishori Lal Mandal specified in schedule below."

He covenanted again that, on erecting houses as required by him he would enjoy the property. He covenanted that he would remove the houses within one month of the expiry of the term at his own cost and would not be competent to claim damages in respect of the same from the plaintiffs. This last lease expired in October 1919 and the suit for partition was brought in January 1920.

In the written statement of defendant 1, he set up as a defence, first of all, that there were some nine cottas of land which had not been comprised in any of his leases and that, as regards those nine cottas, he had become entitled to them by adverse possession apart altogether from the one-third share which he had bought as I have said. Then he went on to say that he raised valuable structures



and a rice-mill on a part of the land and that as far as possible, that portion of the land should be allotted to him. So far not much difficulty arises. In para. 9, he said that :

"the land in suit was low and jungly and this defendant reclaimed it, raised its level, covered the major portion of the land with bricks and cement plaster for the purpose of making a grain-yard ; the defendant values the said improvements at about Rs. 20,000 and submits that he is entitled to get the value of the same from the other cosharers according to their shares on partition."

It will be seen, therefore, that the improvements which he claims are in no way claimed as having been made at any particular time rather than another. It might have been as well that particulars of this allegation had been given ; but the allegation is that he reclaimed the whole land, raised its level and covered the major portion with bricks and cement plaster. There is no particular allegation about the nine cottas. There is no particular allegation that he did this before or after 1904 or that he did this at one point of the land rather than another. In that position, the suit came on for trial and, when the plaintiffs' witness was in the witness-box, the defendant's pleader wanted to cross-examine him about the details of these improvements ; but the learned Judge thinking this to be irrelevant had the matter argued and came to the conclusion that, in this suit the question of improvement did not arise. He gave to defendant 1 in the directions contained in his preliminary decree for partition a right to have as far as possible the land upon which these valuable structures had been erected and no complaint as regards the structures erected in the way of a rice-mill is now pressed before us. The learned Judge was of opinion that in this case no other question could be entertained as regards the improvements ; and it is on that point that this appeal is directed.

Mr. Hira Lal Chuckerburty for the appellant says that without hearing evidence to find out what these improvements are, when they are made, what their value is and so fourth, it is not possible to make a partition and to be sure that defendant 1 is not entitled to more than the right which has been granted to him, namely, to get as much as possible the land which has got the structures and the rice-mill upon it.

Upon that question the first thing that has to be carefully looked into is the question of the position of defendant 1 as a lessee. The lease which I have referred to of 1st December 1909 expired in October 1919 and the first thing to see is whether that lease is still subsisting or not. Defendant 1 in his written statement objected that the plaintiffs were not in possession and, when one comes to the evidence given by the parties what one finds is that, in October 1919, there is no suggestion that defendant 1 wrote to the plaintiffs or to anybody else so as to change his status or position giving notice to them that he would be no longer their tenant or anything of that kind. The evidence on the part of the landlords was that they regarded defendant 1 as a tenant and not as a trespasser and that defendant 1 was really in the position of a tenant holding over upon the terms of the kabuliati of 1909. In my judgment, that was his position. The principle at all events of S. 116, T. P. Act a principle which in no way depends upon that enactment, is clear enough. If a tenant holds over, it only requires the consent of the landlord to keep him as a tenant upon terms which can be discovered from the proper source. In my opinion, the learned Judge was entirely right when he dealt with this suit on the footing that at the time it was brought defendant 1 was a tenant of the plaintiffs holding over with the consent of the lessors.

That being the position, there can be no doubt that the plaintiffs had possession of the land to found a suit for partition and I see no objection at all to this suit upon that score. In these circumstances, the learned Judge's reasoning is this. We are here partitioning land which is in the occupation, so far as the plaintiffs' share is concerned, of defendant 1 as a tenant. The terms of the tenancy deal expressly with the question of improvement. At the end of the term, the various covenants or bargains that have been made with defendant 1 will take effect. He was to be entitled to put up any structures he liked on a part of his tenancy. Equally he was not to be entitled to make the landlords, the plaintiffs, pay for them. He was to have the right to take them away, if he wanted. Otherwise, as between the lessee and the les-



sors, when the terms came to an end, he was to have no further advantage for his expenses on the improvements. In these circumstances, the learned Judge says that it is not reasonable or possible in this partition suit to do more than to give to defendant 1 a one-third share directing that, as far as possible, his one-third share should be the land upon which these structures of his have been erected. Mr. Hira Lal Chakraborty contends before us that that is not enough, because his client after 1904 was a co-owner. He says that his client, defendant 1 is to be treated as if he were a co-owner in possession of the whole as such and he says further that it is a general principle of equity that when a man, as co-owner, has made improvements over the whole, *prima facie* he is entitled not merely to get an allotment of his share which will carry with it, so far as possible, the benefits of the improvements but he is entitled *prima facie* either to make the other co-owner pay for the improvements he has made upon the rest of the property or else the other co-owners must get a smaller share in order that the person who has made the improvements may reap the value of his expenses.

In my opinion, this appeal fails upon two main grounds in that respect as to which Mr. Chukerbutty in a very able and careful argument has not convinced me at all. First of all, it seems to me that, as between defendant 1 and the plaintiffs, defendant 1 who took his *kabuliat* after he became a co-owner, namely, in 1909, is not in the position of a co-owner in occupation of the whole as such. He is a person who has definitely attorned to them in respect of the plaintiffs' share. He has made a bargain with them, notwithstanding that he is a co-owner a bargain that he will get possession of the plaintiffs' share as a tenant with the right to build what he likes on the term that he is not to charge the plaintiffs with the costs that he may have expended. It appears to me, therefore, that the general principle applicable to a co-owner who is in possession of the whole as such is not to be applied to this case without qualification. *Prima facie*, this matter of improvement is a matter upon which the plaintiffs and defendant 1 have long ago made their bar-

gain with their eyes open and that is an important circumstance when we come to consider the equity in this case. In the second place, Mr. Chuckerbutty's case here would require us to put the law too high. I am prepared to assent to the proposition that where a person has expended money upon a joint property and a time comes to partition it, it is reasonable and right to endeavour to give him such an allotment as may enable him to reap the advantage of what he has expended upon improvements. But when we are asked to go beyond that and to say that it is the *prima facie* right of such a co-owner expending money to improve the whole or a greater portion of the joint land to have in one way or another recouped to him by his co-owners the value of the improvements which they got in the shares which are allotted to them, then I say that that is not the law. In some cases it may be possible to go so far. In the case before North, J, for example, namely *In re : Jones, Forrington v. Forrester* (1) money had been borrowed at the instance of both the joint tenants, it had been secured on the share of one, it had been borrowed for the purpose of making improvements and the property at the time of the suit had to be sold and the price was going to be enhanced by reason of the improvements which had been made. In such a case as that, it may be right enough to give to the person who has made the improvement not only his one-third of the purchase money but such a further sum as represents improvement which he has made. But in a case which is not such, in a case where the improvements have been made by a co-owner at his own will I do not say improperly, in any way, but at his own will it is a very different matter; *prima facie* it is not a thing which the Court will do to endeavour to make sure that the owner who has improved the property will get every penny to himself of the advantage which his money has created. See, in this connexion, *Freeman on Co-tenancy and Partition*, Edn. 2, p. 680 :

"If one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so

(1) [1893] 2 Ch. 461=62 L. J. Ch. 996=69 L. T. 45.



made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land; because it would be the improver's own folly to extend his own improvements over the whole estate and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case, the improver stands as a mere volunteer and cannot, without the consent of his co-tenant, lay the foundation for charging him with improvements."

Prima facie, it seems to me that such an owner will be given an allotment, so far as is possible, that may enable him to keep the advantage of his improvements. But it requires a special case and a very strong case for the Court to go any further than that.

I notice that, in two cases of this Court which were cited to us in which Asutosh, J. Mookerjee, delivered judgment, namely, the cases of *Upendra Nath v. Umesh Chandra* (2) and *Jagannath Marwari v. Chandni Bibi* (3) there is no reason for saying though the language is undoubtedly wide in certain of the expressions, that Mookerjee, J., intended to lay down a proposition beyond what I have endeavoured to state. He was most careful in one of those cases to say that the question whether one could go further and invoke the aid of equity so as to enable a co-sharer to get the whole advantage of his own improvements was a question which did not arise. For these reasons, I think that, although the learned Subordinate Judge perhaps took a certain risk in striking so soon as he did and in refusing to go into evidence about these improvements, he arrived at a right conclusion. It does not seem to me that it is necessary or advisable that we should require the defendant-appellant to give particulars of the dates and the characters of the various improvements he claims to have made upon the property or to direct any enquiry thereon because it is sufficiently clear that it is not in this case possible upon any principle of equity for the Court to do more for him than the decree of the learned Subordinate Judge has done.

Certain other points have been taken by the learned advocate for the appellant which are only minor points and

(2) [1911] 15 C. W. N. 375=6 I. C. 346=12 C. L. J. 25.

(3) A. I. R. 1921 Cal. 647.

need not be dealt with at any length. One is that there was a defendant Khattiza Bibi a married lady who lived at an address in Natal in South Africa which appears to have been known to the parties. She was served quite properly by a registered letter. I observe that this registered letter was apparently a registered post-card. It does seem to me rather inadvisable to send such a notice in the form of a post-card. But she was served in a way that complied with the rules under O. 5, Civil P. C. Then, it is said that there was no acknowledgment of the return and another notice was sent again. That was quite proper and was a fresh service under the rules. Thereupon the plaintiffs getting somewhat excited about the position appear to have gone to the learned Subordinate Judge and got an order under the guise of an order for substituted service an order according to which a copy of the notice was put up in the Court House of the twenty-Perganas by way of giving information to the lady who by all consent was then living with her husband somewhere in Natal in South Africa. That is an absurdity. It is certainly not a reasonable way of serving notice. Substituted service is not to be used in any way which is unbusiness like and ridiculous. But in this case, there is ample evidence that under O. 5, R. 25, Civil P. C., this lady was properly served by a proper notice being sent to her and posted to her in the ordinary manner. In these circumstances, it was not necessary to have recourse to the somewhat peculiar procedure that had been adopted in this case under the guise of substituted service.

The last point which remains for consideration is with reference to a plot of 9 cottas which does not appear in any of the leases granted to defendant 1 or his predecessor Melosh. As regards that, defendant 1 makes a claim to have acquired a complete title thereto by adverse possession. That is not an easy thing to make out as against a co-owner at any time. But on the evidence of the defendant-appellant's own witnesses in this case, it seems to me that that claim is wholly unsubstantial. This plot of 9 cottas is a piece of land on which there seems at first to have been a cattle-shed and it was not originally leased to Mr.



Melosch for the purposes of his mill. As time went on, the owner of the mill seems to have taken to use it. He seems to have used it as a place where some of his coolies might sleep at night. I need not say that one co-owner by making use of the property in that way does not acquire adverse possession as against the other co-owners. The case of adverse possession on the oral evidence can safely be rejected.

In the circumstances mentioned, it appears to me that this appeal fails and must be dismissed with costs to the plaintiffs-respondents. This hearing-fee is assessed at fifteen gold mohurs. The advocate for the minor defendant respondents says that he has been siding with the appellant.

**B. B. Ghose, J.**—I am entirely of the same opinion.

V.B./R.K.

*Appeal dismissed.*

### **A. I. R. 1929 Calcutta 558**

**B. B. GHOSE AND PANTON, JJ.**

*Eradat Sarakar*—Appellant.

v.

*Abu Ahamed and others*—Respondents.

Appeal No. 28 of 1926, Decided on 7th March 1929, against original decree of Sub-Judge, Birbhum, D/- 23rd December 1925.

**Cosharer—Fraud—Cosharers colluding to deprive other cosharers of property by purchase at Court sale for arrears of rent cannot retain property as against other cosharers and aggrieved cosharers are entitled to mesne profits, while out of possession.**

A property was put up for sale for arrears of rent. One of the cosharers charged to deposit the amount in Court and avoid sale colluded with the third person who was also a cosharer and with a view to deprive the other cosharers of the property caused the property to be sold. The property was purchased by the (third person) cosharer promising four annas share to the cosharer charged to deposit the amount. Aggrieved cosharers brought a suit for setting aside the sale.

**Held :** that the purchasing cosharer was to be regarded to be in possession of the property for the benefit of the aggrieved cosharers according to their several interests at the date of sale. The purchasing cosharer and the colluding cosharers were in the position of trustee on behalf of the cosharers and as soon as the aggrieved cosharers deposited in the Court their share of the purchase money according to their share of the estate with interest thereon they would be entitled to a reconveyance of the property with respect to their shares as well as to profits received by them : *A. I. R. 1916 P. C. 227 ; A. I. R. 1923 P. C. 73, Ref.*

*S. C. Basak, Gopendra Krishna Banerji and Nasim Ali*—for Appellant.

*Kanjilal, Rabindra Nath Chowdhury, and Surji Kumar Aich*—for Respondents.

**B. B. Ghose, J.**—This is an appeal on behalf of defendant 1 which arises out of a suit brought by a large number of plaintiffs for setting aside a revenue sale of towzi No. 1080 of the Birbhum Collectorate. This estate belonged to a large number of cosharers including several defendants in this case. It is not necessary to give the shares of the parties. The important fact is that defendant 3 had a small share as proprietor and another share as purchaser of an interest which consisted of a mokarari mourashi ease in favour of defendants 20 to 26. There was a small arrear for the share of some of the plaintiffs. There was no separate account, but by an arrangement among the several cosharers of the property, they used to pay revenue according to their shares in the collectorate. The revenue of the March Kist of 1922 being in arrears, the whole estate was advertised for sale. Defendant 20 applied for payment of the arrears to the collectorate and the Collector granted permission to pay the arrears on 20th June 1922. But although the amount was a small one, it was not paid, and the property was put up to sale on 26th June 1922 and purchased by defendant 1 for Rs. 1,600. It is found by the Court below that the property was valuable and would be worth about Rs. 12,000. The plaintiffs alleged that they sent one of their cosharers whose name is Md. Ahmed with sufficient money to make the deposit before the property was put up to sale. But this Md. Ahmed colluded with Abu Taher, defendant 3, and did not pay the amount with the object that the property would be sold at the revenue sale and purchased by Abu Taher who would give four annas of the property to Md. Ahmed after the sale. Shortly stated, that is the story of the plaintiffs and they asked for setting aside the sale on the ground of fraud of Abu Taher who is alleged to have purchased the property in the benami of defendant 1. The defendants denied every statement made by the plaintiffs. The pleadings of the parties are very lengthy and the issues framed in the Court below were numerous. The real questions which we have to consider in this case are covered by



issues 9, 10 and 11. The questions were first, whether defendant 1 was a benamdar for defendant 3 and secondly whether the plaintiffs sent Md. Ahmed with money to make the deposit as alleged by them and, if so, whether Md. Ahmed and defendant 3 in collusion did not pay the arrears and caused the property to be sold with a view to depriving the co-sharers of the property. Various other questions were raised before the Subordinate Judge and those questions were found mainly against the plaintiffs' contention. The Subordinate Judge, however, decided the three important questions in favour of the plaintiffs. His judgment is a very well considered one and we do not think we need elaborate the facts dealt with very carefully by the Subordinate Judge.

He has found that defendant 1 was lately a servant of defendant 3 and was his benamdar. He has also found by a careful analysis of the evidence that the plaintiffs did actually send the money required for preventing the sale by making a deposit of the arrears. But Abu Taher who is very rich and who went to Suri, where the sale was held, specially for the purpose of purchasing the property himself entered into an agreement with Md. Ahmed who was charged with the duty of depositing the arrears, not to make the deposit and to cause the property to be sold. The purchase of the property being made under such circumstances the Subordinate Judge quite rightly held that the purchaser was guilty of fraud towards his co-sharers, and that he could not retain the property as against them. He has, therefore, made a decree, as was made by their Lordships of the Judicial Committee of the Privy Council in the cases of *Deo Nandan v. Janki Singh* (1) and *Satish Chandra v. Satish Kanta* (2). He has made a decree to the effect that on payment of the share of the purchase money which amounted to Rs. 1,600 by the plaintiffs according to their shares of the estate, defendant 1 should reconvey to the plaintiffs at his own cost that share of the estate and it was also directed that defendants 1 and 3 should pay to the plaintiffs a certain sum of money as mesne profits with interest.

(1) A. I. R. 1916 P. C. 227=44 Cal. 573=44 I. A. 30 (P. C.).

(2) A. I. R. 1923 P. C. 73.

The contention on behalf of the appellant is that he is not the benamdar of defendant 3 and that there was no fraud as found by the Subordinate Judge and that the plaintiffs are not entitled to a conveyance of the property. It is hardly necessary to discuss the evidence as we entirely agree with the findings of the learned Subordinate Judge on those points. It was argued that the plaintiffs are not entitled to any mesne profits as they would only be entitled to get the property on payment of their shares of the purchase money. But the Judicial Committee has laid down that in such cases the defendant must be held to be in possession of the property for the benefit of the plaintiffs and the other co-sharers according to their several interests at the date of the sale. If that is so, defendants 1 and 3 are in the position of the trustees on behalf of the plaintiffs and as soon as the plaintiffs deposit the money which they have been ordered to pay, they would be entitled to a reconveyance of the property with respect to their shares as well as to receive the profits realized by those defendants on account of their shares. The last argument of the appellant also fails.

There is, however, one small point which must be found in favour of the appellant and it is this: that the learned Judge has directed the plaintiffs to deposit in Court seven annas odd share of the purchase money (Rs. 1,600) within three weeks from the date of the judgment. The learned advocate for the appellant contends that he should have been allowed interest on that sum. That proposition is quite correct and in accordance with the judgment of the Privy Council in the cases cited above. We, therefore, make this variation that the plaintiffs are bound to pay into Court seven annas 16 gandas 2, 247/792 karas share of the purchase money (Rs. 1,600) plus interest at the rate of six per cent per annum from the date of the sale, that is, 26th June 1922, up to the date of their depositing their share of the purchase money into Court, that is, 27th January 1926. The learned advocate for the plaintiffs-respondents states that they have deposited a sum which would cover that interest. Whether that is so or not, it is unnecessary for us to decide. If the interest is not covered by the sum that has been deposited, the plaintiffs



must deposit the balance before the conveyance is executed by defendant 1 in their favour. With this variation this appeal is dismissed with costs, payable only to the plaintiffs-respondents.

**Panton, J.**—I agree.

V.B./R.K.

*Appeal dismissed.*

### **A. I. R. 1929 Calcutta 560**

**RANKIN, C. J. AND C. C. GHOSE, J.**

*Manmotta Kumar Bose*—Plaintiff—Appellant.

v.

*Abu Jafer Mahomed Hashin Ali*—Defendant—Respondent.

Appeal No. 8 of 1928, Decided on 27th April 1928.

**Presidency Small Cause Courts Act, S. 22—Suit cognizable by Small Cause Court instituted in High Court—S. 22 applies—Plaintiff is not entitled to costs unless Judge certifies the case for trial by High Court.**

Where the suit is cognizable in the Small Cause Court and where it is instituted in the High Court, the provisions of S. 22, Small Cause Courts Act are attracted. In cases governed by S. 22 no costs are allowable to the plaintiff, unless the Judge who tries the suit certifies that it was one fit to be brought in the High Court. A party, having chosen to avail himself of O. 37, Civil P. C., in a suit for the recovery of a sum less than the amounts mentioned in S. 22, takes the risk of having no costs allowed to him unless he can induce the Judge to certify that it is a fit and proper case to be brought in the High Court. [P 560 C 2]

**B. K. Chaudhuri**—for Appellant.

**C. C. Ghose, J.**—This appeal relates to a question of costs. It is settled law that the Court of Appeal will never interfere with the order of the Judge in the trial Court as to costs, unless the order offends against some well recognized principle or unless the Court of Appeal feels that it would be unjust to the party against whom it is made if the order be allowed to stand.

In this case, the plaintiff's suit was for recovery of a sum of Rs. 705 and it was instituted under O. 37, Civil P. C. The claim arose on a promissory note executed by the defendant on 23rd December 1926, for Rs. 600 with interest thereon at 24 per cent per annum. Pearson, J., made a decree on 9th January 1928, for the amount claimed, but he did not allow any costs to the plaintiff.

On appeal it is contended on behalf of the plaintiff that, having regard to the words used in O. 37, R. 2, sub-Cl. (2), Civil P. C., the plaintiff was entitled, as a matter of right, to a decree for costs on

the prescribed scale, i. e., costs on scale 1. The plaintiff argues that O. 37, Civil P. C., does not apply to the Small Cause Court and that, therefore, he, having instituted the suit in the High Court, ought not to be held disentitled to costs.

The question of procedure under O. 37, Civil P. C., and the question of the right to institute a suit for the recovery of a sum of Rs. 705 in the Small Cause Court are entirely different. Ordinarily, the plaintiff who avails himself of the procedure indicated in O. 37, in the event of O. 37, R. 2, sub-Cl. (2), being held applicable, is entitled to his costs; but where the suit is cognizable in the Small Cause Court and where it is instituted in the High Court, the provisions of S. 22, Presidency Small Cause Courts Act, are attracted. In cases governed by the last mentioned section, no costs are allowable to the plaintiff, unless the Judge who tries the suit certifies that it was one fit to be brought in the High Court. I am unable to see why the provisions of S. 22, Presidency Small Cause Courts Act, should not be held applicable to this case. The plaintiff was not bound to avail himself of the procedure indicated in O. 37, Civil P. C., but he having chosen to avail himself of that procedure in a suit for the recovery of a sum less than the amounts mentioned in S. 22, Presidency Small Cause Courts Act, took the risk of having no costs allowed to him unless he could induce the Judge to certify that it was a fit and proper case to be brought in the High Court. In this case, it would appear from the minutes of the trial before Pearson, J., that the learned Judge considered the matter of costs and being apparently of opinion that the case was not one fit to be brought in the High Court, disallowed costs to the plaintiff. It may be that in some instances of like nature costs have been allowed to the plaintiff, but, on fuller consideration, I am of opinion that the question of costs in a case of this description is regulated by the provisions of S. 22, Presidency Small Cause Courts Act.

The result is that this appeal fails and must be dismissed. As the respondent does not appear, there will be no order for costs.

**Rankin, C. J.**—I agree.

R.K.

*Appeal dismissed.*



**A I. R. 1929 Calcutta 561**

B. B. GHOSE AND PANTON, JJ.

*Jyotirupa Devi*—Defendant—Appellant.

v.

*Satish Kantha Roy and another*—Plaintiffs—Respondents.

Appeal No. 208 of 1927, Decided on 26th April 1929, against the original decree of the Addl. Sub. Judge, Jessore, D/- 7th June 1927.

**Specific Relief Act. S. 21**—Covenant granting right to realize rent, manage debuttar property, and perform Sheba on behalf of the covenantee, cannot be enforced.

A Solenama provided that "Sm. J. hands over the charge of realization of the income of the debuttar properties in her share to K and his brother. They shall realise the rents of the said debuttar properties from the tenants; as empowered by the said Rani as well as the produce, etc., of the Khamar lands. And if necessary they shall be entitled to exercise all rights of a proprietor or Shebait for recovery of possession in case they are dispossessed from any portion of the said property. That is to say they will hold possession of the said property and they shall perform the Debsheba from the income of the same as trustees and agents of the said Rani. The brothers sued the executrix for specific performance of the term.

**Held:** that upon the proper reading of the language used the executrix did not desire to give up her interest as Shebait in favour of the plaintiffs. What she wanted to do was to clothe the plaintiffs with the right to realise rents, manage the property and perform the sheba on her behalf as her trustees and agents. No right to any property was agreed to be conveyed but only the right of management as agent and therefore according to the provision of S. 21, it was not a contract which could be specifically enforced.

[P 562 C 2]

*Jogesh Chandra Roy, Rupendra Kumar Mitter and Benode Lal Mukherjee*—for Appellant.

*H. D. Bose, Brojo Lal Chakravarti and Jatis Chandra Guha*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the defendant against the judgment and decree of the Additional Subordinate Judge of Jessore, dated 7th June 1927. The suit was brought for enforcing specific performance of a contract embodied in a Solenama dated 6th May 1920 by which two civil suits namely. Suit No. 295 of 1929 brought by the plaintiffs against the defendant and Money Suit No. 279 of 1919 brought by the defendant against the plaintiffs were compromised. The plaintiffs in the pre-

sent suit are related to the defendant as brothers of her deceased husband. The defendant's husband was separate from the plaintiffs. He died on 6th May 1927 when defendant was probably a minor or had just attained majority having completed eighteen years of age. On 7th August 1917 she applied for succession certificate for about Rs. 9,000 which, she claimed, was due to her husband from third parties. The plaintiffs put in an objection that she could not have the power of disposal of the money. It appears from the subsequent conduct of the parties that there was not much love lost between them: the defendant sued the plaintiffs for collections made by them and for some moveable properties in her suit in 1919 and the plaintiffs sued the defendant for taking the properties inherited by her from her husband out of her hands on the ground of waste and mal-administration. In their suit the plaintiffs alleged that the defendant was a person of tender age and inexperienced in the conduct of business. The defendant had brought another suit against the plaintiffs, as appears from the Solenama itself for accounts and for a certain sum of money, which suit was not proceeded with, because she did not pay the proper Court-fees after the compromise of the suits already referred to. After the petition of compromise was filed in those two suits they were dismissed according to the terms of the compromise.

Subsequently on 14th June 1920, the defendant executed three documents in favour of the plaintiffs in terms of the provisions contained in Cl. 2 of the petition of compromise. Difference arose between the parties with regard to the terms of Cl. 3. There was some correspondence between the pleader for the defendant and the pleader for the plaintiffs. Ultimately, the plaintiffs wanted to enforce the terms by way of execution which was rejected on final appeal to this Court, which was of opinion that the terms of the Solenama could not be enforced in execution. The plaintiffs stated in their plaint that on that account they have brought this suit for specific performance of the contract. The defendant took various pleas against the claim of the plaintiffs, and, as usual, a large number of issues was framed by the Court below. The Subordinate Judge



has decided all the important issues against the defendant and he finally directed specific performance of the contract and it was decreed that the defendant do execute within two months from the date of the judgment an Arpannama in favour of the plaintiffs in terms of the draft duly approved by the Court and within the said time she do further execute and register a kobala in respect of the rents in arrear in terms of the draft submitted by the plaintiffs.

The defendant appeals from that decree and the points taken on her behalf are:

(1) That there was no intelligent execution of the solenama by the defendant.

(2) That the terms of the contract are so unfair and so one-sided that specific performance should not be granted in the exercise of the discretion of the Court;

(3) That the solenama requires registration and as it is an unregistered document, it cannot be put in evidence;

(4) That the agreement was only with regard to a deed of management and no specific performance can be enforced of such an agreement.

(5) No specific performance should be allowed for executing a kabala for arrears of rent; and

(6) That the agreement for certain properties which the defendant is alleged to have undertaken to make Debutter cannot be enforced by the plaintiffs but it can only be enforced by the idol. (His Lordship after discussing evidence with regard to first point proceeded). With regard to the second point, it is urged that the terms are unfair in that the lady gives up her interest in certain dwelling houses belonging to her husband and undertakes to grant a lease of certain properties to the plaintiffs and so forth and the main point is also that she undertook not to adopt a son to her husband although she insisted upon the fact of having due authority from him to make an adoption. She has actually executed the document of relinquishment with regard to those properties and has executed a lease as was agreed under the solenama. Nothing, therefore, remains to be done in the circumstances as to those terms and in this case we need not consider the question as to the validity of her agreement not to adopt a son to her husband although

she maintained that she had a proper authority from him. These are questions which may be dealt with hereafter. Having regard to the view we are disposed to take in this case, it is not necessary to go into any elaborate discussion on the points urged before us. We heard elaborate arguments on all the points but after the arguments were heard the ground was cleared with regard to the actual point for decision in this case and which appears to me to be a short one.

The question is whether the agreement contained in Cl. 3 of the solenama is one which can be specifically enforced. It refers to the Debutter properties. The provision runs thus:

"Sm. Jyotirupa Devi hands over the charge of realization of the income of Debutter properties in her share to Kumar Satish Kanta Roy and Jyotish Kanta Roy. They shall realize the rents of the said Debutter properties from the tenants, as empowered by the said Rani as well as the produce, etc., of the khamar lands. And if necessary the shall be entitled to exercise all the rights of a proprietor or Shebait for recovery of possession in case they are dispossessed from any portion of the said property. That is to say they will hold possession of the said property and they shall perform the Debsheba from the income of the same as trustees and agents of the said Rani (the translation of this portion of the Bengali document in the paper-book is somewhat inaccurate)."

Pausing here for a moment, we have to consider what is the agreement contained in these words which can be specifically enforced. If the lady desired to transfer her right in the property as Shebait of the idol, then questions might have arisen as to the validity of such an agreement under the Hindu Law, which is a question of some debate. But it seems to me upon a proper reading of the language used that she did not desire to give up her interest as shebait in favour of the plaintiffs. What she wanted to do is to clothe the plaintiffs with the right to realize rents, manage the property and perform the Sheba on her behalf as her trustees and agents. No right to any property was agreed to be conveyed but only the right of management as agent and, therefore, according to the provisions of S. 21, Specific Relief Act, it is not a contract which can be specifically enforced. The rest of the clause in the Solenama referred to states that the income of the debutter property is not adequate for the expenses of the



Debsheba and hence she will make over to two Kumars the properties described in Sch. 3 below for meeting the said expenses. This does not mean that she will convey all her rights in the property in favour of the said Kumars. Therefore, reading the document in its proper sense, it seems that it does not amount to a contract which can be specifically enforced. And what was the deed that the Rani undertook to execute? It is said that the Rani shall execute in favour of the Kumars a Trust Deed or any other document, required in respect of the above-mentioned debutter and additional property. A deed for what purpose? Not giving an absolute right to the property or to the Debsheba of her share. I, therefore, think that this suit for specific performance of the alleged contract must fail, even assuming that the lady did execute the solenama with full knowledge of its contents.

With reference to the kobala in respect of the rents in arrears, the learned advocate appearing for the respondent has stated that it would be useless to make a decree with regard to that claim, because, the rents in arrears, even if the plaintiffs succeed in getting a kobala for those arrears, are long barred by limitation and the kobala for such arrears would be a useless document in their hands. It is contended by the learned advocate for the appellant that this also is a contract which cannot be specifically enforced, because it is an agreement for money. That argument is also of substance as a breach of the contract may be compensated by damages.

On the grounds stated above, this appeal must be allowed and the plaintiffs' suit dismissed with costs in both the Courts. Hearing-fee Rs. 350.

The cross-objections are not urged and are dismissed without costs.

**Panton, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 563

PEARSON AND MALLIK, JJ.

*Gopal Chandra Chakravarti and another*—Petitioners.

v.

*Suresh Chandra Sanyal and others*—Opposite Parties.

Criminal Revn. 568 of 1929, Decided on 14th May 1929, against order of Deputy Magistrate. Allipore.

**Criminal Trial**—Criminal proceedings pending civil suit between substantially same parties and on same issue—Crown prosecution—Proceedings cannot be stayed.

An accused applied for stay of Criminal proceedings pending decision in a civil suit on substantially the same issues and between substantially the same parties.

*Held*: that in the case of a crown prosecution with the Crown a party, whose interest and rights are not those of a private prosecutor, but of public justice, proceedings in a criminal Court could not be stayed pending decision in the civil suit: 13 C. W. N. 398; 23 Cal. 610; 30 Bom. L. R. 962; 24 C.W.N. 418; 2 Weir 415; 38 Cal. 106; A.I.R. 1922 Lah. 424; 5 C. W. N. 44; 30 Mad. 226; 5 C. L. J. 233; A. I. R. 1921 All. 365, Cons. [P 566 C 2]

*N. K. Bose, Probodh Chandra Chatterjee, Sures Chandra Taluqdar and Susil Kumar Banerjee*—for Petitioners.

*N. N. Sircar and Satindranath Mukerji*—for the Crown.

*Asitaranjan Ghose, Dines Chandra Roy and Bijalibhusan Sanyal*—for Opposite Parties.

**Pearson, J.**—This is an application on behalf of two accused persons for stay of certain criminal proceedings against them and three others, one of whom joined in support of the rule, before the Court of the Deputy Magistrate at Alipore, pending the disposal of a civil suit No. 40 of 1929 before the Court of the Additional Subordinate Judge, Alipore.

Accused 1 was an officer employed by one Sm. Sailasuta Devi, mother and certificated guardian of her two minor sons. The civil suit was filed by her on 25th September 1928 on behalf of the minors against the present petitioners defendants 2 and 3 and accused 1, defendant 1. It was alleged that in February 1928, defendant 1, the manager of Sailasuta, was instructed to purchase a touzi No. 151 notified for sale under the revenue laws, and was entrusted with Rs. 1,00,000 for the purpose but purchased in his own name though informing Sailasuta that it had been purchased on behalf of the estate for Rs. 85,000. Then it is said she was further informed by the manager that there would be delay in getting the matter completed, as the defaulting proprietors had instituted proceedings to have the sale set aside, and for injunction meanwhile. Upon the injunction application, it is said, it came to light that defendant 1 had fraudulently declared himself as the purchaser. This led to further enquiries and it is alleged



that defendant 1 had collusively made certain further entries in the books and utilized the Rs. 1,00,000 to purchase the touzi in his own name, and for alleged payment upon a hand note for Rs. 36,000 to Gopal Ch. Chakrabarty (accused 4)-none of which transactions were authorized by the plaintiff's mother. It is then alleged that defendant 1 is attempting to get the sale certificate in his name and deal with the property, while defendants 2 and 3 (the present petitioners) claim certain interests therein. Consequently the relief claimed is a declaration of the plaintiffs' title and injunction restraining defendants from dealing with the property.

It appears further that in October 1928, plaintiffs applied for amendment of plaint and appointment of receiver. The petitioners replied to that application on 3rd December 1928, alleging that the original purchase was made to the knowledge of the plaintiffs' mother and with her knowledge and that she knew of the handnote and had accepted it, and the subsequent transfer to him of a portion of the touzi was with her consent and knowledge.

On 29th January 1929, the petitioners filed their written statement to the same effect. On 12th March 1929, issues were settled in the suit and the next date fixed is 1st June. The issues are as follows:

1. Have the plaintiffs any cause of action?
2. Is the suit maintainable if the plaintiffs are not in possession of the property?
3. Is the Court-fee paid sufficient?
4. Is the suit barred by the provisions of Ss. 36 and 8, Revenue Sale Law under the facts of the present case?
5. Is the suit barred by estoppel, waiver and acquiescence?
6. Have the plaintiffs their alleged title to the property in suit?
7. Did defendant 1 advance a loan of Rs. 36,000 to defendant 2 out of the money of the estate on a pro-note in the name of the plaintiffs' mother in order to enable him to purchase the Ohota Hudda and one-third share of the Barra Hudda in the revenue sale under instructions from the plaintiffs' mother and guardian Sailasuta Devi?
8. Did defendant 1 make over the pro-note to the said Sailasuta Devi?
9. Did the plaintiff purchase the whole of the touzi No. 151 in the name of defendant 1 or two-third of share of Barra Hudda only as stated in the written statement under arrangement made by their mother?
10. Did defendant 1 inform the mother of the plaintiffs on 23rd February 1928 that the touzi No. 151 had been purchased on behalf of the estate?

11. Did defendant 1 commit any act of fraud in the matter of the said purchase or make any fraudulent entries in the account book as alleged in the plaint?

12. Was the touzi No. 151 purchased by defendant 1 on behalf of the plaintiffs alone as alleged in the plaint or was it purchased by defendant 1 as trustee and agent of the plaintiffs and defendant 2 in pursuance of the arrangement as stated in paras. 12 and 13 of the written statement of defendant 2? If so, what are the respective interests of the plaintiff and defendant 2 in the said touzi?

13. Are the plaintiffs entitled to the declaration and injunction as prayed for?

14. What reliefs, if any, are the plaintiffs entitled to?

On 7th December 1928 information was given to police regarding the transaction, and accused 1 was arrested on 12th December 1928, accused 2 and 3 on 14th December and the present petitioners on 24th March 1929. The police on 9th April 1929, after four months' investigation submitted a charge sheet against accused 1 under S. 409 for criminal breach of trust as an agent in respect of the sum of Rs. 1,00,000 and misappropriation by purchasing the property in his own name and fraudulently transferring portion to accused 4. The further charge against all the accused is under Ss. 120-B and 409, with having entered into a criminal conspiracy to commit the said offence under S. 409. There is also a charge of falsification under S. 477-A against accused 1 and 2 as to the entries in the account book.

The petitioners then allege that the object of the criminal prosecution is to put pressure upon them in the civil suit. They add that the issues involved are the same and they will be prejudiced in the civil suit if the criminal matter is first decided. They point to the fact that the civil proceedings were first instituted and say that the matter can best be disposed of by a civil Court.

An affidavit has been filed on behalf of the Crown by the investigating officer to the following effect. It is there stated that on 25th February 1928 accused 1 executed a conveyance in favour of accused 4 in respect of the "Choto Hudda" part of the property for Rs. 4,269 paid by accused 4 out of the Rs. 36,000 and it is also recited that accused 1 had received Rs. 29,911 for 1/3rd of the "Bara Hudda" part. A conveyance for the 1/3rd was executed on 23rd August 1928 but not registered.



On 12th March 1928 accused 4, it is said, transferred to his father accused 5, half of the Chota Hudda thus restoring to him the interest which the latter originally had in the property. According to the prosecution case the whole story of the handnote and the loan is a figment. Then it is said the plaintiffs mother only became aware of the nature of the transactions in the course of an application in the suits filed by the owner for setting aside the revenue sale, namely on 10th September, and it therefore became necessary to file the civil suit forthwith to prevent further dealing with the property.

Certain authorities have been placed before us by the learned Advocate General on behalf of the Crown and by the learned advocate for the petitioners to indicate the considerations by which a Court ought to be guided in such matters. The result is only to show that no hard and fast rule can be laid down, and that each case must be determined upon its own facts. Even if some or all of the matter materially in issue are the same that in itself cannot be a reason for staying the criminal proceedings; *Brojobashi v. Emperor* (1). There proceedings had been taken under S. 476, Criminal P. C., and accused tried to stifle them by filing a civil suit, and no stay was allowed. So no stay was granted in *Rajkumari v. Bamasundari* (2) a case where the proceedings related to an injury of an essentially personal nature under S. 499 of the nature of a private prosecution, and even there the subsequent filing of a civil suit by the accused relating to the same subject matter was not allowed as good cause for a stay. It was there pointed out that if the stay were granted the civil proceedings would be dragged out, and the decision would not affect the action of the Magistrate who must decide on the accused's criminality for himself. It was also said that the discretion to stay or not should ordinarily be left to the Magistrate. Ghose, J., says at p. 620:

"I am not myself prepared to say that as a general rule a proceeding in a criminal Court should be stayed pending the decision of a civil suit in regard to the same subject matter; but what I think I might properly

say is that ordinarily it is not desirable if the parties to the two proceedings are substantially the same, and the prosecution before the Magistrate is but a private prosecution, and the issues in the two Courts are substantially identical, that both cases should go on at one and the same time. So in *Jahangir v. Framji* (3) another case of defamation, it was said that the test seems to be whether the prosecution is public or private. Where it is public the Court as a rule in the exercise of its inherent jurisdiction, would not stay criminal proceedings. Where it was private (as in that case) there would not be the same reluctance of the Court to interfere."

The petitioners have relied on *Lucas v. Official Assignee* (4), where Jenkins, C.J. said:

"Though no invariable rule can be laid down, it is ordinarily undesirable to institute criminal proceedings until determination of civil proceedings in which the same issues are involved. It is too well-known to need elaboration that criminal proceedings lend themselves to the unscrupulous application of improper pressure with a view to influencing the course of the civil proceedings, and beyond that there is the mischief illustrated by this case of criminal proceedings being instituted with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigation of a civil Court."

While agreeing generally with the views there expressed, we must not forget that that case was one where the penal sections of the insolvency law had been invoked against the insolvent much more in the nature of a private prosecution, and much more open to the suggestion of improper pressure for behoof of the creditors. So if the object of the criminal proceedings be in reality to prejudice the trial of the civil suit or coerce accused to a compromise the Magistrate should as a general rule postpone the enquiry *Subramanyan Chetty, In re* (5). Then of other cases referred to, they are mostly of a particular class to which particular considerations would apply, relating to documents forming the basis of attack or defence in civil suits, where the other party says they are forgeries or fraudulently obtained or the like and the criminal proceedings on that count have been stayed; See *Sasi Bhusan v. Emperor* (6), *Janaki Das v. Emperor* (7), *Goborhone v. Iswar Chunder* (8), *Anna Ayyar*

(3) [1927] 30 Bom. L. R. 962.

(4) [1920] 24 C. W. N. 418=56 I. C. 577=21 Cr. L. J. 481.

(5) 2 Weir 415.

(6) [1911] 38 Cal. 106=7 I. O. 317=12 C.L.J. 270.

(7) A. I. R. 1922 Lah. 424.

(8) [1901] 5 C. W. N. 44.

(1) [1909] 13 C. W. N. 393=1 I. C. 485=11 Cr. L. J. 4.

(2) [1896] 23 Cal. 610.



v. *Emperor* (9) *Ram Charan v. Emperor* (10), where however there was no appearance to show cause. In *Debi Mahto v. Emperor*, a stay was ordered for proceedings under Ss. 193 and 209, I.P.C., pending an appeal against an order of the civil Court revoking a succession certificate on the ground that appellant was not related to deceased. In this case also no cause was shown. Then there may be cases where the proper course may be to expedite civil proceedings where a question of fact involved therein is also raised in criminal proceedings *Raj Kumar v. Emperor* (11).

An examination of these cases shows that no hard and fast rule can be laid down, and that each case must stand upon its own facts. Here one may agree that in some of the issues in the civil suit especially 7, 11 and 12, the matters to be agitated will be in substance the same as in the criminal proceedings and the parties are substantially the same. It may be of course that the suit will fail upon one of the technical issues such as No. 4 when the merits would never be gone into. Again, it is all very well to say that the plaintiffs have the conduct of the civil suit and that it rests in their own hands to bring it to an early conclusion, while the case is fixed for the 1st June. At the very best it would take a considerable time before the trial would be completed and judgment could be given, and then the matter would not in the ordinary course be disposed of, up to the highest tribunal of appeal, for another 4 years at a moderate estimate. I do not consider that it disposes of the matter to say that the criminal proceedings should be stayed because in the criminal case the accused's mouths are shut, whereas in the civil case they will be able and ready to give their own evidence. If that argument were to prevail, it would apply in every case of this nature, and there would be no need to go further. Assuming the facts disclosed by the prosecution to be true, it was essential for Sailasuta with all speed, after what she discovered in the interlocutory proceedings in the other suit, to file her civil suit to protect the title to and prevent dealings with the property. If her information to the police is at a

somewhat later date it was not unreasonably so. It is now a fact that it is a Crown prosecution with the Crown a party, whose interests and rights are not those of a private prosecutor, but of public justice. I agree that indirect motive or coercion by way of pressure on the defendants in the civil suit might lead a Court to stay criminal proceedings; but in the present case there is no room for that. It is a public prosecution and none the less so because the police have in the first instance no choice but to enquire into the offences charged. Lastly, as pointed out by the learned Advocate General, an offence under S. 120-B is non-compoundable.

In the facts and circumstances of this case as presented to us, I am of opinion that the decision arrived at by the learned Magistrate was right and should not be interfered with by this Court. The rule is accordingly discharged.

**Mallick, J.**—I agree.

K.N./R.K.

*Rule discharged*

**\* A. I. R. 1929 Calcutta 566**

MITTER, J.

*Bipul Behari Chakravarty*—Plaintiff  
—Petitioner.

v.

*Nikhil Chandra Chakravarty and others*—Defendants—Opposite Parties.

Civil Rule No. 1558 of 1928, Decided on 17th April 1929, from decree of 1st Munsif, Comilla, D/- 11th September 1928, in Small Cause Suit No. 219 of 1928.

(a) Interpretation of Statutes—Act re-enacted after judicially construed—Construction should be deemed to be recognized.

It is a well settled principle of construction that the legislature must be presumed to know not only the general principles of law but the construction which the Courts have put upon particular statutes and when a section of an Act which had received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of the construction.

[P 567 C 2]

\* (b) Civil P. C., S. 11 — S. 11 is no bar to fresh suit for mesne profits though in the first suit the decree was silent in regard to future mesne profits.

In a suit for possession of certain land and future mesne profits a decree was obtained for possession of the land. On execution of the decree, decree-holder obtained possession of the land and then brought a suit for mesne profits for the period between the date of the prior suit and the date on which he obtained possession of the land through Court in exe-

(9) [1907] 30 Mad. 226.

(10) [1907] 5 C. L. J. 233.

(11) A. I. R. 1921 All. 365=43 All. 180.



oution of the decree obtained in previous suit. A preliminary objection was raised that the claim for mesne profits was barred by S. 11, as there was a prayer in the previous suit for future mesne profits and as the decree in that suit was silent in regard to mesne profits.

*Held* : that the suit was not barred by S. 11: 41 *Mad.* 188 ; 40 *All.* 292, *Foll.* ; 44 *Bom.* 954, *Diss. from.* [P 568 C 1]

*Shyama Prasanna Deb* — for Petitioner.

*Gunendra Krishna Ghose* for *Hiran Kumar Roy*—for Opposite Parties.

**Judgment.**—This rule which was obtained on behalf of the plaintiff relates to a suit in which the plaintiff claimed mesne profits for the years 1332 to 1334 B. S. a period subsequent to the period when he obtained a decree for khas possession in title Suit No. 102 of 1924 brought by him in the Munsif's Court at Brahmanbaria. His case is that he took delivery of possession of the land decreed to him in that suit on 25th February 1928 which corresponds to 12 Falgoun 1334 B. S. He consequently asks for recovery of mesne profits from 1332 up to 1334 Falgoun the date of his taking possession. The defendants took a preliminary objection that the claim for mesne profits was barred by S. 11, Civil P. C., as there was a prayer in the previous suit for future mesne profits and as the decree in that suit No. 102 of 1924 was silent with regard to future mesne profits it must be held that the claim was disallowed. This preliminary objection prevailed with the Small Cause Court Judge who tried the suit and the Munsif exercising the Small Cause Court powers followed the decision of the Bombay High Court in the case of *Atmaram Bhaskar v. Parashram Ballal* (1), in support of his view that plaintiff's suit was barred by the doctrine of *res judicata*. He accordingly dismissed the suit.

The plaintiff has obtained this rule and it is contended on his behalf that the decision of the Bombay High Court does not take the correct view and is opposed to decisions of the Madras High Court and the Allahabad High Court. It is further contended that the decisions were unanimous under the Code of 1882 that in circumstances like the present a fresh suit for future mesne profits would not be barred and that the change effected by the Code of 1908 does not in any way affect the decisions under the

old Code. I think the contention of the petitioner is sound and must be given effect to. It appears that in a series of cases under the Code of 1882 it was held in this Court that S. 13, Civil P. C., of 1882 did not bar a suit for future mesne profits which was claimed in a previous suit between the parties, but in regard to which the decree was silent, the mesne profits being for a period subsequent to the institution of the first suit. It is not necessary to refer to all the cases but reference may be made to one case as a type.

The case of *G. S. Hays v. Padmanand Singh* (2), may so be referred to. The question for consideration is if there is any change in the Code of 1908 which justifies the view which has been taken by the learned Judges of the Bombay High Court in the case which has been cited by the Munsif. It appears to me that the provision with regard to mesne profits was contained in Ss. 211 and 212 of the Code of 1882 and O. 20, R. 12 of the present Code is, in my opinion, substantially the same and all that has been done in the present Code is that the two sections of the old Code have been amalgamated into one. The Legislature when enacting the Code of 1908 was certainly familiar or must be taken to have been aware of the unanimity of the decisions of all the High Courts in India as to the view, viz., that a fresh suit for mesne profits would not be barred if the decree in the suit for recovery of possession is silent with regard to the same. It is a well-settled principle of construction that the legislature must be presumed to know not only the general principles of law but the constructions which the Courts have put upon particular statute and when a section of an Act which had received a judicial construction is re-enacted in the same words such re-enactment must be treated as a legislative recognition of the construction. If the Legislature had intended to overrule the unanimous decision of all the High Courts on the point I should think that it would have used clear and apt language for that purpose. Such intention would not be inferred indirectly or by mere implication. That being the position, I think the learned Judges of the Madras High Court took the right view and I agree with what has been said by

(1) [1920] 44 *Bom.* 954=58 *I.C.* 419=22 *Bom.* L.R. 982.

(2) [1903] 32 *Cal.* 118.



Sir John Wallis, C. J., of the Madras High Court in this behalf in the case of *Doraiswami Ayyar v. Subramania Ayyar* (3). The learned Chief Justice said :

"the word 'relief' in the explanation means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief such as mesne profits accruing after the date of the suit as to which no cause of action had then arisen, but which the Court was nevertheless expressly empowered to grant. The explanation having been reproduced in exactly the same words, the presumption is that it was intended to have precisely the same effect. I do not find any sufficient indication to rebut this presumption in the fact that Ss. 211 and 212 of the old Code were amalgamated to form O. 20, R. 12. The change introduced by the new rule is that the award of mesne profits in all cases is to be preliminary decree, and that when ascertained they are to be embodied in a final decree, whereas under Ss. 211 and 212 they were to be ascertained in execution. This change does not appear to me to affect the construction of Explan. 5. S. 11, nor do I think is affected by the omission in S. 47 of the new Code of the proviso to the corresponding S. 244 of the old Code."

This view of the Madras Full Bench has been followed by the learned Judges of the Allahabad High Court in the case of *Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan* (4). In that case the learned Chief Justice Sir Henry Richards and Pramada Charan Banerjee, J., maintained the view that there was nothing in the Code of 1908 which would suggest that the earlier decisions under the Code of 1882 were no longer good law. I prefer to follow the view of the Madras and the Allahabad High Courts and with great respect I do not agree with the narrow view taken by the learned Judges of the Bombay High Court in *I. L. R. 44 Bom. 954*, which has already been cited.

The result is that this rule must be made absolute. The judgment and decree of the Small Cause Court Judge dismissing the plaintiff's suit must be set aside and the case sent back to him in order that he may retry the suit on the merits. The petitioner is entitled to his costs of this rule the hearing fee of which I assess at one gold mohur.

K.N./R.K.

*Rule made absolute.*

(3) [1917] 41 Mad. 188=33 M.L.J. 699=6 M. L. W. 784=42 I. C. 929=(1917) M. W. N. 847 (F.B.).

(4) [1918] 40 All. 202=44 I.C. 88=16 A.L.J. 182.

## A. I. R. 1929 Calcutta 568

JACK AND MITTER, JJ.

*Abhoya Charan Sen and others*—Plaintiffs—Appellants.

v.

*Hem Chandra Pal and others*—Defendants—Respondents.

Appeal No. 597 of 1927, Decided on 5th March 1929.

**Landlord and Tenant—Rent—Suspension—Tenant deprived of occupation of part—Rent due being entire sum, landlord not entitled to any rent.**

The doctrine of suspension of rent depends solely on this that the rent due is in respect of the land demised. If therefore the tenant is not given occupation of the whole of the land demised, landlord has no right to the entire rent and unless he has a right or some equity to an apportionment he can recover nothing on the contract. The whole basis of doctrine is that rent due is an entire sum.

The landlord dispossessed the tenure-holder from a small part of the land demised and gave khas possession to a third person. The land was included in the patta.

*Held* : that the conduct of the landlord was mala fide and he was not entitled to any rent at all : *A. I. R. 1925 P. C. 97, Rel. on.*; 24 Cal. 296; 14 C. W. N. 207n.; 12 W. R. 103; 46 Cal. 956; *A. I. R. 1926 Cal. 908*; *A. I. R. 1929 Cal. 395*; *A. I. R. 1925 Cal. 1187*; *A. I. R. 1923 Cal. 479, Ref.*; 28 Cal. 188, *Expl.*; *A. I. R. 1927 Cal. 737, not Foll.* [P 572 C 1]

(b) **Practice—Hardship.**

It is always desirable to follow a definite rule rather than to be guided by considerations of hardship in individual case : *Rutherford v. Richardson*, (1923) A. C. 1, *Foll.* [P 572 C 1]

*Brojo Lal Chakrawarty, Gunada Charan Sen, and Bimal Chandra Das Gupta*—for Appellants.

*Jogesh Chanadra Roy, Rajendra Chandra Guha and Prokas Chandra Majumdar*—for Respondents.

**Mitter, J.**—This is an appeal by the plaintiffs from a decision of the second Additional District Judge of Dacca dated 4th October 1926 reversing the decision of the Subordinate Judge, 4th Court, of the same place dated 11th December 1924.

The suit out of which this appeal arises was brought for recovery of rent with cesses and damages after apportionment in respect of a shikmi taluk more fully described hereafter. The rent sued for was for the years 1323 to 1326 B. S. The plaintiff's case, as stated in the plaint, is this. The previous proprietors of touzi, No. 315 of the Dacca Collectorate, having defaulted in the payment of the Government revenue, the mehal was sold and



purchased by one Prosonna Coomar Sen in the year 1287 B. S. Prosonna Coomar took possession of the property in due course and thereafter created two tenures by registered pattas one in favour of Nand Coomar Dutt on 21st Baisakh 1289 B. S. and the other in favour of Srish Chandra Das in the year 1290 B. S. Within this Zemindari, there had previously been in existence a tenure in respect of which the present suit has been instituted which was Sikmi taluk of the name of Jagabandhu, Raj Chunder and Raj Coomar Pal and which carried, according to the arrangement between the proprietor and the tenure holders, a rent of Rs. 415 per annum. The main defence of defendants 1 to 6 who along with others are the holders of this tenure is that the plaintiffs are not entitled to get any rent as they (defendants) have been dispossessed from a portion of the demised premises. Their case is that they were dispossessed from about 60 bighas of land by Prosonna Coomar Sen who had leased out the identical chuks which are covered by these 60 bighas to Nanda Kumar Dutt and Srish Chunder Das as stated above. The Court of first instance gave a partial decree to the plaintiffs. On appeal, the lower appellate Court has dismissed the suit in its entirety.

The findings of fact on which the lower appellate Court has rested its decision may be briefly summarized as follows. They are (1) that there can be no doubt on the facts on the record that Prosonna Coomar Sen dispossessed the tenure-holders and that he took khas possession of some of the lands of the taluk in question and settled them with Nanda Coomar Dutt and Srish Chunder Das; (2) that there is no dispute that the thak chuks Nos. 42, 43 and 90 which are included in the sikmi patta Ex. A (4) were included in the pattas granted by Prosonna to Nanda and Srish and (3) that Prosonna's conduct was wholly mala fide and that he deliberately dispossessed the Sikmidars from a considerable portion of the taluk. On these findings, the lower appellate Court came to the conclusion that the defendants were justly entitled to a suspension of the entire rent till they are restored to possession of the dispossessed lands since they had been wrongly and deliberately dispossessed by Prosonna from those lands. The conse-

quences of the act of Prosonna in Subletting the tenure to Nanda and Srish will affect the plaintiffs who stand in the shoes of Prosonna, they having purchased Prosonna's interest in the zemindary on 2nd Agharayan 1304 B. S., by a deed of sale. In this view as has already been stated, the plaintiffs' suit was dismissed by the lower appellate Court.

A second appeal has been taken to this Court on behalf of the plaintiffs and the main argument addressed before us by their learned advocate has been that the lower appellate Court is clearly in error in not allowing apportionment of the rent as the defendants have been dispossessed on the findings from a very small quantity of about 60 bighas of land out of a very large area of 2,500 odd bighas and that, in equity, the plaintiffs are entitled to get a proportionate rent or the area which is still in the possession of the defendants—that is, the entire area covered by the patta Ex. A (4) less the 60 bighas from which they have been dispossessed. There is no question that, in the present case, the rental is a lump rental and it cannot be said that the rent is not chargeable on every bit of land covered by the lease. In these circumstances, the respondents contend that the decision of the lower appellate Court is right having regard to the principle of the decisions which have been almost uniform in this Court, namely, that where the rental is a lump rental and there is dispossession from a portion of the demised premises—however small that portion may be, such dispossession is to be regarded as an eviction of the tenant from the entire premises and, therefore, there should be a total suspension of rent. The respondents have further relied on the recent pronouncement of their Lordships of the Judicial Committee of the Privy Council in the case of *Katyayani Debi v. Udai Kumar Das* (1). The appellants, on the other hand, have relied on certain observations made in a recent decision of this Court where it was said that their Lordships of the Judicial Committee did not intend to lay down the broad proposition that there should be suspension of rent in every case where there was dispossession of the tenant from the demised premises if the

(1) A. I. R. 1925 P. C. 97=52 Cal. 417=52 I. A. 160 (P.C.).



rental was a lump rental. It becomes necessary, therefore, to examine the two contentions carefully.

It appears to me that the weight of authority is on the side of the contention raised on behalf of the respondents. So far back as the year 1869 in the case of *Gopanand v. Lala Govind* (2), Sir Barnes Peacock, C. J., referred to the following statement of the law in this behalf in Bacon's Abridgment, Title Rent (M):

"Where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry and it seems to be the better opinion and the settled law at this day that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession whom by the policy of the law he ought to protect and defend."

This principle was followed uniformly till the decision of the case of *Dhunpat Singh v. Mahommad Kazim* (3). In that case, it was stated by the learned Judges that the principle to be gathered from the earlier cases was that, even if the landlord dispossessed the tenant from a portion of the demised premises, there should be no apportionment of the rent—the whole rent being equally chargeable on every part of the land demised. This principle was given a further extension in the case of *Hurro Kumari Choudhurani v. Purna Chandra* (4) where Sir Francis Maclean, C. J., and Banerjee, J., applied the principle to a case where the tenure was held under a lease which reserved the rent at a certain rate per bigha. The learned Chief Justice thought this conclusion was justified on the principle laid down in the English and Indian cases referred to in the case of *Dhunpat Singh v. Mahommad Kazim* (3). This decision was followed by Asutosh Mookerjee and Carnduff, JJ., in the case of *Surendra Nath Guha v. Kali Kanta* (5). It must be said, however, in view of the decision in *Katyani Debi v. Udai Kumar Das* (1) in which their Lordships of the Judicial Committee said that the principle could not be extended to a case where the rent was paid at so much per bigha that this de-

cision of Maclean, C. J., and Banerjee, J., in the case reported in *Hurro Kumari Choudhurani v. Purna Chandra* (4) cannot now be regarded as good law. For the first time, it appears to me that a dissenting note was struck in the case of *Annoda Prosad v. Mathura Nath* (6), in which Chitty, J., questioned as to how far the technicalities to be found in the English law should be allowed to affect the relationship of landlord and tenant in this country. Even after this decision, the course of authority has been in favour of the view that there should be an entire suspension of rent in case of dispossession by landlord from the demised premises held under a lump rent. In 1919 the case of *Manindra Chandra Nundy v. Narendra Chunder Lahiri* (7), Fletcher, J., with whom Cuming, J., concurred held, following the decision in *Neale v. Mackenzie* (8), that

"where the landlord having let out a portion of a land to an earlier lessee lets it out again to a subsequent lessee and fails to deliver to the subsequent lessee possession of the entire land leased to him, the entire rent is suspended."

Fletcher, J., pointed out in that case that the decision in *Neale v. Mackenzie* (8), had always been considered as good law; with reference to the argument that the decisions of the English Courts should not be applied to the system of law in this country, the learned Judge said this :

"But the rule that rent is suspended on account of the dispossession of the tenant by the landlord from a portion of the holding has been recognized in a number of cases in this Court and, in my opinion, it is not open to question now."

It was in this state of the authorities that the matter came up for consideration before their Lordships of the Judicial Committee in the case of *Katyayani Debi v. Udai Kumar Das* (1), to which reference has already been made and Lord Salvesen in delivering the judgment of their Lordships said :

"The doctrine of suspension of payment of rent where the tenant has not been put in possession of part of the subject leased has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject."

(2) 12 W. R. 109.

(3) [1897] 24 Cal. 296.

(4) [1901] 28 Cal. 188.

(5) [1910] 14 C. W. N. 207n.

(6) [1909] 13 C. W. N. 702=2 I. C. 123=9 C. L. J. 585.

(7) [1919] 46 Cal. 936=52 I. C. 13=23 C. W. N. 585.

(8) 1 M. & W. 747=2 Gale 174=6 L. J. Ex. 263.



It seems to me that these observations recognize the rule laid down by the Indian decisions that where the rent is fixed in a lump there would be suspension of rent on the ground of dispossession of the tenant by the landlord from a part of the demised premises. In the case of *Sushil Kumar Biswas v. Rajani Kant* (9), Bepin Behari Ghose, J., and Roy, J., expressed the opinion that these observations of their Lordships of the Judicial Committee were no authority for the proposition that there should not be any apportionment in every case of dispossession by the landlord of the tenant from a part of the demised premises where the rent was a lump rental. With great respect to these learned Judges, I should say that it is difficult to read the decision of the Judicial Committee in the way these learned Judges seem to have read it. It appears to me that there would be no point in their Lordships of the Judicial Committee referring to the law in this behalf unless they intended to lay down that that was a view from which they did not dissent, even if they did not actually prove the rule. Thus it seems to me that the Privy Council was really laying down the rule that there is to be a distinction between the two classes of cases and that, in the case of lump rental, the rule of suspensions should be applied and, in the case where the rent is so much per bigha, the rule has no application. It is to be noticed also that the observations made by B. B. Ghose and Roy, JJ., in the case reported in *Sushil Kumar Biswas v. Rajani Kant* (9), were not necessary for the decision of that case; for, in that case, the rental was a rental of so much per bigha and the observations made therein are obiter dicta and cannot prevail against the concurrent decisions in a large number of cases beginning with the case decided by Peacock, C. J., in 1869. It is also to be noticed that, in an earlier case, Bepin Behari Ghose, J., said this:

"It is true that the rule of suspension of rent on account of eviction by the landlord of the tenant from a portion of the demised premises has been adopted in this Court in a series of cases and it is too late to question the adoption of that rule in our Court now; see *Biseswar Sarkar v. Kali Churn Ash* (10)."

observations difficult to reconcile with the obiter dicta of the learned Judge in

31 *Calcutta Weekly Notes* 990. The later authorities to which reference may be made are the decisions of Page and Mallik, JJ., in the case of *Dhirendra Nath Roy v. Bhabatarini Debi* (11), where the learned Judges were in favour of the view of total suspension of rent in cases of dispossession from part of tenancies carrying lump rentals and of Greaves and Cuming, JJ., in the case of *Suresh Chunder v. Mathura Nath* (12), where the same view was adopted. Reference may also be made in this connexion to an unreported judgment of this Court in appeal from *Appellate Decree No. 2361 of 1927* which was delivered by me sitting singly on a review of the authorities and in which I came to the conclusion that the decisions of their Lordships of the Judicial Committee of the Privy Council in the case of *Katyayani Debi v. Udai Kumar Das* (1), laid down the rule of suspension of rent in cases of lump rentals. This decision of mine alluded to above which was given on 10th September 1928 was appealed from under the Letters Patent and it has been affirmed the appeal having been summarily dismissed by C. C. Ghose and Mallik, JJ., on 8th January 1929. It appears, therefore, on a review of the cases to which reference has just been made that the learned Additional District Judge has taken the correct view of the law in this behalf.

It has been argued, however, on behalf of the appellants that the facts in the present case do not give rise to the legal inference that there has been such dispossession by the landlords as to attract the operation of this rigid rule. It is said that Prosanna was a revenue purchaser and that, as he had not in his possession the sikmi patta, it cannot be presumed that the subsequent settlement of some chunks with Nanda and Srish was done with the deliberate intention of depriving the defendants of certain lands of their tenancy. The answer, as given by the learned District Judge, is that it was quite easy for Prosanna to discover after his purchase at the revenue sale what lands were covered by the patta which was granted to the defendants. It is also a significant fact in this case which has been found by both the Courts below that no rent has ever

(9) A.I.R. 1927 Cal. 737.

(10) A.I.R. 1926 Cal. 903.

(11) A.I.R. 1929 Cal. 395.

(12) A.I.R. 1925 Cal. 1187.



been realized by the plaintiffs from the defendants. The Subordinate Judge at p. 3 line 40 of the printed paper-book in this case states that no rent was ever realized by the plaintiffs from the defendants after their purchase.

It has been next argued on behalf of the appellants that the rule of law indicated above seems to operate harshly on the plaintiffs in this case for, while the defendants are in possession of a large tract of land and are making profits out of it, it is sheer injustice that the plaintiffs should be deprived of rent in respect of the portion which is in the possession of the defendants. In these cases, the rule which is followed is that the landlord must secure to the tenant quiet enjoyment of every part of the demised premises. It does not matter in the least that the area from which the tenant has been dispossessed is a small area. The law does not encourage a landlord to dispossess the tenant from land in respect of which he has been granted a lease by letting it out again to a third person after the original demise had been effected. It may operate harshly in individual cases. But it is always desirable to follow a definite rule rather than to be guided by considerations of hardship in individual cases. As is pointed out in another connexion by Lord Birkenhead in *Rutherford v. Richardson* (13), that it is undoubtedly true that it is even better that some slight degree of injustice should be done in an individual case than that the Courts should abandon the sure anchorage of a dependable rule. Once you begin to deviate from the rule on the ground that the area from which dispossession by the landlord has taken place is a small area you will not know where to stop. In the absence of any equity to apportionment the rigid rule has always been adhered to. The true principle which should guide us in cases of this kind is that laid down by the learned Chief Justice in a case to the decision in which I was also a party. The learned Chief Justice said :

"But the doctrine of suspension of rent depends solely on this that the rent due is an entire rent in respect of the land demised. If therefore the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent and unless he has a right or some equity to an apportionment he can recover nothing on the contract.

(13) [1923] A.C. 1.

But the whole basis of the doctrine is that the rent due is an entire sum *Sajjad Ahmad v. Trailokhya* (14)."

In this view, I am of opinion that the decision of the lower appellate Court is right and that it must be affirmed.

In final reply, the learned advocate for the plaintiffs appellants raised the point that whatever our decision might be with regard to the recovery of rent, it ought not to affect the right of the plaintiffs to recover cesses from the defendants. This point was not raised in either of the Courts below ; nor was it raised in the opening of the case before us ; and it would not be right at this stage to allow this large question to be raised in reply. We, therefore, do not allow the point to be raised.

The result is that the appeal fails and must be dismissed with costs.

Jack, J.—I agree.

V.B./R.K.

*Appeal dismissed.*

(14) A.I.R. 1928 Cal. 479.

## A. I. R. 1929 Calcutta 572

SUHWARDY AND JACK, JJ.

*Raj Chandra Datta*—Petitioner.

v.

*Habij Mohamed and others*—Opposite Parties.

Civil Revns. Nos. 1620 and 1621 of 1928, Decided on 4th June 1929, against order of Munsif, 1st Court, Moulvi Bazar (Sylhet), D/- 23rd August 1928.

(a) Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 52—Mortgagee of a non-transferable occupancy holding cannot make deposit.

A mortgagee of a non-transferable occupancy holding is not entitled to make deposit under S. 52, as it is there contemplated that the deposit must be made by the tenant or on his behalf: *A. I. R. 1927 Cal. 752, Foll. 27 C. L. J. 478, Ref., 23 C. W. N. 132; A. I. R. 1929 Cal. 133, Dist.* [P 573 C 1 & 2]

(b) Precedent—Conflicting decision—Single Judge differing from decision of Division Bench should submit case to Division Bench.

When a Judge sitting singly is unable to follow the decision of a division bench the better course for him is to send the case to a division bench and not pass a dissentient judgment which only governs the case in which it is passed. [P 574 C 1]

*Paresh Lal Shome and Nirod Lal Shome*—for Petitioner.

*Hemendra Kumar Das*—for Opposite Parties.



**Jack, J.**—This application has arisen out of an order of the munsif holding that the petitioner as a usufructuary mortgagee is not entitled to make a deposit under S. 52 of Act 8 of 1869 for the purpose of staying execution of a decree for ejectment for non-payment of arrears of rent. It turns on the question whether a mortgagee of a non-transferable occupancy holding is entitled to make such a deposit under S. 52, Act 8 of 1869 for the purpose of staying execution of a decree for ejectment of the tenants on account of non-payment of arrears of rent. It has been held in the case of *Kali Kishore v. Gopal Ram* (1), that a transferee of a portion of a non-transferable occupancy holding is entitled to make such a deposit. On the other hand it has been held in the case of *Baneswar Singh v. Abdul Hassan* (2) that the purchaser of a non-transferable occupancy holding is not entitled to make such a deposit and again in the case of *Shailaja Sundari Rai v. Surja Kanta Chaudhuri* (3) it has been held that the mortgagee of a portion of a non-transferable occupancy holding is entitled to make the deposit.

The case of a mortgagee differs from that of a transferee inasmuch as in the case of a mortgagee the tenant still retains an interest in the holding and if the circumstances are such that the deposit can be regarded as made on behalf of the tenant, then certainly the mortgagee would be entitled to make the deposit. But I am of opinion that under S. 52, Act 8 of 1859 it was contemplated that the deposit must be made by the tenant or on his behalf. We find this is the construction which has been put upon S. 66 (2), Bengal Tenancy Act where the wording is similar (*cf. Brojendra Nath v. Arman Shaikh* (4)). There does not appear to be any reason why in the case of a non-transferable holding the landlord should be forced to receive a deposit from a stranger whose interest he is not bound to recognize unless this is specially laid down in the Act. In S. 170, Bengal Tenancy Act, Cl. (2) of which is similarly worded, Cl. (3) has been added to show that not only the judgment-debtor but any per-

son having an interest in the holding voidable on the sale may make the deposit to relieve the holding from attachment and, under this clause it has been held that while a transferee cannot make the deposit a mortgagee can do so. If it is intended by S. 170 (2) that any one can make the deposit the addition of Cl. (3) would be meaningless as already under Cl. (2) the person referred to therein or any other person could make the deposit. Cl. (3) is apparently to enlarge the category of persons who can make the deposit which otherwise would have been limited to judgment-debtors. As the learned Judges in *Kali Kishore's* case (1) pointed out the decision in *Sarada Prosad v. Nobin Chandra* (5) may have referred to transferable holdings so that it is not necessarily an authority for the proposition that the transferee of a non-transferable holding is entitled to make the deposit. The learned Judges in *Kali Kishore's* case (1) followed the decision in *Inder Pershad Singh v. Campbell* (6) (which was however under S. 78 of the Act) and relied rather on the wording of the section itself and the principles laid down in the case of *Dayamoyi v. Ananda Mohan* (7). These were more directly applicable to that particular case inasmuch as it was held in *Dayamoyi's* case that the transfer of a part of an occupancy holding does not entitle the landlord to evict the purchaser.

There is a good deal to be said from the point of view of equity for the construction which has been put upon the section by the learned Judges in *Kali Krishna's* case and by Mallik, J., in *Shailaja's* case but with the greatest respect I think that the view adopted by the learned Judges in *Baneswar's* case is the correct one and their reasoning would also apply in the case of a mortgagee of a non-transferable occupancy holding.

The Rule is accordingly discharged with costs one gold mohur.

This judgment will govern Civil Revision Case No. 1621 of 1928 which is also discharged with costs one gold mohur.

**Suhrawardy, J.**—I agree. I wish to add that it seems to me that when a learned Judge of this Court sitting

(1) [1919] 23 C. W. N. 132=49 I. C. 766.

(2) A. I. R. 1927 Cal. 752.

(3) A. I. R. 1929 Cal. 133.

(4) [1918] 27 C. L. J. 473=44 I. C. 977.

(5) [1864] Marshall's Rep. 417.

(6) [1881] 7 Cal. 474.

(7) [1915] 42 Cal. 172=20 C. L. J. 52=27 I. C. 61=18 C. W. N. 971 (F.B.).



singly is unable to follow a decision of a Division Bench the better course for him is to send the case to a Division Bench and not to pass a dissentient judgment which governs only the case in which it is passed. I need not give my reasons here in support of this procedure I have suggested but they are many.

V.B./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 574

RANKIN, C. J. AND C. C. GHOSE, J.

*Kalyanee Debi*—Appellant.

v.

*Hari Mohan Ghose*—Respondent.

Appeal No. 25 of 1928, Decided on 23rd April 1928, from a judgment of Pearson, J., in Original Suit No. 1616 of 1922.

Civil P. C., O. 21, R. 89—Sales held in execution of mortgage decree of High Court on Original Side—Amount to be recovered, or costs not specified in sale proclamation—Application to set aside sale can be made on depositing five per cent of purchase money and amount of decree.

Order 21, R. 89, though well adapted to Mofussil practice is not in terms applicable to the practice of the High Court on its original side as regards sales held in execution of mortgage decrees inasmuch as no amount is specified in the proclamation of sale as that for the recovery of which the sale was ordered, nor the amount of costs before they are taxed. In such circumstances what Court has to do is to apply the words of the section as fairly as possible and the mortgagor applying to set aside sale can do so on deposit of a sum equal to five per cent of the purchase money and the amount of decree. [P 574 O 2]

*H. D. Bose, B. K. Ghose, S. C. Mitter, N. C. Mitter and N. C. Chatterji*—for Appellant.

*B. L. Mitter and J. C. Hazra*—for Mortgagor.

*S. Ghosh*—for Mortgagees.

**Rankin, C. J.**—In this case an appeal is brought by the purchaser at a sale held in a mortgage suit. It appears that the appellant purchased the property that was put up for sale and thereafter, within thirty days from the sale, the mortgagor judgment-debtor applied under O. 21, R. 89, Civil P. C., to have the sale set aside on paying the amount due to the decree-holder mortgagor and five per cent. compensation to the purchaser for the loss of the property. It appears that the auction purchaser thinks so highly of his bargain that he is not content with the five per cent and this appeal is

brought to set aside or vary the order of Pearson, J. permitting O. 21, R. 89, to take effect.

The main difficulty arises by reason of the fact that that rule is framed in language, which though well adapted to mofussil practice, is not in terms applicable to the practice of the High Court on its original side as regards sales held in execution of mortgage decrees. The amount to be deposited for payment to the decree-holder, it is said by the rule is the

"amount specified in the proclamation of sale as that for the recovery of which the sale was ordered,"

and it is expressly provided by the last clause of the rule that nothing in R. 89, shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale. There are authorities which say that as this rule is a concession to judgment-debtors it is to be applied strictly; and there can be no doubt of the correctness of this in cases to which the rule can be applied strictly. When by reason of the fact that no amount is specified in any proclamation of sale as that for the recovery of which the sale was ordered, it is impossible to apply those words strictly, it appears to me that in a matter of this kind what this Court has to do is to apply those words as fairly as possible to the circumstances of the sale on the original side.

Now, in the present case, the position is this. There had been a preliminary and a final decree. Those decrees were adjusted by an arrangement scheduled to an order made on 23rd March 1926, and under that arrangement the plaintiffs were to accept a certain sum—Rs. 36,000, in full satisfaction. The defendant was also to pay all costs. The amount of Rs. 36,000, however, was to be adjusted and satisfied as to a part by the sum of Rs. 17,000 in the hands of one Mohini Mohan Ray; the balance being a sum of Rs. 19,000 and costs and a sum of Rs. 1,000 which was to be paid by the plaintiffs to one Jokhram was to be realized by sale of the properties comprised in the mortgage. As regards this Rs. 1,000 it seems that one Jokhram was a creditor—creditor, as I understand, of the defendant—and the sum of Rs. 1,000 was to be paid by the plaintiffs and was to continue to remain a charge on the pro-



Perties comprised in the mortgage in favour of the plaintiffs—to be realised by the plaintiffs out of the sale proceeds thereafter. In these circumstances, the defendant applied to the learned Judge and obtained an order which directed him to pay a sum of Rs. 582, being the compensation to go to the purchasers and a sum of Rs. 13,082 for payment to the plaintiffs of the balance of the amount of principal and interest payable to them under the decree. Nothing was said in the order about the costs of the suit. It appears that thereupon the defendant, instead of paying that money to the Registrar of the Court in his capacity as Accountant-General, paid it to the Registrar of the Court as such and it appears that no commission became at any time payable to the Accountant-General. The order had directed it to be paid to the Registrar to be by him paid to the Controller of Currency with the privity of the Accountant-General and had also directed the commission of the Accountant-General to be deposited. So far as the deposit with the Registrar was not in terms of that order it is a variation which we have ascertained results in no harm to the present appellants because they can without any deduction take the sum of money which was intended for them out of Court if the order of the learned Judge stands. In these circumstances I dismiss that question from our consideration.

It appears next that as regards the actual amount to go to the plaintiffs the dispute centres upon two points only. The first complaint is that no sum was paid as costs and the second complaint is—it is not a very meritorious complaint—that the Rs. 1,000 to go to Jokhiram was not paid into Court.

As regards the question of costs what we have to consider is what is the amount for the recovery of which the sale was ordered; and, in my judgment, it is wrong to say that on the original side of this Court a person desiring to take advantage of R. 89 is obliged to pay in a lump sum making a guess of the amount or to go to the attorneys for the plaintiff and find out from them how much they are prepared to consider as correct. In my judgment, sales are not ordered for recovery of the amount of costs before they are taxed and it would be unreasonable and unfair in applying this rule to say that a person in-

tending to take advantage of R. 89 has to pay into Court an amount which is not yet ascertained. In this respect it may well be that the rules and orders of this Court—now that it has been decided that R. 89, O. 21 applies to mortgage suits—require some further consideration and amendment. Speaking for myself I will have nothing to do with any doctrine which involves paying in an amount arrived at either by guess or by agreement with either side's attorneys or by getting an order for taxation in the absence of other side's attorneys. I do not, therefore, think that the learned Judge, in the circumstances, was wrong in failing to include a direction as to costs.

The remaining question is the question of this Rs. 1,000. It does not appear that the plaintiffs had paid the sum of Rs. 1,000 to Jokhiram or anybody. In these circumstances, I do not think that the learned Judge was wrong in refusing to hold that that was a sum for the recovery of which the sale was ordered.

This disposes of the appeal. In my opinion, the appeal must be dismissed with costs—two sets—the plaintiffs' costs being limited to one counsel only. The plaintiffs and the purchasers are at liberty to take their respective moneys out of Court.

**C. C. Ghose, J.**—I agree.

V.B./R.K.

*Appeal dismissed.*

## A. I. R. 1929 Calcutta 575

RANKIN, C. J.

*Ram Charan Goldar and others—Appellants.*

v.

*Hamid Ali and others—Respondents.*

Application in Appeal from Appellate Decree No. 809 of 1925, Decided on 26th April 1928, for leave to appeal under S. 15 of the Letters Patent.

Court-fees Act, Sch. 2, Art. 11 (b)—Appeal from order rejecting leave for further appeal—Application not referred to in the decree—Art. 11 (b) applies.

A memorandum of appeal against an order rejecting an application for certifying under the amended Letters Patent that the case is a fit one to be taken on further appeal when the decree in appeal does not make any reference to the application is governed by Sch. 2, Art. 11 (b). [P 576 C 1]

*Jitendra Kumar Sen Gupta and Pro-nodh chandra Kar—for Appellants.*



**Order.**—In this case two learned Judges differed in the decision of a second appeal and in the end Cuming, J., under the amended letters prevailed and the appeal was dismissed. Thereupon an application was made to Patent for a certificate that the case was a fit one to be taken on further appeal. That application was made subsequently to the learned Judge upon a separate petition. It was rejected and the rejection was recorded in the order sheet ;

"Read an application filed on 23rd February 1928, and moved to-day. It is rejected."

The order is dated 24th February 1928.

From that an appeal has been brought and the memorandum of appeal when lodged was excepted to by the stamp reporter on the ground that it was insufficiently stamped. It does not appear to have been sufficiently stamped, but the question of the correct Court-fee has been referred to me by the Taxing Officer under S. 5, Court-fees Act.

It is contended for the appellant that this case is governed by Art. 11 (b), Sch. 2 of the Act, which applies to a memorandum of appeal when the appeal is not an appeal from a decree or an order having the force of a decree. I have examined the decree which has since been drawn up in the matter of the second appeal and I find in it no reference to the application for leave to appeal. In these circumstances it appears to me that the Court-fee is chargeable on this memorandum of appeal under Art. 11 (b), Sch. 2 to the Court-fees Act as has been contended for on behalf of the appellant.

Accordingly the deficit Court-fee will be accepted if put in by Monday next.

M.N./R.K. *Order accordingly.*

### A. I. R. 1929 Calcutta 576

B. B. GHOSE AND PANTON, JJ.

*Gopiram Bhotica* — Creditor—Appellant.

v.

*Biraj Mohan Chatterjee*—Insolvent—Respondent.

Appeal No. 126 of 1928, Decided on 23rd April 1929, from original order of Dist. Judge, 24-Parganas, D/- 16th January 1928.

**Provincial Insolvency Act (5 of 1920), Ss. 41 and 42** — Before ordering discharge Court must satisfy of facts given in S. 42.

Before passing an order of final discharge under S. 41 it is necessary for a Court to examine the insolvent and to be satisfied of certain facts which are to be found in S. 42. [P 576 C 2]

*Bhupendra Kumar Ghosh* and *Benbehari Kundu Chawdhury*—for Appellant.  
*Sitangshu Bhushan Bose* and *Bijan Behari Mitter*—for Respondent.

**B. B. Ghose, J.**—This is an appeal by the creditor against the order of final discharge of an insolvent under S. 41, Prov. Ins. Act. This insolvent, it is stated was indebted to a sum of over eight lacs of rupees and it is also stated that his assets amounted almost to nothing. The receiver made a report objecting to the final discharge. An objection was also made by a creditor. The learned Judge has observed that the objections to discharge put forward by the creditor and the receiver do not appear to me to have any weight and I do not see that any good purpose would be served by the postponement of the order of discharge. The learned Judge, however, has not taken into consideration the facts which are necessary for him to be satisfied about before he makes an order of final discharge. Those are to be found in S. 42, Prov. Ins. Act. The insolvent has not at all been examined. One of the creditors stated that he had got properties in the benami of third persons. Those facts should be considered. It also appears that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities and that being so he had to satisfy the Court that it is due to circumstances for which he cannot justly be held responsible. There are other things to be considered before a final discharge of an insolvent is made. We, therefore, set aside the order of the learned District Judge dated 16th January 1928 and send back the case for decision according to the provisions of the law after taking evidence in the case.

**Panton, J.**—I agree.

S.N./R.K.

*Case remanded.*



## \* A. I. R. 1929 Calcutta 577

B. B. GHOSE AND PANTON, JJ.

*Narendra Narain Choudhuri*—Plaintiff—Appellant.

v.

*Nagendra Narain Choudhuri and others*—Defendants—Respondents.

Appeal No. 53 of 1925, Decided on 21st December 1928, against the original decree of Sub-Judge, Dhubri, D/- 17th September 1924.

\* (a) Hindu Law—Applicability—Family of Rajbansis of Bengal of non-Hindu origin alleging to be governed by Hindu Law—Hindu names—Hindu priests—Hindu castes and gotras—Observed Hindu ceremonies and Hindu secular and ritual observances—Hindu Law held applicable.

It was alleged that Rajbansi family of Bengal of non-Hindu origin was governed by Hindu Law. It was found that the family bore Hindu names, castes and gotras and had Hindu priests. They observed Hindu festivals, and ceremonials on marriages, on deaths and at shradh, as prescribed by the Hindu rituals.

*Held:* that the Hindu Law was applicable and they were governed by the Dayabhaga School of law. [P 580 C 1]

(b) Custom—Family custom of primogeniture—Maxim "Cessat ratis cessat lex" does not apply—Alteration in tenure of estate alters law of succession.

Where a custom has originated in a family for certain reasons it cannot be said that those reasons being non-existent the custom itself should cease to exist. The principle embodied in the maxim *cessat ratis cessat lex* does not apply. But when in the case of zamindari of military tenure the nature of tenure is altered the rule of succession governing the zamindari is altered but where in a zamindari family there was a family custom of primogeniture that system cannot be wiped out by the fact that the zamindari took a new settlement. [P 581 C 1, P 584 C 1]

(c) Custom—Family custom of primogeniture—Service tenures—By Regulation 11 of 1793 succession by general law was introduced—Prior succession by eldest son held not sufficient to prove custom of primogeniture.

The practice of succession by primogeniture was abolished by Regn. 11 of 1793 which enacted that henceforth the succession to the estate would be in accordance with the Mahomedan or Hindu Law to which the parties were subject. The service tenures were therefore altered and became ordinary zamindaris subject to the general law of succession, so that the fact that before passing of the regulation the eldest son was recognized as succeeding to the zamindari estate is not sufficient to establish the custom of primogeniture in the family. [P 582 C 1]

(d) Custom—Succession—Proof of primogeniture.

A custom of primogeniture might be proved by the fact that there were cadets of the family who had no share in the estate or that on any previous occasion a right to partition was asserted and successfully resisted.

A custom as to primogeniture different from the Hindu Law of Succession was pleaded by a family. It was found that the partition on the basis of Hindu Law was at one time let in. Oral statement of persons, family priests was forwarded in support of the custom.

*Held:* that the custom was not proved.

[P 583 C 1]

(e) Evidence Act, S. 115—Conduct—Advantage taken under partition—Party estopped from setting impartibility.

The father of the plaintiff entered into a partition and the deed was acted upon for over 40 years, the plaintiff asserted his claim to entire property as being entitled by law of primogeniture and estate being impartible, but kept quiet for about 12 years and dealt with his share of the property as having been derived under the deed of partition.

*Held:* that he cannot reasonably be heard to say that he is entitled to succeed by primogeniture which is the subsisting custom of the family. [P 584 C 2]

*Langford James, U. L. Sen Gupta, K. C. Chakravarti, Panchanan Ghosal and Durga Charan Roy Chowdhury*—for Appellant.

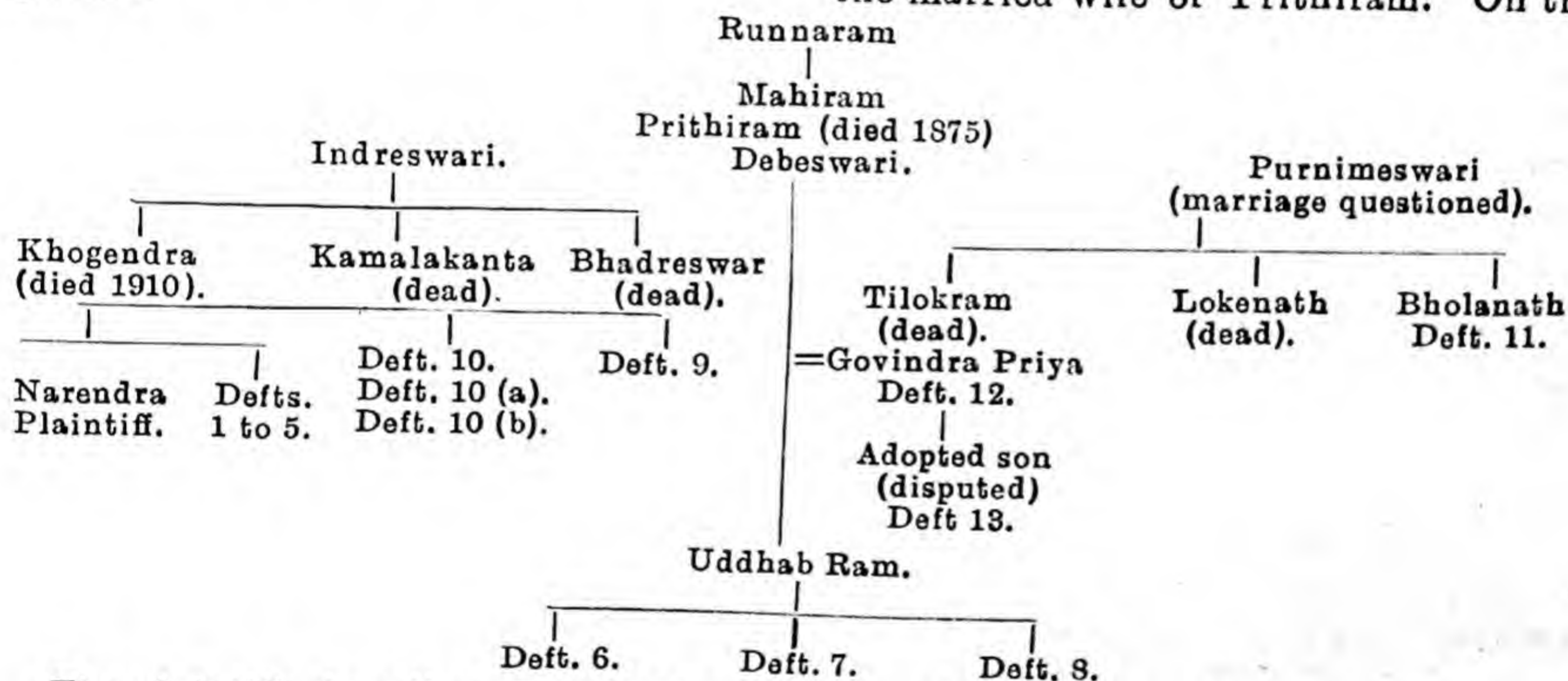
*Binode Mitter, Jatindra Nath Sanjal, N. Sircar, S. C. Roy, Santi Kumar Roy Chowdhury, Sarat Chandra Roy Chowdhury, S. N. Guha and Syed Nasin Ali*—for Respondents.

*Sures Chandra Taluqdar*—for Deputy Registrar.

**B. B. Ghose, J.**—This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge, Assam Valley Districts, dismissing the plaintiff's suit for recovery of possession of an estate which has been described as the Mechpara Estate. Plaintiff's suit is based upon the allegations made in the first paragraph of his plaint that the Mechpara zemindars belong to a well known Rajbansi caste and the Mechpara Estate has been impartible and inalienable since time immemorial by virtue of the kulachar or custom governing the same family. Plaintiff then goes on to state that his grandfather Prithiram, was married to three wives and he had some children begotten of a maid servant by the name of Purnimeswari. His grandfather died in 1875 and disputes broke out among the sons of Prithiram and in order to purchase peace,



his father, Khagendra, the other legitimate sons of Prithiram and the son born of the lady, who was called the maid servant, entered into a compromise, evidenced by a solenama, dated 14th December 1875, by which they had divided the estate into different shares. Khagendra died in February 1910, and the plaintiff has been since then in possession of one anna odd share of the estate. He now brings this suit for recovery of possession of 14 annas odd share of the estate as against his own brothers, who are defendants 1 to 5 and the other descendants of Prithiram. He asks for a declaration that he is entitled to the property as the eldest representative of the eldest line of Prithiram's descendants. A short genealogy would be useful in understanding the claims of the parties:



The plaintiff describes Purnimeswari as a maid servant who was the mistress of Prithiram. His story is that the sons born of Purnimeswari, Tilokram, Lokenath and Bholanath were all illegitimate. Tilokram is dead and is now represented by his widow, Gobinda Priya defendant 12, and an adopted son defendant 13. Lokenath is dead. He died without leaving any descendants. Bholanath is alive and he is defendant 11 in this suit. Of the sons born of Prithiram's wife, Indreswari, Khogendra was the father of the plaintiff and his brothers, defendants 1 to 5. The second son was Kamala Kanta who is dead and is represented by his son, defendant 10 and defendants 10 (a) and 10 (b). The third son was Bhadreswar, who is dead and is represented by his son,

defendant 9. Prithiram had only one son born of his wife Debeshwari named Uddhab Ram, who is dead, and is represented by his sons, defendants 6, 7 and 8. Defendants 1 to 5 do not contest the plaintiff's suit. They are, as I have already stated, the brothers of the plaintiff. Barring them, all the other defendants contest the plaintiff's claim. Defendant 14 is a manager of the estate under the management of the Court of Wards.

The defendants who contested the suit in the Court below and who also appear as respondents in this Court deny the allegations of the plaintiff as regards the kulachar or family custom of primogeniture or impartibility. Some of the defendants also contest the allegations of the plaintiff that Purnimeswari was not the married wife of Prithiram. On the

allegations of the parties several issues were framed in the Court below, but the only issues of importance which have been discussed before us are three. Those are issues 7, 8 and 10 which are in the following terms:

*Issue 7:* "Is there any custom or kulachar governing the Mechpara family as alleged, and if so, is the Mechpara Estate impartible and inalienable by reason of such custom and Kulachar?"

*Issue 8:* "Is the succession to the Mechpara Estate governed by the rule of primogeniture as alleged or by the ordinary rules of succession according to the Dayabhaga School of Hindu Law?"

*Issue 10:* "Were Tilokram, Lokenath and Bholanath illegitimate sons of the late Prithiram Choudhuri and as such excluded from inheritance?"

The Subordinate Judge decided issue 10 in favour of the plaintiff and he de-



cided the other two issues 7 and 8 against him. In the result, as already stated, the entire suit was dismissed. It should be stated at the commencement that Tilokram and Lokenath were older than Khagendra. If they were the legitimate sons of Prithiram, then Khagendra would have no title to the estate, assuming that the rule of primogeniture prevailed in the family and the estate was impartible.

Mr. Langford James, the learned counsel for the plaintiff contended before us that the Subordinate Judge is wrong in his view that the estate was not impartible or inalienable and that this family is governed by the Hindu Law of Succession. His contentions were: (1) Impartibility may be due to the origin of the estate or it may be by custom created by agreement among the founders of the family. Inalienability in the same way may be an incident of the tenure and it may be also by custom and (2) where the family is not Hindu by origin, any person alleging that the succession to the estate of that family is governed by Hindu Law has to prove that it has adopted the Hindu Law of Succession. His contention, with regard to the second point, is that this family is Rajbansi and, therefore, non-Hindu by origin; and the Subordinate Judge has not approached the decision of the questions involved in this case from this point of view.

I will take up the second point first as to the applicability of the Hindu Law of Succession to this family, whether the members of the family are Hindus and whether they are governed by the ordinary rules of Dayabhaga as found by the learned Subordinate Judge.

In my opinion, the question whether the family is governed by the Hindu Law of Succession or not is a matter of secondary importance with regard to the question of the plaintiff's right to the whole of the estate; but as this question has been elaborately argued before us by both sides, I think it is proper to record an opinion on the question. It was argued by Mr. James that as the family is Rajbansi, it is non-Hindu in origin and the defendants, who allege that it is governed by the Hindu Law, must prove that they have adopted the Hindu Law of Succession. Reliance is placed upon the case *Fanindra Deb*

*Raikat v. Rajeswar Dass* (1) in support of this contention. The question is really one of fact whether those people, assuming that their origin is aboriginal, have adopted the Hindu Law as a whole in matters of succession. The evidence in this case, however, leaves no room for doubt that whatever might be the origin of the family they adopted Hinduism in its entirety and it will be idle to say that they are not governed by the Hindu Law. They are in all essential purposes Bengal Hindus. First, it is only necessary to see what names they bear: and it would appear that their names can hardly be distinguished from the usual Bengali names. It is undisputed that they have priests and their priests are Bengali Brahmins. The evidence of both sides shows that their last priest was Hara Prosad Chakravarty and it is also stated that they have got a priest at present, but his name does not appear in the evidence. Exhibit 20, which is the Budget Estimate for the year 1320 of this family shows the religious ceremonies of the family for which money was spent. These religious ceremonies include Jagannath Puja, Satyanarain Puja, Mansa Puja, Janmastami Puja, Durga Puja, Punya, Bastu Puja and Saraswati Puja and then Doljatra, Kamdeb Puja, Rasjatra, monthly Kali Puja and so forth. All these Pujas are performed in well-to-do Bengali families.

The pedigree which the plaintiff produced and which was alleged to have been obtained from their deceased family priest, Hara Prosad Chakravarty, begins by stating their gotra as Kasyap Gotra and there is mention of their sapindas in that list. The aborigines have not been proved to care for sapindas nor have they any gotras so far as I am aware. This is peculiar to Hindus. Then whenever the plaintiff and the other members of the family describe themselves, they describe themselves as belonging to the caste of Rajbansies. There is a large number of documents on the record executed by Khagendra and his brothers and the other members of the family in which they describe themselves as belonging to that caste. It is only the Hindus who speak of caste.

(1) [1885] 11 Cal. 463=12 I. A. 72=4 Sar. 610 (P.C.).



Then coming to the oral evidence it will appear that these people observe mourning on the death of any member of their family and that mourning is observed for 30 days. During the period of mourning they do not take meat or fish, or milk or produce of the milk of buffaloes. That is the practice in orthodox Bengali Hindu families. Then they have the performance of the *sradh* after the expiry of the period of mourning. The evidence of both sides shows that on the death of a member of the family, before the funeral pyre is lighted, there is the *Mukhagni* ceremony which, I believe, is peculiar to Bengal Hindus and it consists of putting lighted reeds to the face of the corpse before the funeral pyre is set on fire. This is generally performed by the eldest son if he is present at the time of the cremation. There is also direct evidence on behalf of the plaintiff as to the family being Hindu. Santoram Burman (witness for the plaintiff) says in answer to question 16. "The owners of the Mechpara Estate are Hindus by creed," Raja Abhoy Narain Dev, a witness examined on behalf of the plaintiff, and son-in-law of Khagendra Narayan Choudhuri, states in answer to question 16 "I know the owners of the Mechpara Estate to be Hindus by creed" and he speaks of himself "I am myself a Hindu."

"I know the owners of the Mechpara Estate to be Rajbansis. My marriage was duly celebrated by calling priests and others. In my marriage my father-in-law gave away the bride."

Kamini Mohan Guha, another witness on behalf of the plaintiff, says in answer to question 11.

"I think that the zamindars that are at present in Mechpara are governed by the *Dayabhaga*."

It is unnecessary to pile up further evidence. There cannot be the least shadow of doubt that whatever the parties may state in order to serve their own purposes, upon the evidence on the record, the family is governed by the Hindu law and being residents of Bengal, they must be governed by the *Dayabhaga* School of Hindu Law.

This finding, however, as I have already stated, does not put an end to the plaintiff's case: because assuming that the family is governed by the *Dayabhaga* School of Hindu Law, the plaintiff

is still entitled to prove that the custom of primogeniture prevails in the family and the estate is impartible and inalienable by custom. That there are impartible estates in Bengal in the possession of Hindus cannot be and is not denied. That such estates exist was recognized by Regulation 10 of 1800, which enacted that the provisions of Regulation 11 of 1793 as regards the rule of succession did not supersede the custom of primogeniture. We have therefore, to see whether the plaintiff has been able to prove the existence of the custom as alleged. In the plaint, as I have already stated, the plaintiff based his claim upon the *kulachar* or family custom, but during the argument in the Court below it seems that the plaintiff's pleader also claimed that primogeniture may be established by the fact that this *Mechpara* *zemindari* was originally a military tenure and, therefore, by the nature of the tenure, the estate is impartible and succession would be by the rule of primogeniture. In support of the contention that the estate was a military tenure, reference has been made to certain publications mentioned in the judgment of the Subordinate Judge. The question is whether it is still a military tenure.

In addition to those historical works referred to by the learned Subordinate Judge, the learned counsel for the plaintiff also refers to the Permanent Settlement *kistibundi*, which describes the *mahal* *Mechpara* as "*mahal Topkhana*" and from those it is contended that it is still a military tenure. There cannot, however, be any doubt that the estate is not held under a service tenure. There are well known estates known as the *Khargapur Ghatwali* Estates, which are impartible and inalienable by the very nature of them. Is this *Mechpara* Estate like one of those? There is nothing to show that it is so. It is really an ordinary *zemindari* and succession to it must follow the ordinary law unless a special family custom is proved. I need hardly discuss the incidents of a military tenure and how such incidents may be lost even if its origin was a military tenure by taking a different sort of grant from the Government. In the case of *Rajkishan Singh v. Ramjoy Surma Mozoomdar* (2), their Lord-

(2) [1875] 1 Cal. 186=19 W. B. 8.



ships made the following observations (at p. 191) :

"In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that upon this settlement, any incidents of the old tenure as a military jagir, requiring the render of services, if any such ever existed, were as conditions of tenure, impliedly at an end and that the zemindari so far as relates to tenure, was thenceforth held under the Government as an ordinary zemindari free from any such conditions. The settlement would not however, of itself, have operated to destroy a family usage regulating the manner of descent."

The argument, therefore, that is advanced on behalf of the appellant that on account of the nature of the tenure it should be held that it is impartible and succession is according to the rule of primogeniture, cannot be maintained. It is quite true as was observed in the case of *Rao Kishore Singh v. Mt. Gahenabai* (3) that where a custom had originated in a family for certain reasons, it cannot be said that those reasons being non-existent the custom itself should cease to exist. In such a case, as their Lordships observe, the principle embodied in the expression *cessat ratio cessat lex*, does not apply. But it is quite different where the claim is made on the basis of the nature of the tenure. When the nature of the tenure is altered then, as their Lordships observe in the case of *Rajkishen Singh v. Ramjoy Surma Mozoomdar* (2) the rule of succession is altered. The plaintiff must, therefore, in order to succeed rest his case upon a family custom as he had actually pleaded in his plaint and we have, therefore, to see whether the plaintiff has succeeded in establishing a family custom of primogeniture and inalienability. The learned counsel for the appellant relied upon certain documentary evidence in support of his contention that the plaintiff has been able to establish the custom pleaded. He refers first to Ex. 2, dated 5th April 1790 in which the Board of Revenue asks the Collector to furnish them with a statement of the family of Runnaram who had died before that. The next document is Ex. 4, dated 17th June 1790, the report of a local official called Roy Royan, which runs thus :

"His eldest son Mahiram is his successor in the zemindari. Respecting any other heirs the deceased zemindar may have left, I am not prepared to report correctly."

Subsequently the Commissioner makes this report which is found at the top of the paper :

"List of the family of the deceased Runnaram, Zemindar of Machpara, Sobun the defunct's mother, two wives, Mahiram a legitimate son, aged 9 years, Gumburam a legitimate son aged 4 years, a legitimate son aged 4 years, a legitimate son whose name is unknown aged one and a half years, Rupram an illegitimate son aged 15 years and an illegitimate son whose name is unknown aged 12 years. N. B. The defunct has not left any other relations."

Upon this report the Board of Revenue made this direction :

"We direct that Mahiram the eldest legitimate son of the late Runnaram be allowed to succeed his father in the zemindari of Mechpara after the usual publication has been made in the district and at the Khalsa."

This is dated 21st July 1790. The next document is Ex. 6, which confirms this report :

"The Governor-General having directed that the eldest son Mahiram should be allowed to succeed his father in the zemindari of Mechpara after the usual publications, I am directed to desire that you will make the same at the Khalsa and report the result."

This is signed by the Secretary of the Board. This is followed by the report of the Commissioner, Ex. 7, that proclamation was made respecting the succession of Mahiram the eldest son of the late Runnaram and the next document is Ex. 8, a letter from the member of the Board of Revenue to the Commissioner of Cooch Behar to the effect that no objections having been made to the succession of Mahiram, the Commissioner would allow him to succeed his father in the zemindari of Mechpara agreeably to the orders of the Governor-General in Council. Upon these documents it is contended that it was recognized by the Government at the time that the succession to the estate was only to the eldest son of the deceased proprietor and that the rule of primogeniture prevailed in the family. I do not think any such inference can at all be drawn from these proceedings. If one looks at the preamble of Regn. 11 of 1793 it shows that the custom had grown under the previous administration of the country before the coming of the British, that upon the death of a proprietor of an estate, it devolved entirely on the eldest

(3) A. I. R. 1919 P. C. 100=15 N. L. R. 176 (P. C.).



son to the exclusion of all other sons. This practice was on account of the inconvenience felt about the division of the estate and of the revenue. Regn. 11 of 1793 enacted that henceforth the succession to the estate would be in accordance with the Mahomedan or Hindu law to which the parties were subject. The fact, therefore, that before the passing of Regn. 11 of 1793, the eldest son was recognized as succeeding to the estate of Runnaram does not establish the custom of primogeniture in the family as this practice was followed by the Government in the case of every estate. The next matter, however, is directly against the contention of the plaintiff. Mahiram died in 1828 leaving a legitimate son Prithiram and an illegitimate son Madhoram. It appears from Ex. E, dated 22nd January 1832, a report of the Collector of Rungpur of Mechpara Pergana, that :

"Mahiram died leaving a son born of his wife, named Prithiram and another son Madhoram born of Runga, a Jul Chittona, or left-handed wife."

It goes on to say that :

"an enquiry was set on foot to establish the right of Madhoram which was proved and agreeably to a bewasteh (the opinion) obtained from the Pundits of Assam, two-thirds of the father's property was allowed to Prithiram and the remaining one-third to Madhoram. To this no objection has been made by either party. I, therefore, assume this point as settled."

This shows beyond any doubt that the estate was not considered descendible according to the rule of primogeniture, nor was it impartible. The illegitimate son was allowed one-third share of the property left by Mahiram. It is contended on behalf of the appellant that at that time Prithiram was an infant and therefore, no objection could have been taken on his behalf. The estate was taken charge of by the Court of Wards on behalf of both the minors and their mothers were appointed their guardians. It is quite true that Prithiram himself could not object to this division of the estate, he being a minor. But if the custom of primogeniture in the family was so well established as the plaintiff would ask us to believe, is it conceivable that the Collector who had made enquiries about the right of the illegitimate son and went into the trouble of taking the bewasteh of the Pundits of Assam as regards his rights could not

have been cognisant of the well established custom of the family of primogeniture and can it be believed that if there was such a custom, he would not have reported that by the custom of the family Prithiram would be the sole owner, even if he had a brother born of a lawful wife of his father. It is next argued on behalf of the appellant that the fact that one-third of the property was allowed to Madhoram, the illegitimate son of Mahiram, is of no consequence, because Madhoram died in 1834 and after that Prithiram claimed the entire estate to the exclusion of the mother of Madhoram who would have been his heir. The learned Subordinate Judge in dealing with this argument has observed that probably the lady was living in the family and did not care to assert her own rights. That may be one explanation.

But assuming that the lady was put aside it would not prove primogeniture. The utmost that the plaintiff could urge was that widows did not succeed to the estate. This one fact that Madhoram got a share goes strongly against the claim of the plaintiff. Reliance is next placed upon the oral evidence on behalf of the plaintiff. This oral evidence consists of the statements made by three persons the first of them being Santoram Burman. He gives his age as 90 or 91 years. His position is that he was menial servant of Prithiram on a pay of Rs. 3 per month, and he speaks about the rule of primogeniture in a zemindari estate of considerable value. Under what circumstances this man came to know of the custom, which could never have been a topic of conversation during his time, it is difficult to say. Apart from the social position of this man, he is an absolutely ignorant person. He does not know anything, what a year is, what a date means, what a month is. He was in service under Prithiram for only about four years. How this man could possibly have known about the rule of succession is difficult to understand. The next witness on whose evidence the plaintiff relies is Kamini Mohan Guha. This man is of a better position in society. He was at first a tutor of the plaintiff under Khagendra Narayan Choudhuri. Then gradually he served the estate in other capacities. He gives evidence to the effect that the custom is that the lawful eldest son of



the Mechpara zemindar would inherit the property: the estate is impartible and inalienable. Then when he was asked from whom he had heard it he said "From Khagendra Narayan Choudhuri," that is the father of the plaintiff, and from such other persons who would naturally know of the existence of the custom in the family. As regards Khagendra Narayan's knowledge, the Subordinate Judge truly observes that his knowledge is of no account, because that man himself had entered into a partition deed with his brothers. This oral evidence, therefore, can be dismissed without much comment. The last witness on whom the plaintiff relies is another person named Krishna Mohan, who says "I simply hear that the succession goes to the eldest son." Apart from that, there is the oral evidence of the plaintiff, who, of course, does not know anything about the custom but he says that he heard of it from his father. In order to establish a custom varying the rule of ordinary descent, better evidence should have been put forward. A custom of primogeniture might be proved by the fact that there were cadets of the family who had no share in the estate, or that on any previous occasion a right to partition was asserted and successfully resisted. Nothing like such evidence is available in this case. There was an illegitimate son of Mahiram along with a legitimate son and the illegitimate son was allotted a share.

The next event which disproves this claim of primogeniture is Ex. A the partition deed entered into by all the sons of Prithiram dated 16th December 1875. In that document it is stated that Prithiram Choudhuri Rai Bahadur, zemindar died leaving the seven brothers as his heirs. Then it speaks of dissensions having broken out among them and so forth. By that deed in para. 1 it was stipulated that Khagendra, Kamala Kanta, Bhadreswar and Uddhob would be jointly entitled in equal shares to an eleven annas share and Tilokram, Lokanath and Bholanath would be equally entitled to a five annas share in the property. This was followed by applications for mutation of names in the Collectorate. Ex. 1 is a petition of Khagendra and others dated 16th December 1875, where the same expression is repeated that Prithiram died leaving seven sons as his

heirs surviving. Ex. J is the petition by Tilokram of the same date. Ex. K dated 17th July 1876, is a petition by Khagendra for opening separate accounts and in it it is stated that Khagendra had inherited moveable and immovable properties of the shares stated in the petition as heir to the properties left by Prithiram. After that suits were brought by Khagendra and all the other descendants of Prithiram for rent against tenants and these documents range from the year 1880 to 1907 which have been filed as exhibits in this case. In 1885 Bhadreswar presented a petition for registration of his name after attainment of majority. That is Ex. YYY. Then Ex. DDD, dated 13th May 1892 shows that the widows of some of the heirs, some of the descendants of Prithiram collected rents and Khagendra entered into an ekrarnama with two of the widows for collecting rents on their behalf. In May 1907 Khagendra mortgaged one anna share of the property, stating that he was entitled to two annas 15 gandas share in the property and he subsequently executed another mortgage. All these transactions show that Khagendra not only entered into a partition with the branch born of Purnimeswari but stated throughout that all the seven sons of Prithiram were his heirs and he asserted title to only his fraction of two annas 15 gandas which was a fourth share of the 11 annas which were allotted to him and his other cosharers. After the death of Khagendra, Narendra the plaintiff in the case, applied for mutation of his name for one-twenty-fourth share in the 11 annas of the property (Ex. 11). There is a note at the end that Narendra claims 16 annas interest but he was actually in possession of one-twenty-fourth share of the 11 annas and he stated later on in a petition dated 13th November 1911 that he reserved the right to apply for his name being registered with regard to the remaining 13 and odd annas share. This, however, was rejected. Subsequently the plaintiff mortgaged his share to others.

The matter, therefore, comes to this, assuming that the estate was a military tenure at the commencement as soon as the zemindar took a permanent settlement, the nature of the tenure was altered and he became an ordinary zamindar-subject to the general law of succession. This would be a complete answer to the



argument based on the fact that primogeniture and impartibility must be assumed from the nature of the tenure. If there was a family custom of primogeniture, that custom certainly could not have been wiped out by the fact that the zemindar took a new settlement from the Government. The authority for that proposition will be found in the case of *Rao Kishore Singh v. Mt. Gahenabai* (3) already referred to. But if the case is that the rule of primogeniture was according to the custom of the family, then the question is what would be the result of the acts of Khagendra supposing that the custom has been proved. I have already shown that the custom has not been proved by the evidence which has been adduced. But if there was such a custom, then by the acts of Khagendra that custom was given up. The authority for this proposition will be found in the case of *Rajkrishen Singh v. Ramjoy Surma Mozoomdar* (2), which has already been referred to. Sir Binode Mitter who appeared on behalf of some of the defendants laid stress upon the observations of their Lordships at p. 195 of the report which run thus :

" Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous, and well established discontinuance must be held to destroy them. This would be so when then the discontinuance has arisen from accidental causes : and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion, and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon."

It is contended on behalf of the appellant that the arrangement entered into by Khagendra was due to compulsion. On the death of Prithiram there were disputes among the brothers and on that account the Deputy Commissioner intervened and they were compelled to enter into this arrangement. Now, it is not a case of the arrangement having been entered into by coercion or undue influence. Khagendra also, as I have already shown,

after having entered into that arrangement, continued to act upon it for nearly 40 years and the documents which have been produced in this case state distinctly that he came into possession as one of the heirs of Prithiram. It is true that Narendra, the plaintiff, after the death of Prithiram stated that he asserted a claim to the whole of the property. Assuming that that assertion of the claim reserved his right to bring the suit about three days before the period of limitation had expired, had he any subsisting right ? If the custom had been discontinued by his father and had been acted upon for such a long period of time, no other member of the family of the succeeding generation could assert that the family custom still subsists. The explanation of Narendra, the plaintiff, is that he kept quiet for about 12 years, and dealt with his share of the property as having been derived under the deed of partition for want of funds. Whatever that may be he cannot now reasonably be heard to say that he is entitled to the entire property according to the rule of primogeniture which is the subsisting custom of the family. In my judgment, therefore, the Subordinate Judge is quite right in holding that the plaintiff is not entitled to succeed in his claim.

This finding finishes the appeal of the plaintiff.

But defendant 11 and defendants 12 and 13 who have appeared separately contend that the Subordinate Judge is wrong in his finding that Purnimeswari was not the married wife of Prithiram and they seek to support the decree of the Subordinate Judge on another ground that assuming that the plaintiff's story is true that succession to the estate was according to the rule of primogeniture, the plaintiff would have no right as his father was really a junior member of the family, Tilokram, Lokenath and Bholanath being older than Khagendra, the father of the plaintiff. Bholanath is the only direct descendant of Prithiram now alive. The learned Advocate General who appears for him contends that the Subordinate Judge ought to have held upon his own findings that Purnimeswari was the married wife of Prithiram. The learned Subordinate Judge has stated that there is no evidence worth the name that Purnimeswari had been a maid servant. In my opinion



the name Purnimeswari itself would show that she could not have been a maid servant. The name is too aristocratic for a maidservant. However, the learned Subordinate Judge has found that if Prithiram married her at all, he must have married beneath his rank. That is quite possible. This marriage again, as the learned Subordinate Judge finds, if it had taken place, must have taken place 100 years ago. Bholanath, the last surviving son, is 71 and it is very difficult to find any person alive after this long lapse of time, who could possibly speak to the fact of the marriage, if it had actually taken place. The evidence is, therefore, mainly on the point as to how she was treated and how her sons were treated during Prithiram's lifetime and also subsequent to his death. There is uncontradicted evidence that the sons born of Purnimeswari were treated in the same way as the sons born of the other two wives of Prithiram. They were married to girls of respectable families as the learned Subordinate Judge has found. Even after Prithiram's death the lady was regarded as the mistress of the house. After her death all the sons of Prithiram observed mourning (asouch) as can only be observed in the case of persons belonging to the same gotra. If she was a maid servant and was never married to Prithiram, the other members of the family the legitimate descendants of Prithiram, however they might have regard for their father's mistress, would have no occasion to observe asouch or mourning according to the Hindu custom after her death. It is unnecessary to restate the instance given by the Subordinate Judge when Bholanath was treated with the respect due to a legitimate son of Prithiram.

The Subordinate Judge, however, states that if Prithiram chose to take Purnimeswari as his wife without a formal marriage, no one within the limits of Mechpara would dare to show her disrespect during his lifetime. That may be true, but it may also be stated that nobody would show her the respect which is due to a married wife of Prithiram. Then it appears that one of the defendants who has been examined and who says that Purnimeswari was not the married wife of Prithiram, had to admit that he had married into the

family of the Raja of Jalpaiguri and the Raja of Jalpaiguri himself has married a daughter of Bholanath. It would be impossible to suppose that the Raja of Jalpaiguri, holding such a respectable position among his community, would marry the daughter of a person who has such a blot in his pedigree. An attempt has been made to show that the Raja of Jalpaiguri has discarded the daughter of Bholanath as his wife, but the witness Jatindra, who gave evidence, as regards this marriage, could not venture to make such an allegation. Then there is the evidence of Tilokram having performed the mukhagni ceremony of Prithiram, which he would naturally do as a legitimate son being the eldest when Prithiram's dead body was cremated. Kamini Kumar Guha the witness of the plaintiff, on whom much reliance was placed by the appellant, says that on the death of Khagendra Babu all the zemindars of Mechpara along with Bholanath Babu sat together and dined. There is no question and not a title of evidence that Bholanath was at any time looked down upon as a man born out of wedlock.

The defendant's witness, Rebati Kanto Chakravarty, who is the manager of a different estate, was in the service in the Mechpara Estate from the year 1287 to 1319. He gives evidence as to the position which Purnimerwari occupied during her lifetime. He says that Khagendra used to call Purnimeswari "mother" and the witness lived with Khagendra for a long time. Then there is the evidence of this very witness that after the death of Tilokram, all the members of the family observed asouch, which would not be the case if Tilokram was not a legitimate son of Prithiram. There is also the evidence of Kamini, plaintiff's witness, who says that Bholanath Babu and Khagendra Babu have the same guru (spiritual guide) and purohit. This also would not be the case if Bholanath had not been the legitimate son of his father. Taking all these things into consideration it seems to me absolutely wrong to say, after this lapse of time, that Bholanath or his brothers were the illegitimate sons of Prithiram. It is not stated that Purnimeswari belonged to a different caste. The only assertion made is that she came as a maid servant. Now even if that be so, as these people belong to the



lower caste of the Hindu community, no elaborate formal ceremony is necessary for a legitimate marriage and I do not see that there was any difficulty in having the marriage performed between Prithiram and Purnimeswari. At any rate, she was never treated as a mistress of Prithiram, nor were her sons treated as illegitimate.

The Subordinate Judge after stating the facts came to the opposite conclusion merely upon the ground that by the partition, Tilokram and his brothers took a little more than the share of illegitimate sons, and a little less than the legitimate sons. In settling the dispute some one must make concessions and it is stated that at the time Tilokram was ill and he was asked by certain pleaders as the eldest member of the family to make some sacrifice in order to purchase peace. That might have been a reason for his giving up a small share. It is not improbable that the dispute was with regard to ornaments in the hands of Purnimeswari, she was the last surviving wife of Prithiram and it is not improbable that after the death of two wives of Prithiram she got all the ornaments belonging to those ladies and after the death of Prithiram, Khagendra and others would naturally ask for a share of those ornaments. That might have been the cause of the dispute and if she had those ornaments, Tilokram might very well have given up a small share in the property instead of giving up those ornaments. However that may be, there may be many other reasons why this reduced share was taken and I do not think that the inference of the Subordinate Judge that this concession was made because Tilokram and his brothers were illegitimate, can be the only inference as to why this concession was made.

I do not think that this inference is legitimate. Having regard to these circumstances, in my opinion, the plaintiff has failed to establish that Purnimeswari was not the married wife of Prithiram and Bholanath and his brothers were his illegitimate sons. That being so, the plaintiff's claim should also fail on the ground that Tilokram was the eldest surviving son of Prithiram at his death. This appeal must, therefore, stand dismissed with costs. There will be two sets of hearing fees. Defendants

7, 8 and 10 represented by Sir Binode Mitter, will get one set of costs. Defendants 9 and 11 represented by the learned Advocate-General, and defendants 12 and 13, represented by Mr. Roy Choudhuri will get another set of costs, to be divided equally among them. The minors' costs have already been paid.

**Panton, J.**—I agree.

V.B./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 586

**B. B. GHOSE AND PANTON, JJ.**

*Jamilennessa Khatun and others — Appellants.*

v.

*Ijjatennessa Khatun and others—Respondents.*

Appeals Nos. 254 and 320 of 1922, and No. 58 of 1924, Decided on 31st January 1929, against original decrees of Addl. Sub-Judge, Backarganj, D/- 3rd May 1922.

(a) Civil P. C., O. 32, R. 3—Decree without guardian ad litem is nullity.

A decree passed against a minor without a proper guardian ad litem being appointed for him is a nullity: 31 All. 572 (P. C.), Ref. 25 Bom. 337 (P. C.), Expl. [P 589 C 1]

(b) Specific Relief Act, S. 42—Partition decree affecting plaintiff's rights—Declaratory suit to declare it nullity is not barred.

Section 42 does not bar a declaratory suit declaring the previous decree in a partition suit throwing clouds on the rights of the plaintiffs as nullity on the ground that the plaintiff can bring a suit for partition and claim any share in the property treating the former judgment as non-existent. [P 589 C 1]

(c) Cosharer — Partition — Evidence Act, S. 115.

A cosharer under a partition decree cannot reprobate the decree after having obtained an advantage to the detriment of the other cosharer. But if the decree was a nullity it cannot be affirmed by anything that a cosharer does short of obtaining an advantage under it to the detriment of others. [P 589 C 2]

*H. D. Bose, Girija Prosanna Rai Chowdhuri, Abinash Chandra Ghosh, Sachindra Kumar Roy, and Probodh Chandra Kar*—for Appellants.

*S. N. Banerjee, Ambica Pada Chowdhuri, Jatindra Nath Lahiri, Dharendra Lal Khastgir, Nasim Ali, Nagendra Nath Basu, Mahendra Kumar Ghose, Radhika Ranjan Guha, Mukunda Behari Mullick, Bhupendra Chandra Guha*—for Respondents.

*S. C. Taluqdar and Surja K. Aich*—for Deputy Registrar.

**B. B. Ghose, J.**—This is an appeal arising out of a suit instituted by the



appellant for a declaration that the decree passed in a suit brought in the year 1912 for partition which was numbered 137 of 1912 and re-numbered as 7 of 1920 was a nullity so far as she was concerned. The matter, shortly stated, stands thus: The property of which the partition was sought originally belonged to one Golam Ali Choudhury who died in the year 1295 B. S. corresponding to 1888. He had three wives, Azajannessa Khatun, Ijjatannessa Khatun and Jamidannessa Khatun. It is not necessary to state the names of all the parties concerned in this litigation: these will be found in the genealogical table given at pp. 152-153 in the paper book of appeal from original decree No. 254 of 1922. The appellant is a descendant of Golam Ali Chowdhury by his first wife. There was a dispute among the members of the family that the second wife Ijjatannessa was not validly married to him under the Mahomedan law, she having been the sister of his first wife and the marriage having taken place during the lifetime of her sister.

We are not concerned with that dispute at present. The suit of 1912 was brought by a daughter of Golam Ali Chowdhury by his third wife for partition of the estate left by him. The present plaintiff was made defendant 17 in that suit. Proceedings went on for a considerable number of years. This lady, then defendant 17, was a minor at the time of the suit. The whole dispute arises with regard to the fact whether she was a minor at the crucial moment or not. It is alleged that the appellant Jamilennessa Khatun was born on 27th May 1898. On 20th March 1902, her father named Md. Hashein was appointed guardian of her person and property under the Guardians and Wards Act by the District Judge of Faridpur. Md. Hashein died on 13th May 1909. After his death it appears that no other guardian was appointed for that lady. The result, however, of the appointment of guardian under the Guardians and Wards Act was that under the Majority Act, the minority of the lady Jamilennessa Khatun was extended up to 21 years of age. When the suit for partition was brought in 1912 by Majidannessa the daughter of Golam Ali by his third wife, the present plaintiff was admittedly a minor. Her father's mother Karimannessa who was also one of the

daughters of Golam Ali by his second wife, the validity of whose marriage was in question, was appointed her guardian-ad-litem. Evidently that lady had an interest adverse to that of the minor defendant Jamilennessa Khatun. Having realised that, she informed the Court of the fact and asked to be relieved of her office as guardian ad litem of defendant 17. She was removed and an officer of the Court was appointed guardian-ad-litem. But, as the learned Subordinate Judge observes, within four days of that appointment, one Md. Salem, the father's brother of the infant Jamilennessa, was appointed guardian ad litem. This gentleman also had an interest adverse to that of the minor in the sense that he was interested that his mother should get a share in the property left by Golam Ali, in which case the share of the infant would be diminished to a certain extent. Nothing, however, turns upon the fact of his being appointed guardian because on 28th April 1916, Md. Salem filed a petition in the partition suit alleging that Jamilennessa Khatun had attained her majority in Falgoun preceding and he could no longer continue as guardian-ad-litem.

It may be mentioned that this gentleman was also a party defendant to the suit. Apparently, the learned Judge required a petition from the infant herself who was alleged to have attained majority and a petition is on the record dated 2nd June 1916, filed on behalf of the lady defendant 17 stating that she had attained majority and she desired to continue the suit as sui juris with certain other prayers about giving her time for filing written statement and so forth. This petition was also supported by an affidavit by Mr. Salem dated 5th June 1916 in which the correct date of the birth of Jamilennessa Khatun was given as the 14th Jaistha 1305 corresponding to 27th May 1898 and it was alleged that she had completed her 18th year on the 14th Jaistha 1323 which corresponds to some date preceding the date of the affidavit in the year 1916. The fact that the lady would not attain majority on her completing 18 years of age was lost sight of, and the lady was treated as if she was sui juris. As a matter of fact, under the law Jamilennessa Khatun did not attain majority till the 27th May 1919. It is not necessary to state the



various details about the proceedings in the partition suit; but a preliminary decree was made on 31st July 1916. The question now turns upon the fact that the lady was in the eye of the law an infant and she was not properly represented in the suit by a guardian ad litem duly appointed. It is contended that under the circumstances all the proceedings held from the 28th April 1926 in the partition suit are null and void so far as this defendant is concerned. The allegation of the plaintiff (in the suit out of which this appeal No. 58 of 1924 arises) is that she did not know of the various proceedings that were taken in the partition suit as she was living with her uncle and father's mother whose interests were adverse to hers and she became aware of her legal right only after her marriage in the year 1921 when her husband informed her of the facts, and the suit out of which the present appeal has arisen was brought on 31st March 1922 for a declaration that the proceedings in the previous suit for partition of 1912, taken after the date of the removal of her guardian ad litem are null and void. Various issues were raised in the Court below but the Subordinate Judge really decided the suit upon issues 3 and 4, namely "whether the suit is barred by estoppel and res judicata" (issue 3) and

"Is the plaintiff estopped from saying that the decree in Title Suit No. 137 of 1912 is not binding against her" (Issue 4).

Before the lady brought this suit, she made an application in the partition suit under S. 151, Civil P. C., for the reliefs she asks for in her own suit. The Subordinate Judge dismissed her application and it seems to me rightly, because the questions raised would not come within the provisions of S. 151 of the Code. An application in revision was made in this Court which was rejected on the ground that the plaintiff had another and a fuller remedy. Then the plaintiff brought the present suit.

With regard to the question of res judicata, it is only necessary to observe that the present suit is for a declaration that the decree in the previous suit is null and void. The decree in the previous suit, if null and void, cannot operate as res judicata with regard to the present suit. If the decree is a valid one, the present suit fails without any reference to the rule of res judicata. The

learned Subordinate Judge relies upon the case of *Malkarjun v. Narhari* (1), and says that as the Court had jurisdiction in the previous suit to decide whether Jamilennessa Khatun had attained majority or not and as it had wrongly decided that she had attained majority, plaintiff is precluded from questioning that finding in the present suit. It seems to me that the reasoning of the Subordinate Judge is not correct and the present controversy is not covered by the decision of their Lordships of the Privy Council in the case of *Malkarjun v. Narhari* (1), nor by the other cases of that type which the Subordinate Judge has cited. The question about the majority of the lady was not put in issue in the previous suit. Her real age was given there and in the petition of one of her guardians-ad-litem as I have pointed out, it was said that she had attained the age of 18 years only. As there was no decision of the Court on the question of the majority of the lady, there cannot be any application of the rule of res judicata. The Subordinate Judge has not dealt with the question of estoppel against the lady on the ground of her having made a representation in Court which was accepted by the Judge.

It has, however, been argued before us that there cannot be any estoppel by representation as against a minor. The decisions of all the Courts in India except those of the Bombay High Court are in favour of the view that the rule of estoppel laid down in S. 115, Evidence Act does not apply to the case of minors. The latest case on the point was decided by the Lahore High Court in the case of *Khan Gul v. Lakha Singh* (2), in which all the previous cases have been cited. But I do not think it necessary to discuss that point in the view I take in this case. The question of estoppel by representation under S. 115, Evidence Act, does not arise in the present case. The decision in this case depends upon the general principle of procedure that no decree can be passed against a minor without his being represented by a proper guardian ad litem. The Court throws its protection over a minor in any suit brought against him and even if the guardian ad litem enters into a compro-

(1) [1901] 25 Bom. 337=27 I. A. 216=2 Bom. L. R. 927=7 Sar. 739 (P.C.).

(2) A. I. R. 1928 Lah. 609=9 Lah. 701 (F.B.).



mise it is for the benefit of the minor. There is no question, and it has not been contested before us on behalf of the respondent that a decree passed against a minor without a proper guardian-ad-litem being appointed for him is a nullity : see *Rashidunnissa v. Muhammad Ismail Khan* (3). But the judgment of the Subordinate Judge is sought to be supported on two grounds : first, that no decree should be made under S. 42, Specific Relief Act, declaring that the previous decree was a nullity because the plaintiff, if she so desires, may bring a suit for partition and claim any share in the property treating the former judgment as non-existent. I do not consider that there is any substance in that contention. There is the decree of the Court ; on the face of it, it is a good decree and it throws a cloud on the rights of the plaintiff, if she has any. And she is certainly entitled to remove that cloud in her title by having a declaration that the decree originally passed is a nullity as against her.

The second ground urged is of more substance. It is stated that this lady has approbated the decree and cannot reprobate it by the present suit. With regard to the question of approbation the learned advocate pointed out that by various petitions she had asked for certain allotments of the property and for money from the receiver for her maintenance according to the order of the Court and so forth. I do not think that those matters can be considered as approbating the decree. She was not bound to give up possession of the joint property. As regards asking for money for subsistence allowance, it may very well be said that she was making the best of a bad bargain and, instead of begging of other people for her subsistence, tried to get as much out of the joint property as the Court would allow. It is next pointed out that by a certain petition in July 1920 this plaintiff along with other defendants filed a petition giving a list of the properties which had belonged to their ancestor Ali Ahmed Chaudhuri, a son of Golam Ali Choudhury, and which had been sold away to different persons. At the end of the petition, after giving the shares of other persons who were parties to the suit, it was stated that the

balance which remained was 8 gandas odd, which fact would go against the share which the plaintiff now claims. We are, however, not concerned whether the actual share now claimed by the plaintiff is her legitimate share or not. It may be that she is making an unreasonable claim but I do not find that there is anything in the petition which may be said to have affirmed the decree after she had attained majority. Further, no one can be said to affirm even a voidable contract, unless one knows the circumstances under which he was entitled to avoid the contract. Here, in my opinion, the matter goes further. If the decree was a nullity, then it could not be affirmed by anything that the plaintiff might have said. Of course, if it could be shown that the plaintiff had obtained an advantage to the detriment of any other cosharer, it might be argued that this Court, in the exercise of its discretion, would not make a declaratory decree in favour of the plaintiff. But nothing like that has happened in this case. The plaintiff, if she has got money from the receiver for her subsistence has received less than what she says, she was entitled to and after the final allotment had been made of the property, she has never applied for taking possession of the allotment. In these circumstances, it cannot be said that the plaintiff was precluded by her act from claiming the relief that she is entitled to get.

Another argument was addressed on behalf of the respondent by Mr. Banerjee that if we hold that the Subordinate Judge was wrong in his judgment we should remand the case for trial of the other issues. The only issue that requires to be tried is as to the age of Jamilennessa Khatun. An issue was raised on the question whether she had attained majority or not at the time when the preliminary decree in the partition suit was passed. The defendants, however, stated in their written statement that the date of birth of Jamilennessa : Khatun was not 14th Jaistha 1305 corresponding to 27th May 1898 but she was really born in 1303 B. S. (1896-1897). That is, what is stated in para. 42 of the written statement. Taking that to be the correct date of the birth of the lady, she will still be below 21 years in 1916 when the preliminary decree was passed. It is,

(3) [1909] 31 All. 572 = 3 I. C. 864 = 36 I. A. 168 (P.C.).



therefore, not necessary to remand the case for taking evidence on any question of fact.

The judgment and decree of the Subordinate Judge must, therefore, be set aside and the suit of the plaintiff decreed. And it is declared that the preliminary decree made in the title suit No. 137 of 1912 on 31st July 1916 is null and void as against the present plaintiff and all subsequent proceedings taken in that suit from April 1916 and after that date must be set aside as null and void as against her.

The result, therefore, is that the original suit No. 137 of 1912 is restored so far as the plaintiff is concerned and the case sent back to the lower Court to proceed with it as from the date of the dismissal of the guardian ad litem of minor Jamilennessa Khatun, defendant 17, in that suit i. e. from about April 1916. The Subordinate Judge will accept a fresh written statement of Jamilennessa Khatun in suit No. 137 of 1912 and proceed to try the case as regards her interest. It is, however, unnecessary now, as she has attained majority, to have any guardian ad litem appointed. If she succeeds in obtaining a greater share than what was given to her by the preliminary decree in the above suit the sharers of other parties would of course be affected.

The appellant is entitled to her costs of this appeal as well as of the Court below hearing fee being assessed at 15 gold mohurs.

Appeals Nos. 254 and 320 of 1922 arise out of Suit No. 137 of 1912 which was renumbered as 7 of 1920. It is not necessary for us to give a detailed judgment in these two appeals, because in our judgment in appeal No. 58 of 1924, we have set aside both the preliminary and the final decree of the Court below, and have directed that the suit be remanded to the trial Court for hearing from the stage where it was as from April 1916. The Court below will accept a fresh written statement of Jamilennessa Khatun defendant 17, and proceed to try the case as if no decree had been passed, as regards her interest. We make no order as to costs in these two appeals. The cross-objection was not pressed. This is dismissed without costs.

**Panton, J.**—I agree.

**V.B./R.K.**

*Order accordingly.*

**\* A. I. R. 1929 Calcutta 590**

**B. B. GHOSE AND BASU, JJ.**

*Phani Bhusan Dhar*—Petitioner—Appellant.

**v.**

*Anukul Mukherjee and others*—Respondents.

Appeal No. 424 of 1928, Decided on 22nd May 1929, against appellate order of District Judge, Murshidabad, D/- 11th June 1928.

**\* Civil P. C., S. 144—Suit for ejectment—Suit decreed and possession obtained in execution—Decree finally reversed—Property leased in meantime to third persons—Application under S. 144—Possession can be recovered from the third persons and mesne profits from ejector only.**

*A* brought a suit against *P* for ejectment. The suit was decreed and *P* was dispossessed in execution of decree. The decree was finally reversed. But in the meantime *A* granted a lease of property to third persons. *P* made an application under S. 144 against *A* and third persons.

*Held*: that he was entitled to recover possession as against all including the third persons and to mesne profits for the period he was kept out of possession from *A* and not from third persons for they were not responsible for depriving *P* of his possession of property. [P 591 C 1]

*Gopendra Nath Das*—for Appellant.

*Amarendra Narayan Bagchi*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by an applicant. The application was made under S. 144, Civil P. C. A suit was brought by respondent 1 against the appellant for ejectment. The suit was decreed and the appellant was dispossessed in execution of that decree on 6th September 1926. That decree was reversed finally on 26th March 1927. In the meantime, respondent 1 granted a lease of the property to respondents 2 and 3. The appellant made the application against all the respondents. The learned Munsiff allowed the petition as against respondent 1 and he directed that the petitioner would get possession as against him, but he dismissed the petition against respondents 2 and 3. The result of it might have been that the appellant Phani Bhusan would not get possession of the property of which he was deprived in execution of a decree which had been reversed. Thereupon Phani Bhusan appealed to the learned



District Judge. The learned District Judge has very rightly decided that Phani Bhusan is entitled to recover possession as against all the respondents including respondents 2 and 3 who claimed to have been put into possession by respondent 1 under a lease. Having made that order the learned Judge ought to have further added that the appellant would be entitled to a refund of any costs that he had to pay in execution of the decree or damages and mesne profits which were properly consequential on the variation or reversal of the decree. It seems to have been an unintentional omission in the judgment of the learned District Judge. Only respondents 2 and 3 appear and they say that they should not be made liable for any mesne profits as they did not dispossess the applicant, nor were they in wrongful possession. In my opinion, that position taken by respondents 2 and 3 is quite sound. It was respondent 1 who was responsible for depriving the applicant of his possession of the property.

We therefore direct that in addition to the order made by the learned District Judge that the petitioner should be put into possession of the house or a portion thereof in question, he would also be entitled to a refund of any costs that he might have paid to respondent 1 with interest and mesne profits for the period he was kept out of possession of the property from respondent 1. The petitioner is entitled to his costs of this appeal as against respondent 1. Respondents 2 and 3 will bear their own costs of this appeal. The hearing fee is assessed at three gold mohurs.

**Basu, J.**—I agree.

P.N./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 591

C. C. GHOSE AND PANCKRIDGE, JJ.

*Giris Chandra Kit*—Plaintiff—Appellant.

v.

*Ram Saran Majumdar and others*—Defendants—Respondents.

Appeal No. 1046 of 1927, Decided on 6th June 1929.

(a) Civil P. C., O. 1, R. 9—Non-joinder of proper parties till limitation has run out bars suit.

If a necessary party is left out and is not impleaded till limitation had run out, suit must be considered to be one which is barred by limitation: 41 Cal. 727, Ref. [P, 592 C 2]

(b) Civil P. C., O. 26, R. 8—Deposition of sick person admitted without objection—Appellate Court should reject deposition.

A person alleged to be ill was examined on commission. Objection to admitting his deposition was not taken in trial Court. Court of first appeal rejected his evidence on the ground that he was not ill.

*Held*: that no objection being taken by trial Court, which could have cured the defect if it was proved that he was able to depose in Court, the decision of the lower Court was wrong.

[P 592 C 1]

*Panchanan Ghose and Durga Das Ray*—for Appellant.

*Brojolah Chakravarty and Bejoy Kumar Bhattacharjya*—for Respondents.

**C. C. Ghose, J.**—This appeal must be dismissed and for the following reasons. The appeal arises out of a suit for enforcement of a mortgage. The original mortgagor was one Ramdayal Majumdar. The mortgagees were two in number and they were Ajodhyanath and Pareshnath Biswas. It is said that the mortgage moneys were advanced on behalf of three brothers viz., Ajodhyanath, Paresh Nath and Gopinath Biswas. There is no finding either in the judgment of the first Court or in the judgment of the lower appellate Court that Gopinath was interested in the mortgage or in the moneys which were advanced on mortgage. Now, Ajodhyanath died leaving a widow and without issue, Gopinath died leaving a widow and without issue and Paresh Nath died leaving a widow and four sons. The plaintiff purchased the mortgage-bond from the widows of Ajodhyanath and Paresh Nath and from Hemangini, the widow of Gopinath. Defendants 1 to 3 are the sons of Ram Dayal, the original mortgagor who is now dead. Defendant 4 is the purchaser of the equity of redemption. Defendants 5, 6, 7 and 8 who were not originally on the record are the sons of Paresh Nath and they were subsequently added as parties defendants to this suit. The date of payment under the mortgage is 13th April 1913. Therefore, if a suit to enforce the mortgage in question had to be instituted it was to be instituted within twelve years from that date under Art. 132, Lim. Act. The suit was instituted in April 1925. The first Court



decreed the suit, the lower appellate Court has dismissed the suit on, among others, the ground of limitation. One of the points taken in the lower appellate Court was that the attestation of the execution of the document by the mortgagor has not been proved and that being so, the plaintiff was not entitled to enforce the mortgage. The ground urged is this, that the only witness who proved the attestation of the execution of the document was one who had been examined on commission and there were indications apparent on the record to the effect that at the time when the suit came on to be heard in Court, the witness was not ill and, therefore, was not entitled to claim that he should be examined on commission or that his examination on commission should be received in evidence. On this point the first Court did not say anything for the reason, as we are informed, that no objection to the admissibility in evidence of the deposition of the witness concerned was taken. The lower appellate Court has gone into the matter and, as indicated above, has held that the deposition of the witness could not be received in evidence. In my opinion, the lower appellate Court is wrong in the conclusion to which it came on the point in question.

To start with, no objection was taken in the trial Court and besides if such an objection had been taken, I have no doubt the trial Court would have taken measures to see that the defect, if any, was cured or that the witness in question was summoned to give evidence on the point referred to above. There is no substance whatsoever in the point taken by the lower appellate Court and we must, accordingly, negative the point and uphold the contention urged before us by the appellant. The lower appellate Court has, however, gone into the question of limitation and has held that the suit is barred by limitation. The facts bearing on the question of limitation are these: It appears that on the date the suit was instituted by the plaintiff, he had not got an assignment of the interest of the sons of Pareshnath in the mortgage moneys. The position, therefore, was (and it may be stated in passing that there is nothing on the record to show that Gopinath was interested in the mortgage moneys) that on the date of the institution of the suit,

the plaintiff was the assignee of the interest of one of the mortgagees. It is true that on a date subsequent to the institution of the suit, the plaintiff was successful in obtaining a consequence of the interest of two of the sons of Pareshnath and he obtained release from the other two sons of Pareshnath (defendants 5 and 6) and it is also true that on a date subsequent to the institution of the suit, these four sons of Pareshnath had been made parties to the suit. But in law the position on the date of the institution of the suit was this. The plaintiff had instituted a suit as assignee of one of the mortgagees and he had not taken any steps whatsoever within the time limited for the institution of suits on mortgages to bring on the record the representative of the deceased mortgagee Pareshnath; in other words, in law his suit on the date of the institution thereof was an incompetent suit. It is unnecessary to refer to cases or even to the sections. The suit on the date of the institution being an incompetent suit, the question is whether the addition of defendants 5 to 8 on a date subsequent to the institution of the suit had the effect of curing the defect in question. In my opinion, it had no such effect. The distinction really is between proper and necessary parties. If a necessary party is left out and is not impleaded till limitation had run out, the suit must be considered to be one which is barred by limitation: see in this connexion the case of *Debi Prosad Sahi v. Dharmajit Narayan Singh* (1) where the identical question arose.

In my view, therefore, the addition of defendants 5 to 8 on a date subsequent to the expiry of limitation as parties defendants to the suit had not the effect of making the plaintiff's suit which was an incompetent one on the institution thereof a competent one on the date when the parties in question were added. That being so, there cannot be any doubt whatsoever that the plaintiff's suit was barred by limitation and this appeal must, therefore, stand dismissed with costs.

**Panckridge, J.**—I agree.

V.B./R.K.

*Appeal dismissed.*

(1) [1914] 41 Cal. 727=22 I. C. 570=19 C. L. J. 437.



## A. I. R. 1929 Calcutta 593

SUHRAWARDY AND GRAHAM, JJ.

*G. V. Raman and others*—Accused—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 192 of 1929, Decided on 19th February 1929, against order of Chief Presy. Magistrate, D/- 8th February 1929.

(a) Criminal P. C., S. 208 (2)—In an enquiry conducted under Chap. 18, the accused has no right to reserve cross-examination of prosecution witnesses.

The provisions of chapters dealing with enquiry into cases triable by Court of Sessions and those relating to summons cases and warrant cases are not interchangeable and provisions appearing in a particular chapter relating to "trial" cannot safely be imported into that relating to "enquiry." [P 594 C 1, 2]

The wording of Cl. 2, S. 203, does not lend support to the view that it assumes that the accused shall be at liberty to cross-examine the witnesses for the prosecution after all the witnesses have been examined-in-chief.

A Magistrate may be justified in allowing the accused even in a trial under Chap. 18, to reserve cross-examination for a future occasion in the special circumstances of a case and in the interests of justice. That will, however, not be under any express enactment but in the exercise of the inherent power of the Court in administering justice. But the Magistrate is justified in refusing a prayer for cross-examination of prosecution witnesses when the defence had declined to cross-examine them after the examination-in-chief of each was over: 36 Cal. 48, *Disappr.*; 39 Cal. 885, *Diss. from.*; 5 C. W. N. 110, *Expl.*; A.I.R. 1927 Pat. 243, *Appr.*; 36 Mad. 321; A. I. R. 1924 Cal. 780; 16 C. L. J. 45, *Ref.*

[P 596 C 1, 2]

(b) Criminal P. C., S. 213 (2)—Expression "witnesses for the defence" does not include witnesses for the prosecution, who are cross-examined.

The expression "witnesses for the defence" does not include witnesses for the prosecution who are cross-examined. The witnesses for the defence referred to in Cl. 2, S. 213, are witnesses whom the Court may, in its discretion, summon and examine under S. 212 out of the list of witnesses given by the accused under S. 211 to be examined on his behalf at the trial in the Court of Session. [P 595 C 2]

(c) Criminal P. C., Ss. 215, 435 and 439—In the case of a commitment High Court will interfere only when any provision of law has been contravened and not otherwise.

Where a Magistrate, in making an order of commitment, has contravened any provision

of law, the High Court is entitled and ought to set aside the commitment on the ground; but where he has not violated any provision of law and has only erred in the exercise of the discretion vested in him, the High Court will seldom interfere in such a case.

[P 595 C 1]

*B. C. Chatterji, Suresh Chandra Taluqdar, Mritunjoy Chattopadhyaya and Gopal Chandra Mukherjee*—for Petitioners.

*Debendra Narayan Bhattacharjee*—for the Crown.

**Suhrawardy, J.**—This rule is directed against an order of the Chief Presidency Magistrate of Calcutta committing the accused to the sessions. The ground on which we are invited to quash the commitment is that the petitioners were not given an opportunity to cross-examine the witnesses for the prosecution. In order to understand the ground upon which this revision application is based, it is necessary to state the facts. The accused were charged under Ss. 420 and 120-B, I. P. C. The case against one of the persons who were originally placed on trial was withdrawn under S. 494, Criminal P. C., and he was examined as the first witness in the case. In the course of the examination of this witness the learned Magistrate intimated that on the completion of the evidence he would commit the accused to the sessions. The learned counsel appearing for the accused then asked for permission to reserve cross-examination at that stage and to cross-examine at a later stage. The petitioners in their petition say that on such request being made the learned Magistrate remarked that he would consider the application later. But the Magistrate in his explanation says that he refused to grant the prayer. We take it that that was so and the prayer for reserving cross-examination was refused. It appears from an examination of the record that after each witness was examined the defence was asked to cross-examine him and on their declining to do so, there is a note made by the Magistrate at the end of the examination of each witness that cross-examination was declined. The examination of the witnesses went over several days the last batch of 25 witnesses having been examined on 4th February 1929. Thereafter the accused were examined under S. 342 and charge was framed. On that day the Magistrate passed the following order:



"Four accused are discharged. Remainder will be committed to the High Court Sessions under Ss. 420, 120-B and 511, I. P. C. tomorrow."

On the following day the order of commitment was formally passed. On 4th February an application was made on behalf of the accused for permission to cross-examine the approver namely, the first witness and some other witnesses before commitment. This application was rejected by the Magistrate with the following order:

"The correct time to cross-examine has passed. I do not think it necessary at this stage to allow the prayer."

The accused were committed to take their trial at the High Court Sessions which is now sitting and their case appears in the list for the present Sessions. On 8th February this rule was obtained from us for setting aside the commitment on the ground stated above. It is contended on behalf of the petitioners that the Magistrate was wrong in rejecting their application on 4th February, and refusing to grant them permission to cross-examine some of the witnesses for the prosecution before committing them to the Sessions.

In considering the point raised before us I should like first to refer to the law as embodied in the Criminal Procedure Code before commenting on the case law on the subject. It may safely be assumed that Chap. 18, Criminal P. C., dealing with enquiry into cases triable by Court of Session is complete in itself and lays down the procedure to be followed in such an enquiry as do chapters relating to trials of summons cases and warrant cases. It cannot be argued that the provisions of these chapters are interchangeable and that the provisions appearing in a particular chapter relating to "trial" can be imported safely into that relating to "enquiry." The only section which deals with examination of witnesses in an enquiry into cases triable by the Court of Sessions is S. 208. Cl. 1 of that section says:

"When the accused appears or is brought before the Magistrate he shall proceed to hear the complainant, if any, and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused or as may be called by the Magistrate."

The course to be followed by the Magistrate in recording the evidence under that clause is what is indicated afterwards in the sections under that chapter. The second clause says that the accused shall be at liberty to cross-examine the witnesses for the prosecution and in such case the prosecutor may re-examine them. Cl. 3 is to the effect that if the complainant or the accused applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing the Magistrate shall issue such process unless he deems it unnecessary to do so. S. 209 indicates that when the evidence has been recorded in accordance with Cls. (1) and (3), S. 208, the Magistrate shall if he finds that there are not sufficient grounds for committing the accused person for trial record his reasons and discharge him unless it appears to the Magistrate that such person should be tried before himself. This section enables the Magistrate to discharge the accused after recording evidence for the parties under S. 208 (1) and the evidence of witnesses called under Cl. (3) if he is not satisfied that there are sufficient grounds for committing him to the Sessions. But if the Magistrate is satisfied that there are sufficient grounds for committing the accused he shall frame a charge under S. 210. Under S. 211 the accused shall be required to give a list of witnesses whom he wishes to be summoned to give evidence at his trial before the Sessions Court. The Magistrate may in his discretion summon any witness named in the list under S. 212.

Under S. 213, the Magistrate may make an order after all the preliminaries have been observed committing the accused to the Sessions or if after hearing the witnesses for the defence he is satisfied that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused. This is all the procedure laid down in Chap. 18 for the examination of the witnesses and the conduct of the proceedings before commitment. We are asked in this case to quash the commitment in the exercise of our power under S. 439 read with S. 435, Criminal P. C., and this power in a case like the present should be exercised in accordance with the provisions of S. 215, Criminal P. C., which enables the High



Court to quash a conviction only on a point of law. If the Magistrate has contravened any provision of law we are certainly entitled and we ought to set aside the commitment on the ground. But if on the other hand he has not violated any provision of the law and has only erred in the exercise of the discretion vested in him the High Court will seldom interfere in such a case.

Section 208 does not say of reservation of cross-examination of witnesses for the prosecution till a future occasion. The ordinary rule of examination of witnesses in Courts is that after a witness is examined he is cross-examined and if necessary, re-examined (S. 138, Evidence Act). In civil Courts there is no departure from this rule. But in the administration of criminal law it has been relaxed in the trial of warrant cases where under S. 256, Criminal P. C., the accused after the charge has been framed against him shall be asked if he wishes to cross-examine any witness for the prosecution and if he says that he so wishes the witnesses named by him shall be recalled. This procedure has not been incorporated in Chap. 18 relating to enquiry into cases triable by the Court of Sessions. Cl. (2), S. 208 does no more than indicate the ordinary rule as to how examination of witnesses should be conducted. After witnesses for the prosecution have been examined the accused shall be at liberty to cross-examine them and the prosecutor to re-examine them. The wording of that clause does not lend support to the view that it assumes that the accused shall be at liberty to cross-examine the witnesses for the prosecution after all the witnesses have been examined in chief. Cl. (1), S. 208, refers to the examination of witnesses produced by the prosecution without the processes of the Court; and Cl. (3) refers to compelling the attendance of witnesses under process from Court; otherwise there is no difference between the two clauses as regards the procedure to be followed under either of them. If it was the intention of the legislature to insert in Chap. 18, a provision similar to what is contained in S. 256, Chap. 21, the several clauses of S. 208 would have been differently worded. In the absence of any such enactment in Chap. 18 and in view of the express enactment to that effect in Chap. 21 relating to trial of warrant

cases, it will not be wrong to assume that the legislature did not intend to give the accused the right to reserve cross-examination in a case triable by a Court of Sessions. I should not like to lay down that a Magistrate is not justified in allowing the accused even in a trial under Chap. 18 to reserve cross-examination for a future occasion except in the special circumstances of a case and in the interest of justice. That will not be under any express enactment but in the exercise of the inherent power of the Court in administering justice.

In the present case the Magistrate asked the accused to cross-examine each witness before he left the box and they persistently refused to cross-examine the witnesses. At the end of the examination of all the witnesses they wanted to cross-examine some of them but the Magistrate refused their prayer. I invited Mr. Chatterjee who conducted the case on behalf of the petitioners to point out any express provision of law which gives him the right to demand cross-examination of witnesses in an enquiry under Chap. 18 after all the witnesses have been examined. He pointed out Cl. (2), S. 213, which says that if the Magistrate, after hearing the witnesses for the defence is satisfied that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused. The learned counsel's contention is that the expression "witnesses for defence" includes not only the witnesses who are examined as defence witnesses but also the witnesses for the prosecution who are cross-examined. This seems to me to be a forced construction of the plain words of the section. Reading Ss. 211, 212, 213 together it would be clear beyond any possibility of doubt that the witnesses for the defence referred to in Cl. (2), S. 213, are witnesses whom the Court may in its discretion summon and examine under S. 212 out of the list of witnesses given by the accused under S. 211 to be examined on his behalf at the trial in the Court of Sessions. There being no express provision of the law entitling the accused to reserve cross-examination till after the examination of all the witnesses under Chapter 18 has been completed, the learned Chief Presidency Magistrate in my judgment has committed no error of law.



In this connexion several cases have been referred to at the Bar which in the view of the law I have taken does not seem necessary to examine minutely, but as they have laid down certain generalizations I should like to say a few words with regard to them. The point that has now been raised before us did not come up directly for examination in any of the cases of this Court except in *Phanindar Nath Mitra v. Emperor* (1). There witnesses for the prosecution were examined but no attempt was made by the accused to cross-examine them. But an application to cross-examine the witnesses was made to the Magistrate after the prosecution had closed its case and the Magistrate had decided to commit them to the High Court. It seems that in that case the Magistrate had originally proceeded with the trial of the case as before himself. But at a certain stage he decided to commit the accused to the Court of Sessions. As the application was made after he had so decided, the learned Judges were of opinion that S. 347, Criminal P. C., applied and under that section if it appeared to the Magistrate at any stage of the proceedings that the case was one which ought to be tried by the Court of Sessions he should commit the accused under the provisions relating to commitment. The learned Judges seem to be of opinion that as soon as the Magistrate has decided that the case should be committed to the sessions he shall stop further proceedings and commit the accused to the sessions at once. The learned Judges laid some stress upon the words "he shall stop further proceedings" which appeared in the Code but which have now been omitted by the Amending Act of 1923. In that view they held that the Magistrate need not therefore follow the procedure laid down in S. 208. I am unable to agree in this construction of S. 347. It is possible, and it generally so happens, that the Magistrate starts a case before him with a view to try it himself; but in the midst of the trial when certain facts have been disclosed he makes up his mind to commit the accused to the sessions. When the trial was commenced before him he treated it as one of a warrant case and

the accused exercised the right to reserve cross-examination after charge. If in the midst of the trial or immediately after finishing the evidence for the prosecution the Magistrate decides to commit the accused to the sessions it does not seem just to the accused that he should at that stage, because the Magistrate has come to a certain decision, lose the right which he had before such decision. In such a case S. 347 should not be held as compelling the Magistrate to refuse to allow the accused to cross-examine the witnesses and to commit at once the case to the sessions. This view has been taken in a recent case to which I will presently refer. *Phanindra's* case does not help either party; but it lends some support to the view that the Magistrate is not bound to give facilities to the accused for cross-examination after the witnesses for the prosecution have been examined and no attempt is made by the accused to cross-examine them earlier. This case has been disapproved and in my opinion rightly, in *The Sessions Judge of Coimbatore v. Irumuddi Kumara Kangaya Mantridiyad* (2).

A strong case in favour of the petitioners is the case of *Jogendra Nath v. Moti Lal* (3), which is a reverse case to the present. In that case the Magistrate after drawing up the charge in a case triable by the Court of Sessions allowed the accused to cross-examine the prosecution witnesses and thereafter acquitted him. Against the order of acquittal or discharge the prosecutor moved this Court. The learned Judges discharged the rule holding that the Magistrate had the right to allow the accused to cross-examine the witnesses for the prosecution even after charge under S. 213 (2), Criminal P. C. Their Lordships observed:

"No doubt the subsection refers to witnesses for the defence; but in our opinion these words are wide enough to cover evidence extracted by cross-examination from the witnesses for the prosecution."

For the reasons given above, with great respect I am unable to adopt the construction put by the learned Judges

(1) [1909] 36 Cal. 48=1 I.C. 469=12 C.W.N. 1014.

(2) [1913] 36 Mad. 321=23 M. L. J. 368=17 I. C. 410=(1912) M. W. N. 1243.

(3) [1912] 39 Cal. 885=17 I. C. 406=16 C. W. N. 1155.



on S. 213 (2), Criminal P. C. In that case the question as to whether the Magistrate is bound to give opportunity to the accused to cross-examine the witnesses for the prosecution after they have all been examined-in-chief, before or after charge, does not seem to have been raised and discussed. In fact the reliance put by the learned Judges upon sub-S. (2), S. 213 shows that they were of opinion that it was in the discretion of the Magistrate to give this opportunity to the accused, in view of the provisions of S. 212, Criminal P. C. In that case reference has been made to *In the matter of Surya Narain Singh* (4). That was a case in which the application was made for the transfer of an enquiry from the Court of the Magistrate on the ground amongst others that the Magistrate had refused permission to the accused to cross-examine the witnesses for the prosecution.

The question as to whether the Magistrate is bound to do so was not raised or discussed. But it was assumed that the accused should have been given an opportunity of cross-examining the witnesses for the prosecution with a view to obtaining a cancellation of the charge. In that case the learned Judges expressed the view that after the drawing up of the charge the Magistrate is not bound to commit the accused but that he can also discharge him. The point before us was not there raised and as it has not been laid down that it is the duty of the Magistrate to allow an opportunity to the accused for cross-examining the witnesses for the prosecution, though he may do so, as reference in that case to S. 213 (2) shows, I am not prepared to follow it as an authority on the question before us. A much recent case on this point is the case of *Jyotsna Nath Sikdar v. Emperor* (5). The decision in that case supports the view that I have ventured to take with regard to the duty and discretion of Magistrates in inquiries under Chap. 18. There the trial was proceeded with as in a warrant case and before charge was framed and the Magistrate decided to commit the accused to the Court of Sessions the accused applied to cross-examine the

witnesses for the prosecution. This prayer was refused and the learned Judges held that in the circumstances of that particular case the Magistrate had no discretion in the matter having regard to the fact that the application to cross-examine was made:

"before the charge was framed and before the Magistrate had decided to commit the accused to the Court of Sessions."

But he should have allowed the accused to cross-examine the prosecution witnesses. The learned Judges refused to follow the case of *Phanindra Nath Mitter v. Emperor* (1), as also the case of *Fazarali v. Mazaharulla* (6) on the construction of S. 347. The last mentioned case was also a case of transfer. There is an observation there of the learned Judges distinguishing *Phanindra Nath Mitra's* case (1), that if the accused had applied after all the witnesses for the prosecution had been examined to cross-examine them he should have had no right under S. 347 but as in that case the application was made before the prosecution case was absolutely closed and all the witnesses had been examined, the accused should have been granted the indulgence of cross-examining the witnesses. The learned Judges cited no authority and did not discuss the several sections of the Code bearing upon this question. For my part I do not see any difference in the application of law between a case where the accused asked permission to cross-examine witnesses for the prosecution after they had all been examined and that in which he asks for such permission after some of them have been examined. It seems to me that decisions like these are only calculated to confuse as they seem to usurp the function of the legislature. The case of *Jyotsna Nath Sikdar v. Emperor* (5) is not also relevant as in that case the application for cross-examination was made before the charge was framed and before the Magistrate had decided to commit the accused to the Court of Sessions. In the case before us the Magistrate had on the very first day declared that he would commit the accused to the sessions. The view that I have ventured to take finds support in a decision of the Patna High Court in the case of *Sasdat Mian v. Emperor* (7) where it

(4) [1901] 5 C. W. N. 110.

(5) A. I. R. 1924 Cal. 780=51 Cal. 442.

(6) [1912] 16 C. L. J. 45=16 I. O. 336=18 Or. L. J. 688.

(7) A. I. R. 1927 Pat. 243=6 Pat. 329.



has been distinctly held that in an enquiry into cases triable by a Court of Session the accused has no right to reserve cross-examination. In that case too the defence counsel had declined to cross-examine the witnesses after each of them had been examined. I should like to quote that portion of the judgment with which I entirely agree :

"The ordinary rule as laid down in the Evidence Act is that the witnesses will be examined-in-chief, cross-examined and re-examined. There is no express provision for postponing the cross-examination of witnesses till all prosecution witnesses are examined-in-chief. A special provision has been made under certain circumstances with respect to trials in warrant cases (Chap. 21) entitling the accused to postpone the cross-examination of the witnesses till a certain stage. No such provision has been made with respect to an enquiry into the cases triable by a Court of Sessions in Chap. 18 of the Code. The Magistrate, however, to my mind has the discretion to allow the accused to postpone the cross-examination of witnesses in suitable circumstances."

In the view that appeals to me as stated above this Rule fails and is discharged.

**Graham, J.**—The Rule in this case was issued to show cause why the petitioners should not be given an opportunity of cross-examining the witnesses for the prosecution before commitment to the sessions.

The facts are shortly these :

The petitioners were sent up for trial before the Chief Presidency Magistrate on charges under Ss. 420 and 120-B, Penal Code. At the outset the learned Chief Presidency Magistrate intimated that he would upon the completion of the evidence commit the case to the High Court Sessions. Thereafter counsel for the accused is said to have verbally prayed for permission to cross-examine the witnesses for the prosecution, and it is said the learned Magistrate remarked that he would consider the application later. There appears to be some doubt about this, however, as the learned Magistrate says in his explanation that the application was refused, and we may proceed on that basis. The record shows that 10 witnesses were examined for the prosecution on different dates from 20th December to 25th January, and on 4th February 1925 more prosecution witnesses were examined. In the case of each witness there is a note at the foot of the deposition that cross-examination

was declined. On the last mentioned date, however, an application was made by the accused G. V. Raman praying for permission to cross-examine the approver and some other witnesses before commitment to the Sessions Court. That application was rejected by the Magistrate on the ground that the time for cross-examination had passed, and that he did not think it necessary at that stage to allow the prayer. It is this order which is now assailed on behalf of the petitioners, and the contention shortly is that the learned Magistrate had no option or discretion in the matter, and that he was bound to allow the accused to cross-examine the prosecution witnesses so as to give them an opportunity of breaking down the case against them and so obviating the necessity of their being committed to the Court of Sessions.

In my opinion this contention is without substance. An accused certainly has under S. 208 (2), Criminal P. C., a right to cross-examine the witnesses for the prosecution, but he must exercise that right at the proper time, that is to say, after the close of the examination-in-chief. That is the ordinary construction to be put upon the section, and it finds support in S. 138, Evidence Act.

Mr. Chatterjee for the petitioner urged that inasmuch as S. 208, Criminal P. C. does not say when the right of cross-examination is to be exercised, it is open to the accused to exercise it at any time, and that he may, if he so desires, reserve it until after all the prosecution witnesses have been examined. There is nothing, however, in the section to warrant this view. The right if exercised must be exercised in the normal manner.

It cannot be argued that because in the case of warrant trials an accused is allowed under S. 256, Criminal P. C., to reserve his cross-examination, he must necessarily have the same privilege when an inquiry is held under Chap. 18. Indeed the very fact that that chapter contains no provision similar to that in S. 256 (1) is an argument for holding that no such right exists. It may be inferred that the omission was intentional and not a mere accident. Moreover the record plainly shows that the accused declined to cross-examine, and they cannot afterwards revive that right and claim to exercise it at any time they please. The Magistrate might, if he



considered it necessary or desirable, have allowed cross-examination, but it cannot be held that in refusing he committed any error of law.

It is to be borne in mind moreover that under S. 347, Criminal P. C., the Magistrate is empowered at any stage of the inquiry to commit for trial, which furnishes an additional reason for holding that the claim now preferred by the petitioners is not well founded. It seems to me that they are claiming a right which has not been given anywhere in the Code. Certain authorities were cited before us on their behalf and these have been dealt with by my learned brother. It is not therefore necessary for me to refer to them.

I agree that the Rule fails and should be discharged.

K.N./R.K.

*Rule discharged.*

## A. I. R. 1929 Calcutta 599

RANKIN C. J., AND PAGE, J.

*Linton*—Appellant.

v.

*Guderian*—Respondent.

Appeal No. 30 of 1928, Decided on 31st July 1928, from judgment of Costello, J., in Matrimonial Suit No. 3 of 1928.

(a) Divorce Act (6 of 1869), S. 2—Domicile in India at time of petition is essential for granting jurisdiction.

Domicile in India at the time when the petition is presented is an essential condition for the jurisdiction of Indian Courts in cases of dissolution of marriage. [P 603 C 2]

(b) Divorce Act (6 of 1869), S. 2—"Domicile."

Domicile of the parties to a marriage in practice means the domicile of the husband: *Landerdale Peerage Case*, (1885) 10 A. C. 692; *Udny v. Udny*, (1869) 1 H. L. (Sc.) 441; *Bell v. Kennedy*, (1868) 1 H. L. (Sc.) 307, *Ref.* [P 601 C 1]

(c) Divorce Act (6 of 1869) — Change of domicile—Onus.

The entire burden of proving that the petitioner had changed his domicile lies on him: *Winans v. Attorney-General*, (1901) A. C. 287, *Foll.* [P 602 C 1]

(d) Divorce Act (6 of 1869), S. 2—Domicile—Change of domicile—Change of domicile means determination to make alleged domicile home, with clear intention of settling there and ending his days there.

To establish change of domicile it must be proved that the person whose domicile was in question had determined to make and had in

fact made the alleged domicile of choice his home with the intention of establishing himself and his family there, and ending his days in that country: *Winans v. Attorney-General*, (1904) A. C. 287, *Foll.* [P 602 C 2]

(e) Divorce Act (6 of 1869), S. 34—Application for dissolution and damages—Court having no jurisdiction to grant dissolution—Damages alone can be granted.

It cannot be said in view of the plain provisions of the Divorce Act, S. 34, that because the Court has no jurisdiction to grant a decree for divorce, it cannot treat the application for dissolution of marriage and damages as an application for damages alone. It can be so treated and further the damages suffered by the petitioner will be different according as he is getting a decree for divorce or is not getting it: *Bernstein v. Bernstein*, (1893) P. 292, *Dist.*; *Monsell v. Monsell*, (1922) P. 34, *Ref.* [P 603 C 2; P 604 C 1]

(f) Divorce Act (6 of 1869), S. 13—"Collusion."

Collusion between the parties cannot be inferred from such ordinary acts between them as a solicitor would naturally regard as unoffensive and unobjectionable: *Churchward v. Churchward*, (1895) P. 7 and *Harris v. Harris*, (1862) 31 L. J. Pr. (N.S.), 160, *Ref.* [P 605 C 1]

(g) Divorce Act (6 of 1869), S. 13—Object of insisting on no collusion is to ensure fair trial.

The object which the legislature had in mind in insisting that there should be no collusion between the parties to a matrimonial petition was to compel the parties to come into the Court of Divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect; to oblige them so to act as will enable the Court to be in a position to do justice between the parties: *Butler v. Butler*, (1890) 15 P. D. 66, *Foll.* [P 606 C 1]

*Westmacott* and *R. C. Bonnerjee*—for Appellant.

*C. Bagram* and *Moore*—for Respondent.

**Rankin, C. J.**—In this case, we have to deal with a husband's petition for divorce filed in this Court under the Indian Divorce Act, on 20th January 1928. The petitioner was apparently born in a part of Poland, which has been referred to as being at that time German Poland. It appears that when he was very young, only 2 or 3 years old, his family removed to Berlin and when the petitioner was about 27, namely, in 1912, he went to London. In 1914, he was married in London to the respondent. It appears that for a time he went to New York, and afterwards to Honolulu. In 1916, he went to New Zealand, where, apparently, his wife's people had some property or connexions. His evidence



is that he had been endeavouring to do business in New Zealand in connexion with exportation of goods from Germany. But, as the political condition after the war was not favourable for that kind of business, he, in 1923, abandoned all hopes of continuing that business in New Zealand and accordingly he removed with his family from New Zealand to Berlin. He seems to have gone to Berlin in 1920 and gone back to New Zealand in 1921. He appears to have abandoned definitely New Zealand and gone back to Germany in 1923. He went back to Germany with the idea that he would go to some other part of the world and make his living in connexion with exportation of goods from Germany. According to him, in 1926, he made up his mind to go to India and take his wife and two children with him. As they were starting out from Europe, he learned of the possibility of business in Sweden and went to Stockholm—his wife and children going out to India meanwhile. Apparently he expected them to go to Colombo, but, in fact, they came to Calcutta and the wife was living in the Grand Hotel. The husband followed soon after and arrived there towards the end of November 1926. It appears that, when he left Europe, he had two agreements—one of which only is in evidence—one for the sale of German typewriters and other for the sale of motors, I understand, Swedish motors.

The agreements—both of them—were of a preliminary and temporary character, lasting only for one year. In this way, the petitioner came out to start life in business in India. To put the matter quite shortly, at the Grand Hotel at the end of November there was staying the co-respondent. It appears that he made acquaintance of the respondent in the hotel. Before very long, namely, by 10th January, one way or another, he took the respondent to his flat at the Galstaun Mansions and there misconduct occurred and from that time onward it would appear that these parties committed misconduct at various places. More than one visit to Darjeeling was made by them and it would appear that the respondent was constantly living with the co-respondent at his flat. This appears to have gone on for the best part of the year and at the time when the

citation under this petition was served upon the wife in 1928, she was living with the co-respondent at Galstaun Mansions. The husband, it would appear, having come to the Grand Hotel at the end of 1926, had a quarrel with his wife, because, according to him, his wife's reference to the co-respondent made him suspicious. He says that he told his wife that she must leave the hotel, but she refused. He went away, taking with him both the children and it does not appear that until the time when these divorce proceedings were commenced, he saw anything of his wife. That matters little to our present purpose. He appears to have travelled about in India in the endeavour to open agencies for the sale of these German typewriters. He appears to have been ill and he had gone during the course of 1927 to Kashmir to recover. It does not appear that he had any fixed abode in India. He had taken, I think, an office in Bombay and the evidence as to his living and conduct in India is within a very narrow compass. It would seem that, in February 1927, he had been expecting to go to Europe either to London or Berlin to settle about one of his agencies. He expected that this arrangement would take a substantial time. He thought it that would be a year or more before he could come back to India, in any event, and he wanted his wife to go back with him, but she was unwilling. In these circumstances, he brings his petition for divorce on the ground of adultery and he asks for damages against the co-respondent.

The first question that arises for decision in this case is whether or not this is a case in which the Courts in British India have any right to give a decree for dissolution of marriage. Upon the face of the amendment made in 1926 to S. 2, Divorce Act, nothing in the Divorce Act authorizes any Court to make a decree for dissolution of marriage, except where the parties to the marriage are domiciled in India at the time when the petition is presented. There appears to be a certain amount of confusion upon the subject. It seems to me necessary to point out that domicile in India at the time of the presentation of the petition is an absolutely necessary condition of jurisdiction so far as regards divorce. We are in no way concerned whether or not a person not domiciled



India is put to hardship for lack of facilities in obtaining divorce from British Indian Courts. It is manifest that, so long as the matrimonial laws of different countries vary widely, as they do, it is necessary that for every marriage there should be an ascertainable forum for the purpose of adjudicating upon the question of divorce. All countries do not take same view of international law. But the view of international law which obtains in England and in these Courts is that the power to grant divorce rests with the Court of the country in which the parties are domiciled at the date of the petition. Other countries may take different views of international law in that respect. But it is well settled now that that is the view upon which the English law proceeds and that view, for all purposes of this Court, is the law without exception or qualification by the command of the Indian Legislature.

Now, there are two parties to every marriage and the domicile of the parties, in practice, means the domicile of the husband. This is a rule of law which may or may not be subject to exception. But it is evident that the rule that the wife's domicile follows that of the husband would be nearer to the actual fact than any other rule and it is necessary that one Court should be found which has jurisdiction over both the parties for the purpose of divorce. In these circumstances, it is very plain to me that this rule that the Courts will not, under the Divorce Act, entertain any application for divorce except it be first proved affirmatively to its satisfaction that the parties are domiciled in India is a rule which should never be departed from. I protest altogether against the doctrine which was urged before the learned Judge of the trial Court in this case and before us that, if the Court finds that the parties are of ambiguous domicile or nationality the Court will proceed to interfere with the domestic status of persons who are not domiciled in India. Any decree given by an Indian Court in respect of people who are not domiciled in India is a decree which, in the view of international law which this Court entertains, can be disregarded altogether in the country of the parties' domicile. To make orders which will effect that persons who in the country of their domicile are married are in India

strangers is a most serious step and it is idle to talk of justice in connexion with any invitation to make orders of that sort. The main features of such an order would plainly be disorderly confusion of inheritance and rights on the part of the foreigners. The consequence would be that over the face of Europe the decrees of the Indian Courts would have to be regarded as nullities. I cannot, therefore, approve of the language in which the learned Judge has expressed his conclusion upon this question.

It appears to me that we have to find, as a fact, cold hard fact—one way or the other whether, in this case, the domicile of the husband at the time of the presentation of the petition is shown to have been in India. The learned Judge has stated that he is very dubious as to whether he ought to hold that the petitioner is domiciled in this country at all. He has said that the facts upon which he is asked to infer that the petitioner is possessed of Indian domicile are very slender indeed. He has said that he is disposed to take a somewhat lenient view of the evidence of the petitioner with regard to his intentions in the matter and that, in order to do justice in the matter, he feels that he ought to accept what the petitioner has said. He confesses that he is probably stretching the point in the petitioner's favour; but he says that, having regard to all circumstances in this case, it is right that he should take that view of the matter, and, accordingly, in order to conclude the point, he finds as a fact upon the evidence of the petitioner that he is domiciled in India. Upon this finding, both the parties, the co-respondent and the petitioner have, as it seems to me, a certain grievance. Mr. Westmacott for the co-respondent says that the learned Judge has found against his client, though it is evident from the judgment that the learned Judge has no great belief that this petitioner was domiciled in India. In like manner, the petitioner has, I think, a grievance in that, though the learned Judge believed his evidence as to his intentions, he expressed no great firmness in that belief. I collect from the learned Judge's judgment that generally speaking he regarded the evidence of the petitioner as worthy of credence and with that I go to the evidence to see whether, in my



judgment, there is enough to entitle this Court to hold that, in January 1928, this man was domiciled in India.

It appears that this man was originally a Pole. He had been taken to Germany when very young. As a young man, he had gone to England and, after travelling in various parts, he, subsequently to his marriage, lived for several years in New Zealand. His prospects in New Zealand having ceased, he comes back to Berlin and there apparently he takes steps to get business connexions, upon the strength of which he could go somewhere else with regard to the export of German manufactures. He had never been in India in his life, nor had his wife either. He had no friends in Bombay, Calcutta or anywhere in India. He had a chance in this respect that he had an agreement for one year for the sale of German typewriters. Apparently, he had another agreement which has not been properly proved of an equally temporary character in connexion with Swedish motors. There appears to have been no office of either of these concerns in India. It was his business to do what he could to open agencies. He went about and, so far as we know, he opened agencies in Kashmir, Delhi, Calcutta, Bombay and, I think, Lucknow. One would naturally suppose that this man had come to India to see if he could make a living and that in coming to India, he had no occasion to make up his mind as to whether he would live and die in India. Like a large number of people, who come from parts of Europe he had to make his living and he proposed at the time to do so in India.

Before considering whether his domicile was changed or not, we have to see what is meant by change of domicile. In my judgment, we may take all the law that is required on this point from the decision of the House of Lords in the case of *Winans v. Attorney-General* (1). There can be no doubt that the whole burden of proving that the petitioner had made up his mind to come to India and treat it as his ultimate and permanent home is on him. As was pointed out in the case to which I have referred, it was necessary for him to

satisfy the Court that he had a fixed and certain purpose.

"A change of domicile is a serious matter—serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicile."

The question has been put in the language of Lord Cairns in this way:

"Whether the person whose domicile was in question had 'determined' to make, and had, in fact, made the alleged domicile of choice 'his home with the intention of establishing himself and his family there, and ending his days in that country.'"

In other words we have to ask whether the petitioner has satisfied us that he had not come to India to be a Pole or German making his living, but that he intended to come to British India to be domiciled there as being a person whose ultimate and permanent home was to be in India. In my judgment, the evidence in this case falls far short of what is required. We have here a husband who is anxious, I do not doubt, to obtain a decree for divorce and very anxious, it is plain, to obtain reparation from the correspondent at the hand of the Court. In both these matters, the guilty wife is in agreement and her interest coincides with his. The evidence that they bring forward to induce this Court to believe that the petitioner was making India his permanent home consists mostly in saying "yes" when the words "permanent home" are put to them. They made the most unconvincing effort to explain the intention which they had arrived at when they set out for India. The case made is that, although they knew nothing of India, the man had read about India, that he was interested in Yoga philosophy, that his own country Poland or Germany had not seen much of him and was of no great value to him as a place of residence, that he was seeking somewhere to make a permanent home and that before reaching India at all the petitioner decided that he was to be of Indian domicile. Accordingly, on this view, when he finally stepped on to the quay at Bombay, he became a person who was domiciled in India. It appears to me that the circumstance that they sold their house in Berlin and their furniture before they came out to India is small corroboration of so improbable

(1) [1904] A. C. 287=73 L. J. K. B. 613=20 T. L. R. 510=90 L. T. 721.



a story. It appears to me that, on this evidence, the Court would find itself dispensing matrimonial justice to all sorts of people who have arrived in India very recently. It is most necessary in this case to find whether the story that the man's permanent home was to be in a country of which he knew nothing and in which he might be little successful is a story which is to be treated as proved by the evidence that these two highly interested parties have given to the Court. I cannot doubt that this is evidence which should be regarded as altogether insufficient. I think the petitioner may possibly have deceived himself into thinking that his intentions were different from what they really were. But I do not believe this story that he came to India with a fixed and settled resolution to be of Indian domicile so that his domicile of origin had been departed from the moment he arrived in India. Most unfortunately, he had hardly set foot in India before he suffered the very serious wrong with which we are now concerned. It appears that, in the beginning of 1927—within a couple of months of his arrival in this country—his wife was committing adultery with the co-respondent. It does not appear to me that throughout the year 1927 anything happened which strengthens his case to the effect that he had become of Indian domicile.

Stress has been laid upon certain words in a letter which has been put forward as showing the agreement between the owners of the typewriters and the petitioner where it is stated "when he emigrates (or removes) himself to British India"—the German words being "wenn sie nach British India übersiedeln." It does not seem to me that that adds very much to the evidence in this case. I come to the conclusion that this evidence critically looked at is not sufficient to entitle this Court to proceed to deal with the personal status of these parties on the basis that their domestic arrangements in the matter of divorce are subject to the jurisdiction of this Court.

The next question which arises is whether, if that be so, this petition can be allowed to stand as a petition for damages against the co-respondent under S. 34, Divorce Act. Now, cases have been cited to us, particularly the well known

case of *Bernstein v. Bernstein* (2) to show that, in an ordinary case where the English Court has jurisdiction—if the petitioner fails to make good his right to a decree for divorce, he will not be allowed to recover damages from the co-respondent. The explanation of the clauses of the Matrimonial Causes Act of 1857 given by Lord Justice Lopes and other authorities makes it clear that the right to damages is a right which is subject to the same defences as the right to other matrimonial reliefs. In other words, if there has been condonation or connivance or collusion, the right to damages would be defeated equally with the right to a decree for divorce or judicial separation. So much seems to me clear and, in this country, we have an express direction that we are to act and give reliefs on principles and rules conformable to those of the English Divorce Act.

It is said, however, that the English cases oblige us to hold that this petition as a petition for damages must be dismissed, if by reason of lack of jurisdiction we are unable to grant a decree for divorce. That seems to me to be an entirely different proposition and I am not of opinion that there is any authority for it or that it is correct. If by reason of the death of the wife between the decree nisi and the decree absolute no ultimate decree for divorce can be given, it has been decided *Mon-sell v. Monsell* (3) that nevertheless the judgment for damages may take effect. There can be no doubt that the causes of action to use the common law expression against the co-respondent for damages and against the wife for divorce are different and distinct, although, upon a true construction of the Divorce Act, the same defences are open to these claims. But I am not of opinion, in view of the plain terms of S. 34, which says that the husband may claim damages in a petition limited to such object only, that it can be right in a case of this character to say that, because the Court has no jurisdiction to grant a decree for divorce, it cannot treat this petition as a petition for damages alone and award damages upon it. It is quite clear, however, that the damages suffered by the petitioner will be different according

(2) [1893] P. 292=63 L. J. P. 3=69 L.T. 513.

(3) [1922] P. 34.



as he is getting a decree for divorce or is not to get a decree for divorce. It is quite clear that, upon this basis, the question of damages must be reviewed and has to be regarded upon other facts. It will be necessary no doubt to take account of the real position of the petitioner in view of the finding that this Court has no jurisdiction to grant him a decree for divorce.

So far, I have not said anything about one of the defences taken by the co-respondent—the appellant before us—I mean the defence that, in this case, there has been collusion between the petitioner and the respondent. I have no doubt that, if there has been collusion that is an equally good answer to the claim for damages as to the other form of relief; and, in this Court Mr. Westmacott for the co-respondent, has argued that there is evidence of collusion which disentitles the petitioner to get any relief at all. He has relied not so much upon any suggestion that this petition was brought or initiated under or by virtue of any agreement between the petitioner and his wife, or upon any suggestion of the adultery being caused or induced by any connivance on the part of the husband, but upon certain matters which took place in the course of the prosecution of this suit. He says that counsel for the petitioner knew that the solicitors for the respondent had subpoenaed the co-respondent. He says that the petitioner only called himself and the caretaker of the Galstaun Mansions evidently relying upon the wife's evidence to prove the fact of adultery. He says that, in the wife's answers, there are some irrelevant matters volunteered with the sole object of assisting the petitioner—such as the fact she was pregnant by the co-respondent. He says too that in the wife's answers there is an endeavour to prove the case against the co-respondent. He has applied to us to let him introduce additional evidence upon this point, because he says that, in the bills of costs which have been rendered by the attorneys, it can be seen that the wife's attorneys were furnishing certain documents to the husband's attorneys—documents showing that the co-respondent was guilty of adultery on other occasions; and it is said that, in these bills of costs, one would find other suspicious matters, namely, the fact, am-

ongst others, that the petitioner, before he had taken a copy of the co-respondent's answer, was asking for an early date to be fixed for the hearing of the case. We have to consider whether or not this is a case in which we ought to refuse all reliefs to the petitioner on the ground that collusion between the petitioner and the respondent has been made out. Here, again, if I were satisfied that collusion between the petitioner and the respondent had been made out I would regard it as my clear duty to refuse all relief to the petitioner. But I am not of opinion that this is a case in which there has been more than a certain amount of purely mechanical assistance given by one set of advisers to another. I do not think that it vitiates all the proceedings because the attorneys for the wife gave the attorneys for the husband copies of certain documents which they had got. I think that the fact that the learned counsel got to know that the attorneys for the wife subpoenaed the co-respondent is a very narrow ground for supposing that any collusion had taken place.

Having examined carefully each of the grounds set forth as evidence of collusion by Mr. Westmacott, I can only say that, in my opinion, they fall far short of proving any open or secret agreement between the husband and the wife. I quite agree that collusion may be sufficient if it is collusion in prosecution of a perfectly true case. I do not think it necessary here to examine the authorities which have been brought to our notice, because I am not of opinion that this judgment can be based upon any view of the law to the effect that, if the case is true, collusion does not matter: *Churchward v. Churchward* (4). I am quite satisfied that there might be collusion in the mere prosecution as distinct from the initiation of a true case; but I am not of opinion that mere furnishing of documents or, as in *Harris v. Harris* (5), mere furnishing of photographs or that kind of small assistance between the attorneys does amount to collusion in the sense with which we are concerned. I see nothing in this case which is contrary to good faith. I see nothing which

(4) [1895] P. 7=64 L. J. P. 18=43 W. R. 380=71 L. T. 782.

(5) [1862] 31 L. J. Pr. (n.s.) 160.



appears to me to take the colour of an attempt to concert a case and put it forward before the Court. I am, therefore, of opinion, looking at the facts of this particular case that the word "co-operation" used in the learned Judge's judgment is too strong (as the learned Judge himself appears to have thought) and the learned Judge's finding that there was no collusion is one which should be supported. It is quite true that in this case both the parties the husband and the wife had the same interest. Both desired to get a divorce. Both desired that the co-respondent should be made to pay heavily, if possible, for his conduct. That common object would not justify collusion between the parties. But it is very necessary in such a case as this to be careful before imputing collusion between the parties from ordinary acts which a solicitor would naturally regard as inoffensive and unobjectionable.

The next question which arises is whether this petition for divorce is to be amended by asking for damages alone or by asking for judicial separation and damages. As to that, I propose that both the husband and the wife shall be given time to consider the position. We are not going to ask them to make any decision as to this on this afternoon or even tomorrow. This decree will not be drawn up until they have had at least a fortnight from to-day to consider the position. Subject to that the result of this judgment is that the question of damages must be gone into over again. It will not be necessary to take evidence over again, but it will not be right that this question should be entered into again until it is known whether these parties are or are not going to be separated. I do not think it will be fair to the learned Judge who tried this case or to either of the parties that the question of damages which has been dealt with by the trial Judge on one hypothesis should go back to him to be dealt with by him again on another. This case should, in my opinion, be sent back to the original side to another Judge to assess the damages against the co-respondent in the light of the present position. The learned Judge who will now deal with this matter will deal with it completely independently of the findings of the learned trial Judge. He is

given power to take further evidence on any point, if he thinks it desirable.

As regards the costs of this appeal, I am of opinion that each party must pay its own costs. The order of the Court below as regards the costs of the trial will stand.

The sum of Rs. 12,500 which has been paid in Court by the co-respondent will remain in Court, subject to his right to withdraw it on giving security to the satisfaction of the Registrar.

**Page, J.**—I agree. As we are differing from the decision of the learned trial Judge, and having regard to the arguments that have been presented to us, I desire to add a few words upon the issue of jurisdiction.

It is not pretended that the domicile of origin of the parties was in India. Now, Lord Lindley in *Winans v. Attorney-General* (1) observed :

"I take it to be clearly settled by the *Landerdale Peerage Case* (6), *Udny v. Udny* (7), *Bell v. Kennedy* (8) that the burden of proof in all inquiries of this nature lies upon those who assert that a domicile of origin has been lost, and that some other domicile has been acquired. Further, I take it to be clearly settled that no person who is sui juris can change his domicile without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicile is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for some temporary purpose."

Lord Macnaghten in the same case, stated that :

"such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be, to quote Lord Westbury again, "a fixed and settled purpose," "And" says his Lordship [1863] 1 H. L. Sc. 321 "unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that the domicile of origin continues." So heavy is the burden cast upon those who seek to shew that the domicile of origin has been superseded by a domicile of choice ?"

Now, in my opinion the evidence in this case is inconsistent with the existence of an intention on the petitioner's

(6) [1885] 10 A. C. 692.

(7) [1869] 1 H. L. (Sc.) 441.

(8) [1868] 1 H. L. (Sc.) 307.



part at the time when he presented the petition, to reside and establish himself in India for the rest of his days. Indeed, to my mind, the reasonable conclusion to be drawn from the evidence is that the petitioner had come to India to earn a living, and intended to remain in India so long as an opportunity to obtain a livelihood in this country was open to him; that he had formed no intention to settle in any one place rather than in another, and that he realised that his movements in the future might well be as uncertain as his wanderings in the past.

On the issue of collusion I would add that the object which the legislature had in mind in insisting that there should be no collusion between the parties to a matrimonial petition was :

"to compel the parties to come into the Court of divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect; to oblige them so to act as enable the Court to be in a position to do justice between the parties *Butler v. Butler* (9), per Lopes, L. J."

In my opinion, having regard to the authorities, the evidence in this case does not disclose such facts as would have disentitled the petitioner to a decree for divorce on the ground of collusion of the Court has jurisdiction to grant him such relief.

V.B /R.K

*Case remanded.*

(9) [1890] 15 P. D. 66.

## A. I. R. 1929 Calcutta 606

CUMING AND PEARSON, JJ.

*Brindaban Misra Adhikary* — Appellant.

v.

*Dhruba Charan Roy and others*—Respondents.

Appeal No. 487 of 1927, Decided on 21st March 1929, against appellate decree of Sub-Judge, Third Court, Midnapur, D/- 30th November 1926.

(a) Limitation Act, Art. 91 — Document executed by misrepresentation and hence void—Art. 91 does not apply in suit for recovery of property.

Where it is established that the plaintiff or his transferrer was induced by defendant's misrepresentation to execute a deed of gift of the property in question and he executed the same believing it to be a document of a different kind altogether, the transaction is void and not voidable only and Art. 91 has no ap-

plication to plaintiff's application for recovery of the property : 23 C. W. N. 93; 35 Cal. 551, *Foll.*; 42 Bom. 698, *Ref.*; 33 Cal. 257, *Dist.*

[P 607 C 2]

(b) Bengal Tenancy Act, S. 103-B—Presumption of correctness arises with respect to each entry and not whole Record-of-Rights.

What is presumed to be correct by the words "Every entry in the Record-of-Rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct," is each entry and not the whole Record-of-Rights."

[P 608 C 2]

*Santosh Kumar Pal*—for Appellant.

*Apurba Charan Mukerji* — for Respondents.

**Judgment.**—This appeal arises out of a suit for a declaration of title and confirmation of possession and in the alternative for recovery of possession. The plaintiff's case briefly was that he had purchased this land from defendant 3 by a kobala dated 16th September 1923 and after his purchase he had been receiving rent from defendant 4 who was actually in possession of the house and was his tenant. But since then defendant 1 had induced defendant 4 to pay rent to him. Defendant 1 who contested the suit contended that he had purchased the property from defendant 2 and that defendant 2 derived his title under a deed of gift of the property executed in his favour by defendant 3. The trial Court held that there had been a valid deed of gift by defendant 3 to defendant 2 and therefore as defendant 3 had at the time of the plaintiff's purchase no title to the property the plaintiff had acquired no title to the property by his purchase from her; so he dismissed the plaintiff's suit. The plaintiff appealed to the District Court. The learned Subordinate Judge who heard the appeal would seem to have come to the finding that defendant 3 never really executed a deed of gift in favour of defendant 2. He would seem to find that defendant 3 when she executed this document was under the impression that she was executing a power-of-attorney and that she did not realize that what she was executing was a deed of gift. He held that the document was taken by misrepresentation and undue influence and that defendant 2 had practically practised fraud, misrepresentation and undue influence on defendant 3 in getting the deed of gift executed whereas she intended to execute a general power-of-attorney. One would perhaps think that



these findings were sufficient to dispose of the case even though perhaps the findings of undue influence, fraud and misrepresentation were somewhat contradictory. The learned Subordinate Judge, however, goes on further to find that as there was no acceptance of the gift the gift was void. This finding is perhaps unnecessary in view of what he has already found. He goes on further to find somewhat unnecessarily that the gift being a conditional one and the donee not having performed the condition when defendant 3 has subsequently sold the land to the plaintiff she has evidently revoked the gift.

Mr. Pal who appears for the appellant has first of all contended that the suit was barred by limitation. He contends that the period of limitation applicable to the present suit is as provided in Art. 91, Lim. Act. The plaintiff, he contends, cannot succeed in his suit unless he first of all sets aside the deed of gift and as the deed was executed more than three years before the institution of the suit. The suit was out of time. In support of his contention the learned vakil relies upon the case of *Harihar Ojha v. Dasarathai Misra* (1) with special reference to the remark of Woodroffe, J., at pp. 265 and 266 where the learned Judge states as follows :

"There can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under whom he claims he must first obtain the cancellation of the instrument, and that the three years' rule enacted by Art. 91 applies to any suit brought by such person. The reason why a party seeking to recover property against his own instrument must show that it is voidable or void, as for instance for fraud, is that, as long as an instrument creating a later title is valid his former title cannot prevail."

Mr. Pal argues on the strength of this decision that the plaintiff's suit must fail. No doubt this decision lends considerable support to the contention of the learned vakil. As a matter of fact, however, the decision of that particular point which I have just referred to was not necessary, as far as can be seen, for the decision of that particular case; and therefore to that extent the decision must be considered as obiter. On the other hand the case of *Sanni Bibi v. Siddik Husain* (2) a decision directly in point,

(1) [1905] 88 Cal. 257=1 C. L. J. 408=9 C. W. N. 686.

(2) [1919] 28 C. W. N. 93=49 I. C. 76=29 C. L. J. 55.

it has been held that when it is established that the plaintiff by defendant's misrepresentation was induced to execute a deed of sale believing the same to have been a deed of a different kind the transaction is void and not voidable only, and Art. 91, Lim. Act has no application to his suit to recover the property. It will be seen that that decision is directly in point, because in this case the plaintiff sues as the transferee of defendant 3 and stands in her shoes. Defendant 3 was induced by the misrepresentation of defendant 2 to execute a deed of a different kind to what she thought she was executing. It has been found that she thought that she was executing a power-of-attorney when she was really executing a deed of gift. A further support to the case of the respondent would be found in the case *Petherpermal Chetty v. Muniandy Servai* (3) a decision of the Privy Council. On p. 559 of the report Lord Atkinson in delivering the judgment of the Judicial Committee remarks :

"As to the point raised on the Limitation Act 1877, their Lordships are of opinion that the conveyance of 11th June 1895, being an inoperative instrument, as in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims."

If I understand this decision the Judicial Committee held that where the instrument was inoperative it was not necessary to set it aside as a preliminary to his obtaining a decree for possession. The document before us is obviously an inoperative instrument. It purports to be a deed of gift whereas it is really nothing of the sort, because the person who executed it was under the impression that she was executing not a deed of gift but a power-of-attorney. The same principle has been laid down by the Bombay High Court in the case of *Narsagounda v. Chawagounda* (4) with special reference to p. 657 a decision of the Full Bench which follows the Privy Council case already referred to reported in (1). This point, therefore, seems to be concluded by authorities, and must be decided against the appellant.

The next point argued on behalf of the appellant is that the plaintiff should not

(3) [1908] 35 Cal. 551=35 I. A. 98=12 C. W. N. 562 (P.O.).

(4) [1918] 42 Bom. 638=47 I. C. 581=20 Bom. L. R. 802 (F.B.).



be allowed to make a case different from the case set out in his kobala. In the kobala under which the plaintiff claims certain references were made to the deed of gift and the plaintiff or rather his vendor there apparently gave a different version about this deed of gift. The appellant contends that it is not open to the plaintiff to make out any different case whatever in the plaint. Whether the case made in the plaint differs materially from the case made in the kobala is not necessary to be determined. It is obviously open to the plaintiff to make out any case that he chooses in the plaint. The fact that the case made in the plaint does or does not differ from the case as would appear in the document on which he relies would obviously be a point to be taken into consideration by the Court in considering the truth or falsity of the plaintiff's case. But there is nothing to prevent him from making out any case he wishes to make. Whether he could substantiate it is quite another question.

The next point urged by Mr. Pal is that the plaintiff is now estopped from saying that there is no legally valid gift and that defendant 3 did not execute a deed of gift, because, he states, that the plaintiff in his kobala referred to the deed of gift and therefore it is not open to him now to say that defendant 3 never executed any deed of gift. I entirely fail to understand how this statement in the plaintiff's kobala that defendant 3 executed a deed of gift can in any way stop the plaintiff from saying that there is no deed of gift. It has not been shown to us, nor was it ever alleged before the case came up here in second appeal that defendants 1 and 2 were in any way influenced or misled by the statement in the kobala. In fact there is no suggestion defendants 1 and 2 ever saw the statement in the kobala before defendant 1 purchased the property from defendant 2. The only suggestion made by the learned vakil for the appellant is that they might have seen it. Clearly that is not sufficient to create an estoppel.

The appellant has lastly contended that the learned Judge in the Court of appeal below was wrong in saying that :

"under the circumstances no presumption of defendant 2's possession can be based upon it (the Record-of-Rights)."

Now it appears that in the Record-of-Rights one plot is shown in the posses-

sion of defendant 2 and the other plot is shown in the possession of the landlord. It was no doubt the case of defendant 1 that defendant 2 was in possession of both the plots. There is no doubt that the Record-of-Rights raises a presumption in favour of defendant 2 so far as regards the one plot which has been recorded as in the possession of defendant 2. Defendant 1 no doubt has challenged the correctness of the Record-of-Rights so far as regards the other plot recorded in the name of the landlord, but for that reason it cannot be said that no presumption arises in favour of defendant 2 in respect of the other plot which has been recorded in his name the correctness of which has not been challenged by defendant 1. It is not the whole Record-of-Rights but each entry of the Record-of-Rights with respect to which the presumption of correctness arises. The words used in S. 103-B, Ben. Ten. Act are :

"Every entry in a Record-of-Rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct."

What is presumed to be correct is each entry and not the whole Record-of-Rights. In this respect no doubt the learned Subordinate Judge has fallen into an error. I do not think, however, that for this reason alone we should send back the case to him for a consideration of the question of possession after taking a proper view of the presumption as regards the entry in the Record-of-Rights, for the learned Subordinate Judge seems to have gone into this question of possession of defendant 2 independently of the Record-of-Rights and have found on the evidence that defendant 3 had been in possession all along. He has found that :

"the evidence leaves no room for doubt that defendant 3 was all along living in the house and also admittedly was in possession after the execution of the deed."

I do not therefore think that it is necessary to send the case back to the learned Subordinate Judge for abiding on the question of possession.

The result is the appeal must fail and is dismissed with costs.

V.B./R.K.

*Appeal dismissed.*



## \* \* A. I. R. 1929 Calcutta 609

## Full Bench

RANKIN, C. J. AND C. C. GHOSE, BUCKLAND, B. B. GHOSE AND MUKERJI, JJ.

*Sayamali Molla*—Plaintiff—Appellant.

v.

*Anisuddin Molla and others*—Defendants—Respondents.

Full Bench Ref. No. 2 of 1929, Decided on 4th July 1929 in Letters Patent Appeal No. 105 of 1928 from Appeal No. 434 of 1928 against the decree of Mitter, J., D/- 10th September 1928.

\* \* Limitation Act, Art. 148—Puisne mortgagee getting decree for sale without joining prior mortgagee—Subsequent suit by him to redeem prior mortgagee is governed by Art. 148 and not by Limitation Act, Art. 132.

Where the puisne mortgagee has already obtained a decree for sale on his mortgage without making prior mortgagee a party, he is entitled to redeem a prior mortgagee in a subsequent suit and the subsequent suit is governed by Art. 148 and not by Art. 132: 14 C. W. N. 439, *Expl.* and *held rightly decided on its facts.* (Case law Referred). [P 611 C 1]

*Hira Lal Chuckerburty and Syamadas Bhattacharji*—for Appellant.

*Surendra Nath Bose 2*—for Respondents.

**B. B. Ghose, J.**—The facts of the case giving rise to this reference are these: One Bainuddin mortgaged a plot of land to defendant 1 in 1904. In 1908 he again mortgaged this piece of land with another plot (No. 2 in the schedule of the plaint) to the plaintiff. Defendant 1 (who will be referred to as the defendant) brought his suit on his mortgage in 1911 without impleading the plaintiff and obtained a decree for sale against the mortgagor alone on 30th November 1911. Plaintiff brought a suit to enforce his mortgage in 1915. He made the present defendant a defendant in the suit along with the mortgagor and a transferee from him. The defendant set up his prior mortgage and plaintiff's suit as against him was dismissed as the plaintiff did not ask for any decree against him. Plaintiff obtained the usual decree for sale as against the other defendants in that suit on 8th May 1915. Defendant in this case put the property mortgaged to him to sale in execution of his mortgage decree and purchased it himself on 15th August 1916, and obtained possession.

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Plaintiff afterwards executed his decree and purchased both the mortgaged properties on 19th November 1920 but obtained possession only of plot 2. Plaintiff brought the suit out of which the appeal to this Court arose on 17th July 1925 for redemption of plot 1 of the plaint on payment of the mortgage money due on the mortgage of defendant and for possession. Defendant 2 is a brother of defendant 1 and defendant 3 is said to be a tenant under the other defendants. These two may be left out of consideration.

Various points were raised in defence by the written statement of the first two defendants. Defendant 3 did not appear. All the Courts have thrown out the suit on the ground that it is barred by limitation, and this question has caused the reference to the Full Bench.

All the three Courts concurred in holding that the suit was barred under Art. 132, Lim. Act, purporting to follow a decision of this Court in *Nidhiram v. Sarbeswar* (1). The questions referred to the Full Bench are:

- (1) Whether Art. 132 applies to this case;
- (2) Whether *Nidhiram's* case was rightly decided;
- (3) Whether the suit is barred by limitation.

I think it necessary to make some preliminary observations as to the rights of the parties under the circumstances stated above. It seems to have been suggested that plaintiff's right has been affected in some manner as he did not redeem the defendant when he brought this suit. Under O. 34, R. 1, Civil P. C. a puisne mortgagee may sue for sale without making a prior mortgagee a party to the suit. No doubt if he seeks to redeem a prior mortgagee in his suit for sale he may make the prior mortgagee a party and a complete decree may then be made as in Form No. 8, Appendix D, Civil P. C. But if a person is joined as a defendant for enforcement of the right on a mortgage he should be dismissed from the action as soon as he sets up a prior title: see *Nilakant v. Suresh* (2). The fact that plaintiff's suit on his mortgage was dismissed as against defendant does not affect his right of redemption if it is not extinguished in any other manner.

When a puisne mortgagee is not made a party to a suit by the first mortgagee.

(1) [1910] 14 C. W. N. 439=5 I. C. 877.

(2) [1885] 12 Cal. 415=12 I. A. 171=4 Sar. 685 (P.C.).



his rights are not affected by the decree or sale thereunder, and the puisne mortgagee has still the right to redeem the prior mortgage: *Ram Narain v. Bandi* (3). He may notwithstanding the prior decree bring a suit on his mortgage: *Debendra v. Ram Taran* (4). The rights of rival purchasers when the first mortgagee brings his suit without impleading the puisne mortgagee, obtains a decree against the mortgagor only and purchases the property himself and the mortgaged property is sold a second time at the instance of the puisne mortgagee and purchased by himself were considered in the case of *Gopee Bandhu v. Ka'leepulo Banerjee* (5). The purchaser under the first decree purchases the outstanding interest of the mortgagor only and the puisne mortgagee's rights are not affected in any way. It should be noted that in the present case the puisne mortgagee seeks to redeem as the purchaser of the equity of redemption and the suit of the plaintiff as against the mortgagor was properly constituted, for when he brought his suit the equity of redemption of the mortgagor had not passed away from him. There can be no question that the plaintiff would have the right to redeem if his suit is not barred by limitation.

Now I shall consider the question as to which article of the Limitation Act is applicable to this suit for redemption. Plaintiff's suit has been dismissed on the ground that Art. 132 of the Act is applicable to this case. That article refers to a suit 'to enforce payment of money charged upon immovable property.' In my judgment by no straining of language can a suit for redemption fall under that article, as it is not a suit to enforce payment of money. The special article applicable to a suit for redemption is Art. 148, which gives 60 years as the period from the date when the right to redeem accrues. In this case the due date under the first mortgagee's bond is not in evidence but the suit was brought within 60 years of the date of the mortgage. So if this article is applicable there is no question that the suit is within time and is not barred by limitation.

But it is said that the case of *Nidhiram v. Sarbeswar* (1) is authority for the proposition that Art. 132 applies

to this case. It seems to me that if the facts of that case are properly analyzed it would appear that the learned Judges did not profess to lay down any such rule. There the suit on the first mortgage was brought on 28th March 1892 and the sale at which the mortgagee purchased was held on 21st March 1893. The puisne mortgagee was not made a party to the suit. The first mortgagee sold his interest to another person on 14th July 1893. The puisne mortgagee then brought his suit on 6th November 1894, that is to say, after the proceedings in the suit on the prior mortgage had been brought to an end, and himself purchased the property at the sale on 20th July 1895, without making the previous purchasers a party to the suit. In the result the owner of the equity of redemption not being impleaded the only right that was transferred by the decree on the puisne mortgagee and the sale thereunder was the right under the plaintiff's own mortgage. The second mortgagee could no doubt bring a fresh suit against the owners of the equity of redemption to enforce his mortgage within the period of limitation, which suit would be governed by Art. 132, Limitation Act. But he did not do so. He brought a suit after his right to enforce his mortgage was barred, for a declaration of his right to redeem the prior mortgage. The question which the learned Judges were asked to consider was, whether

"the time within which the second mortgagee who has purchased the property in execution of a decree in a suit subsequently brought by him, to enforce his mortgage, or as in this case, his transferee, has to bring a suit, commences to run from the due date of the mortgage debt or from the date of his purchase."

They held, and in my opinion rightly that limitation to enforce his mortgage would run from the due date on the mortgage. The learned Judges proceed to say:

"The second mortgagee, by his purchase at the sale in satisfaction of his mortgage debt cannot acquire any right of redemption which he had not as mortgagee."

I think what they meant was, as the right to enforce the puisne mortgage was barred by limitation, the transferee from the mortgagee had no right in the property to enable him to redeem the prior mortgage. The same observation was made by the learned Chief Justice in his order of reference, with which I fully agree. It is unfortunate that the lan-

(3) [1904] 31 Cal. 737.

(4) [1903] 30 Cal. 599=7 C. W. N. 766 (F.B.).

(5) 23 W. R. 333.



guage used by the learned Judges in *Nidhiram's* case (1) lends itself to misconstruction if dissociated from the facts of the case. But I think they never meant to lay down a rule of limitation for an action to redeem which is not warranted by the provisions of the Limitation Act. It seems to me what they intended to say was that the plaintiff had no subsisting right to redeem.

I do not consider it necessary to elaborate the discussion but it seems to me whenever a suit for redemption is brought by a person entitled to redeem against a mortgagee Art. 148, Lim. Act, and no other article applies to it.

I have now only to refer to *Fisher on Mortgages* (para. 1448) cited by the learned Judge who first tried the case in second appeal. The learned Chief Justice has pointed out the reason why in England the mortgagor is a necessary party to a suit by a puisne mortgagee to redeem the prior mortgagee. The cases cited in *Fisher* show that the reason of the rule that if a puisne mortgagee seeks to redeem he must foreclose all subordinate rights including the ultimate equity of redemption, is that the right to redeem of those persons would otherwise remain open, thus exposing the prior mortgagee to another suit. Where, as in this case, the puisne mortgagee has already obtained a decree on his mortgage, he is entitled to redeem a prior mortgage in a subsequent suit. The law in England is thus stated in *Fisher on Mortgages* para. 1693.

"The second or other puisne mortgagee may foreclose those subsequent without joining those prior to themselves, for the latter can suffer no damage. The subsequent mortgagees, it is true, are left without the opportunity of redeeming all prior to them in the same suit."

The answers I propose to the questions put to us are :

(1) No. Art. 148 is applicable.

(2) *Nidhiram's* case (1) was rightly decided on its facts. If, however, it is supposed that it was decided in that case that a suit for redemption such as this is governed by Art. 132, then it was wrongly decided.

(3) The suit is not barred by limitation.

The case has been referred to this Bench for final decision. But the suit having been dismissed on the ground of limitation the other issues raised in the

case have not been decided by the Courts below, and no other question was argued before us. None of the parties, however, examined any witness at the trial. The questions therefore which now require decision are covered by issues 4 and 5 and the case should be remitted to the trial Court for decision of those issues. Reference may be made to the cases of *Umesh Chander v. Zahur Fatima* (6), *Sukhi v. Safdar Ghulam* (7), *Jnanendra v. Shorashi Charan* (8), regarding the rights of the parties subsisting under their respective mortgages.

The defendant has claimed to redeem the plaintiff in his turn and his right to redeem the plaintiff would depend on the question as to the preferential right to the equity of redemption under the respective sales held under the decrees obtained by the parties on their mortgages. In deciding that question reference may be made to the following cases : *Gopee Bandhu v. Kaleepada* (5) *Dirgopal v. Bolaki* (9), *Ram Narain v. Bandi* (3). If the defendant is held entitled to redeem he would be able to do so on payment of a proportionate part of the mortgage money chargeable on plot 1, as the plaintiff has himself purchased a portion of the property under his mortgage viz, plot 2. It would then be necessary to take evidence as to the respective value of the two plots. The case should be finally determined by the trial Court after taking into consideration all the circumstances.

The appellant must get his costs of the second appeal to this Court, of the Letters Patent Appeal and of this Reference.

**Rankin, C. J.** — I agree with the judgment of B. B. Ghose, J. and have only to make clear that the observations made by me in the order of reference are to be taken to be superseded by this judgment.

**C. C. Ghose, J.** — I agree with the judgment delivered by B. B. Ghose, J.

**Buckland, J.** — I also agree.

**Mukerji, J.** — I also agree.

R.K.

Order accordingly.

(6) [1891] 18 Cal. 164=17 I. A. 201=5 Sar. 507 (P. C.).

(7) A. I. R. 1922 P. C. 11=43 All. 469=48 I. A. 465 (P. C.).

(8) A. I. R. 1922 Cal. 23=49 Cal. 626.

(9) [1880] 5 Cal. 269.



## A. I. R. 1929 Calcutta 612

GRAHAM AND MITTER, JJ.

*Monohar Das Mohanta*—Defendant—Appellant.

v.

*Tarini Charan Nandi*—Plaintiff—Respondent.

Appeal No. 982 of 1927, Decided on 4th June 1929, from appellate decree of Sub-Judge, 2nd Court, Hooghly, D/- 12th January 1927.

(a) Religious Endowment—Alienation by mohant—Permanent lease is not binding on successors unless for necessity.

It is beyond the power of a mohant of an endowment to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the benefit of an augmentation of a variable rent from time to time unless there is some special circumstance of necessity justifying the permanent lease. Such an act is a breach of duty in the mohant and is void as against succeeding mohants: 36 Cal. 1003 (P. C.), *Foll.*; A. I. R. 1922 P. C. 123, *Ref.* [P 613 C 2]

(b) Religious Endowment—Alienation by mohant—Benefit for estate is synonymous with necessity.

The words "for the benefit of the estate" should be construed in a sense almost synonymous with necessity and that they mean something which is necessary for the protection and preservation of the estate: A. I. R. 1922 P. C. 123 (P. C.) and 36 Cal. 1003 (P. C.), *Foll.* [P 612 C 2, P 613 C 1]

(c) Contract Act, S. 196—Lease void in itself cannot be ratified.

There cannot be any ratification of a lease which is in itself void. [P 613 C 1]

(d) Hindu Law—Alienation—Minor's estate—Guardian is not competent to alienate and contract cannot be enforced against minor—Minor.

It is not within the competence of a guardian of a minor to bind him with a contract to alienate property and such contract if entered into cannot be enforced against the minor: 39 Cal. 232 (P. C.), *Foll.* [P 614 C 2]

S. C. Bose and Narendra Krishna Basu—for Appellant.

Rupendra Kumar Mitter and Nalin Chandra Paul—for Respondent.

**Graham, J.**—This appeal is by the defendant and arises out of a suit for specific performance of a contract. The land to which this contract related has an area of six cottahs situated at Chinsurah and was formerly in the possession of Madhusudan Das, Mohunt of Asthal, Burdwan. Plaintiff alleged that the mohunt leased out the land permanently to him on his paying a sum of Rs. 155 as selami and agreeing to pay rent at Rs. 11-8-0 per annum. Subse-

quently, a patta and a kabuliyat were executed but were not registered. In the meanwhile, the mohant died and was succeeded by the defendant Monohar Das Mohunt.

The defence to the suit was that the land was not the personal property of the former mohunt but that it was debuttar, that the defendant was not the successor and heir of the former mohunt, that, therefore, the suit did not lie against him, and that, inasmuch as the land was debuttar property and not personal property and contract for a permanent lease of the land was not binding upon the mohunt's successor. The trial Court held that the plaintiff was entitled to a decree for specific performance and gave a decree accordingly, and that decree was affirmed on appeal by the learned Subordinate Judge of Hooghly.

The main contention which has been urged before us on behalf of the appellant is that the Court of appeal below was wrong in holding that a permanent lease was within the powers of mohunt if it was for the benefit of the estate, and it is argued that the real question is not whether there was benefit to the estate, but whether there was necessity. Reference has been made to the decision of Judicial Committee of the Privy Council on the subject in the case of *Abhiram Goswami v. Shyama Charan Nandi* (1). Their Lordships of the Privy Council observed in that case:

"It is well settled law that the power of the mohant to alienate debuttar property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity."

Again, in the case of *Vidya Varuthi Thirtha v. Balusami Ayyar* (2), Ameer Ali, J., who delivered the judgment of the Court observed:

"According to the well settled law of India (apart from the question of necessity, which does not here arise) a mohant is incompetent to create any interest in respect of the mutt property to endure beyond his life."

There can be no doubt from these decisions, and other decisions to which reference has been made in the course of argument, that the words 'for the benefit of the estate' should really be construed in a sense almost synonymous with necessity, and that they mean some thing

(1) [1903] 36 Cal. 1003=4 I. C. 419=36 I. A. 148 (P. C.).

(2) A. I. R. 1922 P. C. 123=44 Mad. 831=43 I. A. 302 (P. C.).



which is necessary for the protection or preservation of the estate. It certainly cannot be held on the facts of the present case that anything has been established to prove benefit of the estate in this sense. There is no evidence, for example, to show that the interest of the estate would not have been equally served by a lease which was something other than a permanent lease. In reply to this contention Mr. Mitter on behalf of the respondent has urged that the lease which was intended to be granted by the late mohant was not a permanent lease at all, and laid stress upon the fact that the word "mokorari" is nowhere to be found in the lease. But although that word is not to be found it seems to be clear, taking the patta and the kabuliyat together that the lease is a mokorari or permanent lease.

It was next urged on behalf of the respondent that even if the lease was beyond the powers of the former mohant there was a ratification of it by the present mohant and that that being so the lease would enure at all events for the lifetime of the present incumbent of the office of mohant. There could not, however, be any ratification of a lease which was in itself void. It was also argued that the principle which should be applied is the principle of benefit to the estate, but, as I have already said, that expression must be interpreted in its special meaning and cannot be construed in such a manner as to cover any and every contract or lease which may bring some sort of financial benefit to the estate. In my judgment, the decision of the Court of appeal below cannot be supported and the appeal should be allowed and the plaintiff's suit dismissed with costs in all Courts. We further direct that the appellant do refund the sum of Rs. 155 which was paid by the respondent to the previous mohant.

**Mitter, J.**—I agree with my learned brother that this appeal should be allowed and the plaintiff's suit for specific performance dismissed with costs.

The question raised in this appeal is as to whether the contract entered into by the previous mohant of an endowment can be specifically enforced against his successor in shebaitship it not having been shown that the contract was entered into for the purpose of meeting unavoidable necessity. It appears that

the previous mohant Madhusudan Das Mohant of Asthal, Burdwan, contracted to grant a permanent and mokorari lease to the present plaintiff after taking a certain premium and fixing a certain rental annually. He executed a patta and a corresponding kabuliyat was also executed by the plaintiff, but before these two documents could be registered he died and he was succeeded in his mohantship by the present appellant. The respondent consequently instituted the suit in which this present appeal arises for the purpose of specifically enforcing the contract entered into by Madhusudan with him to grant a permanent mokorari lease. It is now finally established on the authorities to some of which reference has been made by my learned brother that it is beyond the power of a mohant of an endowment

"to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time."

Such an act has been held by the Judicial Committee of the Privy Council in the case of *Abhiram Goswami v. Shyama Charan Nandi* (1) "to be a breach of duty in the mohant." Such an act is void as against a succeeding mohant and no Court would be justified in enforcing the specific performance of a contract which is illegal and void under the law. The illegality of a contract furnishes a good defence to a suit for specific performance. In the present case there is no allegation in the plaint showing that there were special circumstances of necessity in this case which would justify the grant of the mokorari patta which the predecessor-in interest of the present appellant intended to grant. In such circumstances, it will not be right for any Court to grant specific performance.

It has been argued on behalf of the respondent that there has been some profit to the estate and that is sufficient to justify the grant of the mokorari patta by the previous mohant and that such a mokorari patta, if executed, could undoubtedly be binding on his successor. There is no authority for this contention. All the cases in the books show that wherever a mokorari patta of a debuttar land has been upheld as against the successor of the shebait granting a patta it has been supported on the ground that it was granted in



consideration of money said to be required either for the repair and completion of a temple, for which no other funds could be obtained or for the purpose which fell into the category of protecting of the estate from injury or deterioration. One of the earlier instances in which such a mokorari lease has been upheld was in the case of *Doorga Nath Roy v. Ram Chunder Sen* (3) which went before the Judicial Committee of the Privy Council where a mokorari patta of a debuttar lease was supported on the ground that money was required for the repair of the temple and that it was not possible to get money from other sources than by granting a permanent mokorari lease. Quite recently their Lordships of the Judicial Committee of the Privy Council had to consider the circumstance under which a lease by the head of an endowment could be justified where the lease was granted for the purpose of benefiting the endowment. In the case of *Palaniappa Chetty v. Deivasikamony Pandara* (4), their Lordships of the Judicial Committee after stating that it was not possible to give a precise definition of the word "benefit" said this :

"The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits."

As I have already stated, there is not a single allegation in the plaint which would suggest that the mohant was under any necessity of granting this permanent mokorari patta depriving the Asthal of the benefit of an augmentation of a variable rent. The only fact on which the lower Courts have drawn the inference that the endowment has been benefited is that the debuttar estate has made a certain profit out of the alleged contract of the mohant. That, in my opinion, is wholly insufficient to justify the granting of the mokorari lease.

It has next been argued by the learned advocate for the respondent that even if this lease be regarded as binding on the present appellant still as he did ratify the intended lease on behalf of his predecessor-in-interest he is bound to execute the lease on behalf of his pre-

decessor as his successor in the gadi. There is no substance in this contention, for, as has been pointed out by my learned brother, the lease is altogether void. It is wholly ineffective as against the successor and no question of ratification could possibly arise with reference to a void instrument. No authority has been shown and none can really be found where the question of ratification can arise where the instrument which is said to be ratified is void and not merely a voidable instrument. It seems to me that there has been no ratification at all for the present appellant never ratified. The ratification, if there was any, was by his guardian at the time when he was an infant and all that is alleged is that the guardian asked the present respondent to execute the kabuliyat in terms of the patta which was intended to be granted by the former mohant. I do not think the facts also lay any foundation for the ratification. It is argued that there was a new contract by the guardian of the appellant. Assuming there was this contract cannot be enforced against his ward, the appellant : see *Mir Sarwanjan v. Fakruddin Mahomed* (5) For these reasons, I agree with my learned brother in allowing the appeal.

V.B./R.K.

*Appeal allowed.*

(5) [1912] 39 Cal. 232=13 I. C. 331=39 I. A. 1 (P.C.).

### A. I. R. 1929 Calcutta 614

RANKIN, C. J. AND MUKERJI, J.

*Nafar Chandra Pal Choudhury and another*—Plaintiffs—Appellants.

v.

*Jatindra Nath Das and others*—Defendants—Respondents.

Letters Patent Appeal No. 10 of 1929, Decided on 29th May 1929, from decree of Mitter, J., D/- 29th November 1928, in Appeal No. 190 of 1928, reported in *A. I. R. 1929 Cal. 206*.

Bengal Tenancy Act, Ss. 180-A and 180-B—Liability arises to pay a fair and equitable rent for lands held in utbandi system by a tenant after he has acquired a right of occupancy therein under S. 180.

There is nothing in Ss. 180-A or 180-B which takes away the rights which are conferred by S. 180 upon an utbandi raiyat who has acquired a right of occupancy and, even if resort is not made to the provisions of Ss. 180-A and 180-B for the purpose of fixing a uniform annual money rent in respect of utbandi lands, the general liability of an occu-

(3) [1879] 2 Cal. 341=4 I. A. 52 (P.C.).

(4) *A. I. R. 1917 P. C. 33*=40 *Mad. 709*=44 *I. A. 147* (P.C.).



pancy raiyat to pay a fair and equitable rent for the lands that he holds will accrue to a person who was in the position of an utbandi raiyat and has acquired a right of occupancy under the provisions of S. 180. [P 616 C 1, 2]

(b) Bengal Tenancy Act, S. 24—Suit for rent at rate fixed by all utbandi tenants—Plaintiff cannot in appeal claim fair rent on the ground that tenants acquired occupancy rights.

Where the suit as originally framed is not one for recovery of rent under S. 24 but is a suit for recovery of rent at rates agreed upon by all utbandi tenants, plaintiffs cannot in appeal claim a decree for fair and equitable rent on the ground that the defendants by holding the lands for a continuous period of 12 years had acquired a right of occupancy therein and that they were consequently liable to pay a fair and equitable rent under S. 24, Ben. Ten. Act. [P 616 C 2]

*Amarendra Nath Bose and Radhika Ranjan Guha*—for Appellants.

*Panchanon Ghose and Sitanshu Bhusan Bose*—for Respondents.

**Mukerji, J.**—This appeal has arisen out of a suit for rent. The plaintiffs landlords are the appellants in the appeal. In order to appreciate the contentions that have been urged in the case, it is necessary to set out the pleadings somewhat in detail.

The plaintiffs instituted the suit for recovery of rent on the allegation that they were 12 annas 16 gandas cosharer landlords and that the defendants were holding certain lands under them in utbandi system. In the plaint, certain rates were mentioned as being the rates of rent payable by utbandi tenants in respect of different kinds of land and a decree for rent was prayed for on the footing that separate collections used to be made on behalf of the plaintiffs from those defendants. The main defence of the defendants was to the effect that some of the lands in suit were patit, khicha and asha lands, that no rent was payable for patit lands, that the rate for the khicha lands was 8 annas per bigha and that the rate for the asha lands was 6 pies per bigha. The trial Court held that the evidence that was produced on behalf of the plaintiffs for the purpose of establishing the rates at which they claimed rent in respect of the lands in suit was not satisfactory and, being of opinion that the defendants had succeeded in establishing that no rent was payable for the patit lands and that the rates for the khicha and the asha lands were what were stated in the written

statement, the learned Munsiff gave the plaintiffs a decree on the defendants' admission. This decree was upheld on appeal by the learned Subordinate Judge and, on a second appeal being preferred to this Court, my learned brother Mitter, J. has affirmed that decision. The plaintiffs have thereupon preferred the present appeal under the Letters Patent.

Of the two grounds that have been urged in support of the appeal, one is to the effect that the plaintiffs are entitled to a decree for fair and equitable rent as against the defendants, inasmuch as the defendants by holding the lands for a continuous period of twelve years have acquired a right of occupancy and that, therefore, under the provisions of S. 24, Ben. Ten. Act, they are liable to pay a fair and equitable rent. This contention has been dealt with by my learned brother Mitter, J. as well as by the Courts below and has been held as being answered by the provisions of Ss. 180-A and 180-B, Ben. Ten. Act. It appears that the suit was not based upon an allegation to the effect that the plaintiffs were entitled to get fair and equitable rent from the defendants inasmuch as they were no longer utbandi tenants but had acquired a right of occupancy. Such a contention did not appear in the pleadings and it was only at the time of the argument in the trial Court that it was put forward. The Courts below, however, have dealt with this matter and, inasmuch as it has been argued before us, I may as well express my opinion upon it.

What is contended is that S. 180, Ben. Ten. Act states—and here I read only that part of the section which is relevant :

"notwithstanding anything in this Act a raiyat who in any part of the country where the custom of utbandi prevails holds land ordinarily let under that custom and for the time being let under that custom shall not acquire a right of occupancy until he has held the land in question for 12 continuous years and, until he acquires a right of occupancy in the land, he shall be liable to pay such rent for his holding as may be agreed on between him and his landlord."

It is contended that the section provides that an utbandi raiyat shall not acquire a right of occupancy until he has held the land in question for twelve continuous years and that it further pro-



vides that, until he acquires a right of occupancy in the land he shall be liable to pay such rent for his holding as may be agreed on between him and his landlords; and it is said that from this it follows, in the absence of any other provision in the Act, that, when a right of occupancy is acquired by a raiyat who had been an utbandi tenant, his status as well as all the other incidents of the tenancy are to be governed by those provisions of the Act which deal with occupancy raiyats. This in substance is the contention that is urged on behalf of the appellants and, in support of this, what is stated is that, prior to the amendment introduced by Act 10 (B. C.) of 1923 which for the first time inserted Ss. 180-A to 180-C in the Tenancy Act, there was no provision in the Act which could regulate the rent etc. in respect of utbandi raiyats who had acquired a right of occupancy. S. 180, it is said, limits the liability to pay the agreed rent until such time as the right of occupancy is acquired by an Utbandi raiyat.

Now, the Courts below appear to have been of the view that, inasmuch as S. 180-A provides for an application to be made for the fixing of uniform annual money rent in respect of utbandi lands either by the landlord or by the raiyat and inasmuch as S. 180-B says that whenever an order under S. 180-A is passed determining a uniform annual money rent for any lands such lands shall cease to be held as Utbandi lands with effect from the date from which the new rent takes effect and the tenant shall hold them as an occupancy raiyat from the date of the order, the effect of these provisions is to lay down that, although under S. 180 a right of occupancy may be acquired by an utbandi raiyat he is not liable to pay a uniform money rent or a fair and equitable rent until proceedings have been taken in accordance with the provisions of Ss. 180-A and 180-B of the Act. I am of opinion that this view is not sustainable. In my opinion, there is nothing in S. 180-A or 180-B which takes away the rights which are conferred by S. 180 upon an utbandi raiyat who has acquired a right of occupancy and, even if resort is not made to the provisions of Ss. 180-A and 180-B for the purpose of fixing a uniform annual money rent in respect of

utbandi lands, the general liability of an occupancy raiyat to pay a fair and equitable rent for the lands that he holds will accrue to a person who was in the position of an utbandi raiyat and has acquired a right of occupancy under the provisions of S. 180. This view, however, would not help the appellants in the present case, inasmuch as the suit that they instituted was not one for recovery of rent in accordance with the provisions of S. 24, Ben. Ten. Act but a suit for recovery of rent at rates agreed upon by all utbandi tenants. To have a decree for rent at fair and equitable rates the plaintiffs will have to ask first of all for assessment of rent in a properly constituted suit with their co-sharers as parties. In view of the nature of the claim that they had put forward, the question whether they are entitled to recover a fair and equitable rent is a question which cannot arise in the present case. Although, therefore, I am not prepared to agree with the view that the Courts below have taken as regards Ss. 180-A and 180-B, Ben. Ten. Act, I am clearly of opinion that the decree that has been passed in the present case is correct.

Another argument has been put forward to the effect that, in the judgment of my learned brother Mitter, J. there is a passage indicating that the plaintiffs are not entitled to get any rent on account of the patit lands as it has been established that by custom such rent is not payable. It has been argued before us that there is no evidence of a custom properly so called and that the question as to whether there has been a custom to the above effect is a question which was not gone into in any of the Courts below. What appears, however, is that my learned brother Mitter, J. intended to mean that there was evidence to that effect and that it was proved by the plaintiffs' evidence that no rent was, in point of fact realized on account of the patit lands. I am of opinion, therefore that there is no substance in this contention.

The result is that the appeal fails and is dismissed with costs.

**Rankin, C. J.**—I agree.

K.N./R.K.

*Appeal dismissed.*



\* \* A. I. R. 1929 Calcutta 617

## Special Bench

RANKIN C. J. AND C. C. GHOSE, SUHRA-  
WARDHY, MUKHERJI AND JACK, JJ.*Padam Prashad Upadhyaya*—Applicant.

v.

*Emperor*—Opposite Party.

Full Bench Ref. Decided on 3rd July 1929, against the decision of Jack, J., D/- 9th January 1929.

\* \* (a) (*Per Full Bench*) Criminal P. C., S. 286—Matter of which evidence is not intended or cannot be produced should not be referred by counsel for prosecution in his opening of case — Topics as to accused's character should be excluded—*P* prosecuted under Ss. 193 and 471, Penal Code—During Sessions Trial prosecution insisting on reading complaint against *P* by *R* under S. 372, Penal Code—Complaint containing highly prejudicial statements allowed to be read—Judge omitting to warn jury not to pay attention to the contents of the complaint—Omission amounts to misdirection—Criminal P. C., S. 297 (*Jack, J.*, contra).

*Per Rankin, C. J.*—So far as criminal cases are concerned the opening for the prosecution ought always to be confined to matters which are necessary to establish the jury to follow the evidence when it is brought before them. This is not the stage of a case where a doubtful question of admissibility should be either raised or decided. Whether a document is admissible or inadmissible is a matter which should always be ruled upon at the time when the document is being proved or put in or the question asked of the witnesses. In many cases a thing may be good evidence at one stage of the cases and inadmissible at another. It is frequently necessary to give evidence to lay the foundation which justifies a question or the putting in of a document. The opening speech of the counsel for the prosecution does not afford a proper occasion for the determining of such questions.

[P 620 C 2]

*Per C. C. Ghose, J.*—In a criminal trial counsel for the prosecution, in opening the case to the jury, can only state all that it is proposed or intended to prove in the case, so that the jury may see if there is any discrepancy between the opening statement of the counsel and the evidence afterwards adduced in support of them and it is wholly improper for the counsel for the prosecution to open any matter to the jury in respect whereof no evidence is intended to be read or can be adduced at the trial. Very great care must be taken by counsel for the prosecution in the observation to be made to the jury and that topics of prejudice connected with the character of the prisoner should be carefully excluded.

*P* was prosecuted for selling *R* for immoral purposes under S. 372, Penal Code. In this

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trial *P* had managed to put in a copy of birth register showing that *R* was of 18 years. *P* was ultimately acquitted. Proceedings were subsequently taken against *P* under Ss. 193 and 471, Penal Code for having used as genuine a forged document (copy of birth register of *R*) knowing it to be forged document. When the case began before the Court of Sessions, the counsel for the prosecution insisted upon reading to the jury in his opening speech the whole of *R*'s complaint against *P* in S. 372 Penal Code case, which contained highly prejudicial matters that *P* was of loose morals, that he was notorious for seducing girls, that he used to keep such girls as concubines and that he had assaulted and raped *R* on diverse occasions. Counsel for the accused objected to its being read but the objection was overruled.

*Held*: that an atmosphere of prejudice had been allowed to be created and that there were grave reasons for concluding that the chances of *P* in obtaining a fair trial at the hands of the jury were seriously jeopardized. The allegations in the petition of *R* were such as must have and could not but have influenced the jury against *P* at the very beginning of the trial. The jury in the circumstances could not possibly get out of their minds the fact that *P* was a depraved person. This was specially unfortunate because the Judge in the course of his charge to the jury did not tell the jury, as he should have done, that the petition of complaint had not been admitted as evidence in the case, that the contents thereof which were objected to were irrelevant to the matter in issue at the trial before the jury, and that the jury ought not to pay any attention whatever to the contents of that petition. This was non-direction and it was non-direction of such a character as to amount to misdirection. [P 625 C 2]

\* \* (b) (*Per Full Bench*) Criminal P. C., S. 297—*P* prosecuted under Ss. 193 and 471, Penal Code for using copy of birth register of *R* showing *R* to be 18—Evidence of *R*'s grandmother in another case against third person that *R* was 15 allowed to go in—*P* acting as interpreter at that time—Inference that *P* knew *R* to be 15 (that is below 18) attempted to be drawn—Judge while charging jury not leaving to them to find out whether *P* knew *R* to be below 18 but stating that if jurors were of opinion that *P* must have known *R* to be under 18 that could be a reason for concluding that *P* knew that the copy was forged—Charge to jury was held to be misdirection. (*Jack, J.*, contra.)

*P* was prosecuted under Ss. 193 and 471 Penal Code for having used a forged document (a copy of birth register of *R*) in a previous prosecution by *R* under S. 372 for showing that *R* was of 18 years. During the course of trial in the forgery case evidence of the grandmother of *R* in another case, in which a stranger was prosecuted for kidnapping *R* and in which *P* acted as an interpreter, to the effect that *R* was of 15 or 16 years was allowed to be put in for showing, that *P*, who heard *R*'s grandmother making the statement knew that *R* was not of 18 years and there-



fore he knew that the copy of the register showing R's age as 18 was a forged document. Judge in his charge to the jury as to this evidence said :

"some evidence has been adduced to show that P knew perfectly well that the girl was under 18. That is not very material ; but if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of the grandmother that the girl was at that time 15 has been put in and some other statement of R about her age in which she said she was 14. We are not concerned as to whether R had stated her age correctly or what her age was. If on that evidence you are of opinion that P must have known that she was under 18, that would be a reason for concluding that he knew the document was forged."

*Held* : that the question arising on the evidence of the grandmother of R, whether P knew that R was under 18 should not have been left to the jury in the words which the Judge saw fit to use, and that it would have been advisable if the jury had been told that it was a matter for them to find out on the entire evidence on record whether there was any justification for the theory that P knew that R was under 18, seeing that the prosecution did not adduce any substantive evidence on the point. [P 627 C 1]

(c) **Interpretation of Statutes — Words plain and clear—Court should not raise any doubt as to what statute means.**

*Per Jack, J.*—If the words of a statute be plain and clear it is not for the Court to raise any doubt as to what they mean. [P 630 C 1]

(d) **Interpretation of Statutes—Contemporaneous interpretation.**

*Per Jack, J.*—It is well recognized that a contemporaneous interpretation is the best and strongest in law. [P 631 C 1]

\* (e) **Letters Patent (Calcutta), Cl. 26—Scope of, discussed.**

*Per Rankin, C. J.*—The verdict of the jury cannot be allowed to stand unless the High Court in review under Cl. 26 be of opinion that the same verdict would have been arrived at, had they been correctly and sufficiently directed. It is not open to direct retrial in such a case : 47 Cal. 671 (F. B.), *Rel. on.*

[P 622 C 2]

*Per C. C. Ghose, J.*—The word : "thereupon," means that the determination of the point or points of law reserved or certified must be in favour of the prisoner before the Court can interfere with the conviction and sentence. If it be found that the opinion of the trial Judge on the point or points reserved or certified cannot be supported it is not open to the High Court to direct a retrial. No doubt the High Court has power under Cl. 26 to examine evidence and determine for itself whether after the exclusion of the evidence or matter which may be considered inadmissible, the residue and the record are sufficient to justify the conviction. The Court will not substitute its own finding for the verdict of the jury. It must consider whether the evidence

on record improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury and whether it was reasonably certain that the jury would, not might, have acted on the unobjectionable evidence if the wrongly admitted evidence or matter had not also been presented to them. S. 537, Criminal P. O., has no application to a case under Cl. 26 : 44 Cal. 477, (F. B.), *Appr.*; A. I. R. 1926 Cal. 470 (F. B.), *not Appr.* [P 625 C 1]

*Per Jac, J.*—The Court can, on review, examine evidence for itself and determine without reference to the probable verdict of the jury, whether, excluding inadmissible evidence, the residue is sufficiently justifiable for the conclusion. If the Court is convinced on the evidence that the accused is guilty, he should not be acquitted merely on account of a defective charge. The unanimous verdict of the jurors should not be set aside on the mere speculation that certain allegations might have influenced them to some extent when it is clear that the verdict is entirely justifiable by the evidence. S. 167, Evidence Act is imperative and applies even to the decision of the High Court when exercising its powers under Cl. 26. [P 630 C 1]

(f) **Evidence Act S. 80—S. 80 does not deal with admissibility of documents—Only formal proof is dispensed with.**

*Per C. C. Ghose, J.*—S. 80 does not deal with the question of the admissibility of evidence but simply dispenses with the necessity of a formal proof by raising the presumption that everything in connexion with them had been legally and correctly done. [P 626 C 2]

(g) **Criminal Trial — Omission to direct jury.**

*Per C. C. Ghose, J.*—A grave omission to direct the jury on a vital point cannot be made good merely by calling counsel's attention to it at the termination of the summing up : *Jack, J., contra; R. v. Willett, (1922) 16 Cr. App. Rep. 146, Rel. on.* [P 626 C 1]

*B. C. Chatterji*—for Petitioner.

*A. K. Basu*—for the Crown.

*A. C. Mookerji*—for Complainant.

**Rankin, C. J.**—In this case Padamprasad was tried at the High Court Sessions by my learned brother, Jack, J., and a common Jury on charges laid under Ss. 193 and 471, I. P. C., together with Sujauddin Ahmed and Kanhyalal. He was convicted on the unanimous verdict of the jury of abetment of the offence of fabricating false evidence and also on the substantive charge of dishonestly using as genuine a forged document knowing the same to be forged. Kanhyalal was acquitted of both charges and Sujauddin Ahmed was convicted of abetment of the offence of fabricating false evidence and also of abetment of the offence of dis-



honestly using as genuine a forged document knowing the same to be forged.

On 19th March 1927, a Nepali girl called Raj Kumari presented a petition of complaint to the Additional Chief Presidency Magistrate charging Padam Prasad with divers offences and in particular with the offence of having sold her to one Hiralal Agarwala for immoral purposes. She alleged that she was of the age of about 14 years and asked that process issue against the accused under S. 372, I. P. C., that is for the offence of selling a minor girl for immoral purposes. The Magistrate commenced the trial of the accused on 14th April 1927. On 17th May 1927, he framed charges against the accused including a charge under S. 372. On 6th August 1927 he gave judgment acquitting the accused.

The case for the prosecution at the High Court Sessions was that Padam Prasad in the course of the trial before the Magistrate had filed and made use of a document purporting to be a certified copy of an extract from the daily register of births of the year 1908 kept in thana Dasaswamedh, Benares with a view to show that the girl Raj Kumari was over the age of 18 years at the time at which it was alleged that she had been sold; and that at the time when the document was filed and used as aforesaid it had been altered in four places, in two places 1909 had been altered to 1908 and in two places the name "Baber" had been inserted in front of the names "Jung Bahadur," the effect of the forgery being that whereas the genuine entry recorded the birth as on 19th June 1909 and the father as being Jung Bahadur, the document as forged showed the date of birth as 19th June 1903 and the father as Baber Jung Bahadur. It was proved at the trial that application had been made for the certificate on 26th April 1927 by Sujauddin who was acting as Padam Prasad's tadbirkar in the case before the Magistrate. The certificate is in Urdu script and the alterations made in it have been so made as not to be noticeable, though a careful examination discloses that the document has been tampered with. It is proved, however, that Padam Prasad does not know Urdu script. Upon the evidence there can be no doubt that Sujauddin obtained the certificate in order that it might be altered and used as part of the defence of Padam Prasad. The

sole question so far as Padam Prasad is concerned was the question whether or not Padam Prasad had been proved to have known that the document had been altered at the time when he used it for the purpose of his defence before the Magistrate. Upon that question the evidence before the jury was almost entirely circumstantial. The sole purpose of the forgery was to defeat the charge under S. 372 and the jury had to consider whether in all the circumstances of the case it was a safe and reasonable inference to hold that the document had not been forged in the interest of Padam Prasad without Padam Prasad being well aware of what was being done in his interest.

The prosecution was able to reinforce this consideration by the evidence of Mr. Pashupati Bhattacharjee the advocate who had conducted his defence before the Magistrate. Mr. Bhattacharjee's evidence makes it clear that Padam Prasad was well aware of the importance to him of showing if he could that the girl was above 18 years of age at the time of the offence charged; that Padam Prasad came from Benares and attended the conference held on behalf of the defence, that Sujauddin also attended at these conferences when the question of the proof of the girl's age was discussed; that Sujauddin was the person who read the Urdu documents and that the certificate afterwards filed before the Magistrate was produced at these conferences and was discussed. The defence on the other hand contended that there was no direct evidence to show that Padam Prasad knew what Sujauddin had been doing on his behalf; that he was, wholly unable to read a word of the document in question; that he was relying upon Sujauddin for the preparation of the defence and for obtaining all documents which might assist the defence. They relied upon a statement of Mr. Bhattacharjee that Padam Prasad's instructions to him were that he was quite ready to cite witnesses from Benares Collectorate to prove the certificate which they were putting in. They relied also on the fact that at the close of the trial in the Magistrate's Court no attempt had been made by Padam Prasad to get the document back though it would have been quite easy to do this before the question of forgery had been raised by Rajkumari. They relied



further upon a statement made by Padam Prasad on 24th September 1927 when the investigating officer first questioned him about this document—the statement being that Sujauddin had told him that Rajkumari's birth certificate would be available at Benares Collectorate and that he had asked Sujauddin to take a copy of the extract and to make it over to Mr. Bhattacharjee.

Broadly speaking these were the considerations upon either side. It seems clear to me that the question was entirely for the jury who had to make up their minds whether it was proved that Padam Prasad when he used the document was aware that it had been altered. There was evidence upon which the jury were entitled to find him guilty but it cannot be said in this case that a verdict of acquittal would be unreasonable. The accused had a serious case to meet but he had at the worst a good fighting chance.

It may here be emphasized that at no time did the prosecution as part of their case allege or undertake to prove what the age of the girl was. No evidence was called upon that point. Rajkumari herself could not very well prove the date of her birth but in any case no question was asked of her in examination-in-chief bearing upon the question of her age. Some questions were asked of her in cross-examination for the purpose of showing that she had given different dates at different times. It is true that each of these different statements if true, made her out to be a minor at the material time.

In the fiat of the Advocate-General, which has led to these proceedings under Cl. 26, of the Letters Patent, a number of matters are referred to as grounds of objection taken by Padam Prasad to the learned Judge's conduct of the trial and to his charge to the jury. Excepting upon two points it is reasonably clear to me that these objections have no substance. The charge of the learned Judge was fair, lucid and accurate, well calculated to apprise the jury of the real questions in the case and the state of the evidence upon the points in controversy. These objections, however, require careful consideration.

The learned counsel who opened the case for the prosecution insisted upon reading to the jury in his opening the whole of Rajkumari's petition of com-

plaint against Padam Prasad in the S. 372 case. That petition alleged against Padam Prasad various highly prejudicial matters—that he was a man of loose morals, that he was notorious for seducing Nepalese girls, that he used to keep such girls as concubines that he had assaulted and raped the complainant on diverse occasions. It was clearly necessary that the jury should know that the proceedings before the Magistrate were proceedings upon the charge of selling a minor girl for immoral purposes but these other allegations had prima facie no bearing upon the question whether the certificate of birth was forged or not and if so whether this was known to Padam Prasad. The reading of this petition was objected to by the counsel for the accused and in the circumstance I confess to being somewhat astonished that the Crown Counsel did not at once appreciate that the introduction to the notice of the jury at the beginning of the case of all these highly prejudicial matters was unnecessary and unfair to the accused—a thing which could do no good whatever and was highly calculated to complicate the issues. The course adopted by counsel for the Crown threw upon the Judge at the very commencement of the case the necessity of coming to a decision immediately and in advance of the evidence. So far as criminal cases are concerned the opening for the prosecution ought always to be confined to matters which are necessary to enable the jury to follow the evidence when it is brought before them. This is not the stage of a case at which doubtful questions of admissibility should be either raised or decided. Whether a document is admissible or inadmissible is a matter which should always be ruled upon at the time the document is being proved or put in or the question asked of the witnesses. In many cases a thing may be good evidence at one stage of the case and inadmissible at another. It is frequently necessary to give evidence to lay the foundation which justifies a question or the putting in of a document. The opening speech of the counsel for the prosecution does not afford a proper occasion for the determining of such questions.

It appears to me that the petition of complaint of Rajkumari was a document which the prosecution were entitled to



put in. Even if it had been put in there was no reason, however, why the whole of it should be read to the jury as its only relevance was that it showed that Padam Prasad was being prosecuted on a charge which involved that the girl was a minor girl. The unfortunate consequence in this case of the learned counsel insisting upon reading this document to the jury in his opening was, first, that when the time came to prove the document the learned counsel apparently forgot to prove it. The record shows that when Mr. Bhattacharjee was giving evidence the document was marked for identification. A second consequence was that at the end of the trial the matter was overlooked. The learned Judge did not have it in mind to caution the jury that they must not allow these unproved accusations against Padam Prasad to affect their judgment. The result is that the defence is in a position to complain before us that prejudicial matter was read to the jury and was not properly proved thereafter; also that no warning was given to the jury. Now it is quite true that the jury had before them the fact that the Magistrate had acquitted Padam Prasad.

Unless, however, some caution was given to the jury this circumstance by itself would not necessarily efface from their minds the impression created by the accusations which they had heard. They may have thought that Padam Prasad had been acquitted merely because the girl was not shown to be a minor, that his acquittal may have been due in part or in whole to the forged certificate of birth which had been produced in his defence. The Judge's charge contains no discussion which would clarify the minds of the jury upon any such point though it is quite true that an intelligent jurymen listening to the charge of the learned Judge and appreciating it properly would see that the learned Judge proceeded in no way upon these accusations and invited them to deal with the case on the footing that the jury were not concerned as to the age of the girl and were not concerned whether Padam Prasad was acquitted or not or on what grounds he was acquitted. This the learned Judge in one passage stated to the jury expressly but it is not equivalent to a caution to the

effect that highly prejudicial matters had been brought before them and that it was their duty to see that their verdict was in no way affected by it.

The second point which required examination is this: The prosecution, as I have said, at no time undertook to prove that the girl in fact was a minor. They were not therefore in a position to ask the jury to hold that because the girl was a minor, because Padam Prasad was related to the girl or had other means of knowing the truth, he must have known that she was a minor. Rajkumari was, however, recalled at the instance of the prosecution to give evidence that in August 1926 Padam Prasad was acting as interpreter in a Court at Benares which was investigating a charge against certain persons of having kidnapped Rajkumari; and that in the course of that case Rajkumari's grandmother, Sethirani, gave evidence and stated that Rajkumari's age was 15 or 16. This evidence was objected to by the defence but was allowed by the Judge and it appears from the shorthand notes, that counsel for the prosecution stated that he did not want the statement of Sethirani to go in for the purpose of proving the truth of that statement of fact but only for the purpose of proving that such a statement was made and Padam Prasad knew of it. The recorded deposition of Sethirani was produced and accepted as evidence. Whether or not this deposition was properly proved and accepted under S. 80, Evidence Act is a matter about which a question has been raised. I am not myself satisfied that there is under S. 80, Evidence Act, any objection to this document on the mere question of sufficiency of proof but it is unnecessary in my opinion to discuss that matter. The learned Judge in his charge dealt with this portion of the evidence in the following manner:

"Some evidence has been adduced to show that Padam Prasad knew perfectly well that the girl was under 18. That is not very material but if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of Sethirani, who gave evidence in Benares that the girl was at that time 15, has been put in and some other statements of Rajkumari about her age, one which deals with a statement she made in a petition, not on oath in which she said she was 14. We are not concerned as to whether Rajkumari



stated her age correctly or what her age really was. If on the evidence you are of opinion that Padam Prasad must have known that she was under 18, that would be a reason for concluding that he knew the document was forged."

In my opinion this passage in the charge of the learned Judge amounted to a misdirection. It was not open to the jury to find that the girl was in fact under 18 and it was not open to them to conclude that Padam Prasad knew that the girl was under 18. If on some occasion he had heard the girl's grandmother make a statement about her age—a statement which might be true or false—which he might believe or disbelieve, it in no way follows that when a certificate purporting to be a certificate of her birth was produced, he would know that the certificate was forged. In this case the prosecution had to rely entirely upon circumstantial evidence arising out of the fact that the document had been forged for the benefit of Padam Prasad and that Padam Prasad had been shown to be taking a close interest in the preparation of his own defence. Padam Prasad knew at least from March 1927 that he was being prosecuted on the footing that the girl was under age. This was being solemnly alleged against him as a thing which the prosecution would attempt to prove in a Court of law. It added nothing whatever to the prosecution case to offer proof that he had heard the girl's grandmother say that she was 15 or 16 unless that statement was to be taken as a true statement and unless the jury were to be invited to hold first that the girl was in fact a minor and secondly that Padam Prasad in the circumstances knew of this fact. In my opinion it was not open to the jury to conclude that Padam Prasad knew the certificate to be forged because he knew that she was under 18. If such a statement as Sethirani's was admissible in evidence at all it was very necessary that the jury should be cautioned that they must not take that statement as in any way tending to prove the age of the girl. No such warning was given to them; on the contrary they were told.

"If on that evidence you are of opinion that Padam Prasad must have known that she was under 18, that would be a reason for concluding that he knew the document was forged."

As the case was conducted at the trial, the prosecution, while, not professing to

prove the girl's age in the end, were given the benefit of Sethirani's evidence in another case upon that very point.

In my opinion it is not possible to suggest that the verdict of the jury may not very well have been affected by the direction given to them upon this matter. I have a sufficiently high opinion of common juries in Calcutta to induce me to doubt whether the absence of a caution with reference to the prejudicial matter in Rajkumari's petition of complaint would by itself have made it necessary to interfere with the verdict. But on the point as to Padam Prasad's knowledge of her age I think the case is very different. The verdict of the jury cannot be allowed to stand unless we are of opinion that the same verdict would have been arrived at had they been correctly and sufficiently directed. *Emperor v. Panchu Das* (1). It is not open to us to direct a retrial and I am not prepared to hold that the jury, assuming it to be a reasonable jury, would have convicted the accused if the direction complained of had not been given. In my opinion the verdict and sentence must be set aside and Padam Prasad must be acquitted and discharged.

It was contended before us that Art. 162, Sch. 1 of the Lim. Act 1908, applied to proceedings under Cl. 26, Letters Patent. This contention was overruled at the hearing. The phrase "to review the case" as used in Cl. 26 applies as much where a point of law is reserved by the trial Judge as where the Advocate-General has given a certificate. I am far from saying that inordinate delay may not be a matter for consideration by the Advocate-General at the time when he is called upon to consider whether a certificate should be granted. But we are not now dealing with an "application for review of judgment" within the meaning of Art. 162.

**C. C. Ghose, J.**—This is an application for review of a criminal case on the certificate of the Advocate-General of Bengal under Cl. 26, Letters Patent of 1865. The petitioner Padam Prasad Upadhyaya, was tried on 8th and 9th January last at the Criminal Sessions of this Court by Jack, J., and a common jury on charges

(1) [1920] 47 Cal. 671=31 C. L. J. 402=58 I. C. 929=24 C. W. N. 501 (F.B.).



under Ss. 193 and 109 read with 193, and 471 and 109 read with 471, I. P. C., The accused pleaded not guilty to the said charges. There were two other persons named Sujauddin and Kanhya Lal who were tried along with the accused. The jury brought in a unanimous verdict of guilty against the present petitioner and Sujauddin and of not guilty in favour of Kanhya Lal. The present petitioner was sentenced by the learned Judge to undergo rigorous imprisonment for a period of three years.

It appeared at the trial that one Rajkumari had filed a petition of complaint against the petitioner in March 1927, in the Court of Mr. A. Z. Khan, Additional Chief Presidency Magistrate, Calcutta, charging him with having committed an offence punishable under S. 372, I. P. C. The petitioner was tried by the said Mr. Khan, the trial having lasted from 14th April 1927, to 6th August 1927; but ultimately the petitioner was acquitted. An application to the High Court for leave to appeal was against the said order of acquittal rejected. It was alleged that during the trial of the above mentioned case before the Magistrate the present petitioner had fabricated false evidence for the purpose of being used in judicial proceedings by inserting a word, namely, "Babar" and by altering a certain date in two places in a document purporting to be a certified copy of an entry in a Register of Births kept in Benares relating to the birth of Rajkumari and with having used as genuine the said document knowing or having reason to believe the same to be forged. An application was subsequently made on behalf of the said Rajkumari to the said Magistrate in order that a complaint against the petitioner might be made under S. 476, Criminal P. C., but the Magistrate rejected the same on 31st October 1927. There was an application to this Court in its Revisional Jurisdiction. This Court directed the prosecution of the present petitioner on 3rd May 1928. The learned Chief Presidency Magistrate took cognizance of the case and ultimately committed the petitioner to stand his trial at the Criminal Sessions of this Court. At the trial before Jack, J., the entirety of the petition of complaint of Rajkumari dated 19th March 1927, was read out to the jury. This was objected to on behalf of

the petitioner but the objection was overruled by the learned Judge.

The petition of complaint of Rajkumari which initiated the proceedings against the present petitioner in 1927 contained, among other things the following allegations:

"That your petitioner knew the accused to be a man of loose morals, notorious for seducing Nepalese girls from Nepal, some of whom he used to keep as concubines and some of whom he used to sell to others and as such, your petitioner did not like to go to the house of the accused and accordingly with the help of one Gobind Kishori's wife she removed to the house of Gobind Kishori with a view to avoid being forced to go over to the house of the accused. That thereafter the accused had your petitioner forcibly removed to his own house at Benares where she was intimidated, assaulted and raped by the accused on diverse occasions and your petitioner was kept in a state of complete confinement for about two months and your petitioner found herself absolutely without any help to protest against the ill-treatment meted out to her. That in the month of September 1926, your petitioner was brought down to Calcutta by the accused along with six or seven other young girls and stopped with Hiralal and after some time the accused left Calcutta along with the other girls after selling your petitioner to the said Hiralal Agarwalla for Rs. 1,300 for immoral purposes."

There was another incident at the said trial before Jack, J. to which attention has been called. It appeared that a criminal case had been started in Benares against one Ram Prasad and others for having kidnapped Rajkumari. This was in August 1926, just before Rajkumari came to Calcutta. In that case the grandmother of Rajkumari named Sethirani, gave evidence and the present petitioner acted as an interpreter in that case. It was alleged that Sethirani in her deposition in that case had stated that Rajkumari was 15 or 16 years of age. Learned counsel for the Crown wanted to recall Rajkumari and to ask her about the said statement of Sethirani for the purpose of showing that the petitioner knew that such a statement had been made. In this connexion the following discussion took place before the learned Judge:

"Mr. A. K. Basu:—I want to recall Rajkumari and put one or two questions about the Benares case. Padam Prasad was the interpreter in that case and as such was aware that Sethirani, the grandmother of Rajkumari, said in her deposition that Rajkumari was 15 or 16 years of age."

"Mr. Chatterjee:—I object to any statement of Sethirani supposed to have been



made by her in the Benares Court being proved here by Rajkumari. Such a thing cannot be legally done in view of the fact that Sethirani is living, and further that any statement by her cannot in any way be relevant to any issue in this case between the Crown and the accused."

"Mr. Basu:—I do not want the statement of Sethirani to go in for the purpose of proving the truth of that statement of fact, but only for the purpose of proving that such a statement was made and Padam Prasad knew of it."

Court:—I allow that.

The learned Judge allowed the evidence of Sethirani in the Benares case to be put in evidence and it was marked Ex. 13. Apparently it was sought to be argued on behalf of the prosecution that it had been proved through Rajkumari that the petitioner had heard Sethirani say in the Benares Court that in August 1926 she (Rajkumari) was 15 or 16 years of age and that that fact went to show that although the petitioner knew Rajkumari to be below 18 at the time of her sale for immoral purposes, he was trying to rely on a document which purported to prove that she was above 18 at the time and that in the circumstances, it could be inferred that the petitioner must have known that the said copy of the Birth certificate was a fabricated or false document. The learned Judge referred in the course of his charge to the Jury to the evidence of Sethirani in the following words :

"Some evidence has been adduced to show that Padam Prasad knew perfectly well that the girl was under 18. That is not very material; but if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of Sethirani, who gave evidence in Benares that the girl was at that time 15 has been put in, and some other statements of Rajkumari about her age, one of which deals with a statement she made in a petition, not on oath, in which she said she was 14. We are not concerned as to whether Rajkumari stated her age correctly or what her age really was. If, on that evidence you are of opinion that Padam Prasad must have known that she was under 18, that would be a reason for concluding, that he knew the document was forged."

At the hearing of the present application for review under Cl. 26, Letters Patent, it was strenuously argued by Mr. Chatterjee on behalf of the petitioner (1) that under no circumstances could counsel for the prosecution have been allowed to read to the jury the entirety of Rajkumari's petition of com-

plaint dated March 1927 and that the procedure adopted by the prosecution was wholly wrong and unjustifiable inasmuch as the petition of complaint was not tendered in evidence and consequently the petitioner was deprived of the opportunity of cross-examining Rajkumari on the statement made by her in the said petition of complaint and of removing from the minds of the jury the unfavourable impression that must have been created by the reading of the petition of complaint. Mr. Chatterjee further argued (2) that Sethirani's evidence in the Benares case was not admissible in evidence in this trial and had not been legally admitted and (3) that the portion of the learned Judge's charge to the jury set out above was calculated to materially prejudice the jury against the petitioner.

Before I proceed to consider the three objections summarized above, I desire to make a passing reference to the scope of Cl. 26, Letters Patent. I do not desire to go through the numerous cases on this point and it is sufficient for me to observe that the available authorities are collected in the cases reported in *Fateh Chand v. Emperor* (2), *Emperor v. Panchu Das* (1) and *Emperor v. Barendra Kumar* (3). The trial Judge may reserve a point of law or points of law for the opinion of the High Court or the Advocate-General may certify that in his judgment there is an error in the decision of a point or points of law decided by the trial Judge or that a point or points of law which has or have been decided by the trial Judge should be further considered. The Court then reviews the entire case or such part of it as may be necessary and finally determines such point or points of law reserved or certified as the case may be and "thereupon" may alter the sentence passed by the trial Court and pass such judgment and sentence as shall seem right to the Court. The word "thereupon" has been construed to mean that the determination of the point or points of law reserved or certified must be in favour of the prisoner before the Court can interfere with the conviction and sentence.

(2) [1917] 44 Cal. 477=24 C.L.J. 400=33 I.C. 945=21 C.W.N. 33 (F.B.).

(3) A.I.R. 1924 Cal. 257 (F.B.).



It has been definitely held that if it be found that the opinion of the trial Judge on the point or points reserved or certified cannot be supported, it is not open to this Court to direct a re-trial. No doubt, the Court has power under Cl. 26 to examine the evidence and determine for itself whether, after the exclusion of the evidence or matter which may be considered inadmissible, the residue on record is sufficient to justify the conviction. But there is a large mass of authority in support of the view that the Court will not substitute its own finding for the verdict of the jury and that it must consider whether the evidence or matter improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury and whether it was reasonably certain that the jury would, not might, have acted on the unobjectionable evidence if the wrongly admitted evidence or matter had not also been presented to them. Further, it has been held that S. 537, Criminal P. C., has no application to a case under Cl. 26, Letter Patent [per Mookerjee, J., in *Fateh Chand v. Emperor* (2)] although I am not unmindful of the fact that a contrary view has been taken by Rankin, J., as he then was, in the case reported in *Emperor v. Colin Mackenzie Mackay* (4).

These being the guiding considerations for determination of an application under Cl. 26, Letters Patent, I now proceed to consider the objections taken on behalf of the petitioner *seriatim*. It is a rule of universal application that in a criminal trial, counsel for the prosecution, in opening the case to the jury, can only state all that it is proposed or intended to prove in the case, so that the jury may see if there is any discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them and that it is wholly improper for counsel for the prosecution to open any matter to the jury in respect whereof no evidence is intended to be or can be adduced at the trial. In this case, learned counsel for the prosecution has explained before us that his only object in placing the petition of complaint of Rajkumari before the jury was to draw attention to the fact that she had stated therein that she was 14 years of age. If that was the

sole object, it was a grave error, in my opinion, on the part of learned counsel for the prosecution to read out to the jury the entirety of the petition of complaint by Rajkumari containing, as it did, the statement set out above and it was a procedure which was rightly objected to by Mr. Chatterjee on behalf of the petitioner. It was a procedure which should never have been allowed. It is elementary that very great care must be taken by counsel for the prosecution in the observations he makes to the jury (*R. v. Rudland* (5)) and that topics of prejudice connected with the character of the prisoner should be carefully excluded [*R. v. Bloom* (6)]. The fiction of law, in criminal cases, is, that the Judge is counsel for the prisoner. It may not be inappropriate in this connexion to recall the famous words of Kenyon, C. J., in *R. v. Wakefield* (7), where he observed :

"I have been reminded that I sit here as counsel for defendant. I certainly do so, so far as to interpose between him and counsel for the prosecution and to see that no improper use of the law is made against him and that no improper evidence is given to the jury."

These words have been quoted with approval in *R. v. O'Connell* (8). It is also beyond the region of doubt that counsels for the prosecution ought not to struggle to obtain a conviction but should regard themselves rather as ministers of justice, assisting him in its administration than as advocates *R. v. Banks* (9). In my opinion, there can be no doubt that the allegations in the petition of Rajkumari were such as must have and could not but have influenced the Jury against the petitioner at the very beginning of the trial. The jury, in the circumstances, could not possibly get out of their minds the fact that the petitioner was a depraved person. This was specially unfortunate because of the fact that the learned Judge in the course of his charge to the jury did not tell the jury, as he should have done, that the petition of complaint had not been admitted as evidence in the case, that the contents thereof, which were objected to, were irrelevant to the matter

(5) [1865] 4 F & F. 495.

(6) [1910] 74 J.P. 183=4 Cr. App. Rep. 30.

(7) [1799] 27 St. Tr. 679.

(8) [1843] 5 St. Tr. N.S. 702.

(9) [1916] 2 K.B. 621=85 L.J. K.B. 1657=25 Cox. C.C. 535=80 J.P. 432=115 L.T. 457.

(4) A.I.R. 1926 Cal. 470=53 Cal. 350 (F.B.).



in issue at the trial before the jury, and that the jury were not to pay any attention whatsoever to the contents of that petition. This was non-direction and it was non-direction of such a character as to amount to misdirection. It was stated before us that counsel for the prosecution had warned the jury that they were not to act on the allegation in the petition of complaint. This, in my opinion was not enough. The learned Judge, in the events which have happened, should have himself warned the jury and taken steps to repair the mischief that had been done. It was further stated before us that learned counsel for the petitioner did not ask the learned Judge to caution the jury in the matter of the contents of the petition of complaint of Rajkumari. I do not agree that after what had happened when the petition was read out to the jury, it was not possible or practicable for learned counsel for the petitioner to submit anything further to the learned Judge. In my opinion it was open to the learned counsel for the petitioner to draw the attention of the learned Judge to the matter at the time when he charged the jury.

But the fact that learned counsel did not do so is, in the circumstances, really immaterial. A grave omission to direct the jury on a vital point cannot be made good by counsel's calling attention to it at the termination of the summing up [*R. v. Willet* (10)] : It is not really necessary for me to pursue the question raised by learned counsel for the petitioner as to whether or not in the circumstances he should have been given an opportunity of cross-examining Rajkumari for the purpose of showing that the allegations in her petition were not founded on fact. In my opinion, as indicated above the allegations in that petition to which objection had been taken, were clearly irrelevant ; it would have been sufficient if learned counsel for the prosecution had briefly opened the matter to the jury by saying that a case under S. 372, I. P. C., had been started against the petitioner on the complaint of Rajkumari and that he had been acquitted of that charge. It is not necessary to elaborate the matter further but it is impossible to resist the conclusion that an atmosphere of preju-

(10) [1922] 16 Cr. A. Rep. 146.

dice had been allowed to be created by reason of what has been referred to above and that there are grave reasons for concluding that the chances of the petitioner in obtaining a fair trial at the hands of the jury were seriously jeopardised.

As regards Ex. 13, being the evidence of Sethirani I am not prepared to say, having regard to the provisions of S. 80, Evidence Act, that the document, which purported to be a record or memorandum of the evidence of Sethirani in the Benares case, could not be admitted in evidence without formal proof. S. 80, Evidence Act does not deal with the question of admissibility of the documents referred to therein but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connexion with them had been legally and correctly done i. e., (i) that the documents purporting to be record of evidences or statements or confessions are genuine (ii) that the statements as to the circumstances under which they were taken made by the officer who affixed his signature are true and (iii) that the evidence, statement or confession was duly taken. Assuming that the identity of the deponent Sethirani was established on the evidence of Rajkumari the evidence was admissible. In the circumstances of the present case however, the effect of the evidence of Sethirani against the petitioner was so slight that the jury ought to have been properly cautioned. Padam Prasad was not a party to the Benares case ; he acted merely as an interpreter and he might or might not have remembered when the copy of the birth certificate was produced in the Magistrate's Court what Sethirani had stated about Rajkumari's age. The learned Judge, however used words, in the extract from his charge to the jury set out above wherein there was an undercurrent of suggestion that the petitioner knew or had the means of knowing that Rajkumari was under 18 and that itself was a reason for concluding that he knew the document referred to at the trial namely the copy of the birth certificate was forged on the record as it stood it was not in my opinion open to the jury to conclude that Padam Prasad knew that she was under eighteen years of age. Further the learned Judge made a reference to Rajkumari's peti-



tion which had not been admitted in evidence although marked for identification. I am not unmindful that the charge has to be taken as a whole but I do not find in the charge any neutralizing expressions. These circumstances, along with what has been stated before, are in my opinion, sufficient for coming to the conclusion that the present case has been brought within the rule laid down in *Emperor v. Panchu Das* (1) and that this Court will hesitate to substitute its own finding on the residue on the record for the verdict of the jury. In my opinion, the question arising on the evidence of Sethirani, whether Padam Prasad knew that Rajkumari was under 18, should not have been left to the jury in the words which the learned Judge saw fit to use and that it would have been advisable if the jury had been told that it was a matter for them to find out on the entire evidence on record whether there was any justification for the theory that Padam Prasad knew that Rajkumari was under 18, seeing that the prosecution did not adduce any substantive evidence on the point.

In conclusion it is impossible for me to say that the jury were not very considerably influenced against the accused on the matter referred to above and, that being so, I would, therefore, set aside the conviction and sentence and direct that the petitioner be acquitted and discharged.

**Suhrawardy, J.**—I agree in the order which the learned Chief Justice has passed.

**Mukerji, J.**—I concur in the judgment delivered by my Lord, the Chief Justice.

**Jack, J.**—Padam Prasad was tried under S. 372, I. P. C., on the charge of having sold Rajkumari a girl under 18 years of age for purposes of prostitution. He was acquitted. He was subsequently charged at the High Court Sessions with having dishonestly used at the trial (and abetted the fabrication of) a forged birth certificate which purported to show that Rajkumari was over 18 years of age. His defence and that of his co-accused Sujauddin (his tadbirkar in the case under S. 372) was that they were unaware that the birth certificate was forged. They were both convicted. (Padam Prasad of the principal offence under S. 471 and

Sujauddin of abetment and both of abetment of fabrication of the birth certificate)

In the present application under S. 26, Letters Patent the principal ground urged for review of Padam Prasad's conviction is that the trial was vitiated by the admission in evidence of Rajkumari's complaint in the case under S. 372, I. P. C., and by the omission to warn the jury not to be influenced by the allegations therein against the accused.

The original record of that complaint produced at the trial bears the Magistrate's endorsement to the effect that Rajkumari stated its contents on oath. Under S. 80, Evidence Act therefore the Court shall presume it to be genuine and under S. 4, Evidence Act the Court shall presume it to be proved unless and until it is disproved. It was admitted in evidence in that it was read over to the jury in opening the case by the counsel for the Crown. It was admitted under S. 9, Evidence Act to show that there was such a case under S. 372, I. P. C. It is suggested that inasmuch as there are allegations in the complaint which might prejudice the jury against the accused the complaint should not have been admitted. These allegations are that the accused was notorious for seducing Nepalese girls and that Rajkumari was intimidated, assaulted and raped by him while in his custody previous to being sold for purposes of prostitution. These allegations, bad as they are, did not add in reality, very greatly to the charge that he had sold her, a girl under 18, for purposes of prostitution—a charge which necessarily had to go to the jury being the charge at the trial of which the forged certificate was used. The trial cannot, therefore, be said to have been materially affected by the reading over of the complaint in its entirety.

As regards the omission in the charge of a caution to the jurors not to allow their minds to be influenced by the allegations in this petition against Padam Prasad's character, no great weight can be attached to this omission when it is borne in mind that at the time the petition was admitted it was expressly stated by the Court and by the advocate for the Crown that the petition was put in merely to prove that there was a complaint under S. 372, I. P. C. by Rajkumari, and the jury were told not to



allow themselves to be prejudiced by the allegations against the accused contained therein. Further the learned counsel for the defence who addressed the jury (as stated in the charge) at considerable length, warned them (as he has told us) not to let their minds be influenced by these allegations. The jurors must have realized that the Judge approved of this part of his address which was unchallenged and that the learned advocate was entitled to warn them to totally disregard these allegations. Finally the jury were informed that the accused Padam Prasad was acquitted in that case and no attempt was made to lead the jury to believe that he was acquitted merely because it was found that the girl was above 18 years of age. Had this omission to warn the jury finally been felt to be of any importance at the time I have no doubt the learned and experienced advocate for the defence would have directed the attention of the Court to the omission. I do not think it at all probable that the jurors were influenced by these allegations which were merely included in the original petition of Rajkumari read out to them at the opening of the trial and not specifically alluded to thereafter. Nor do I think the unanimous verdict of the jurors should be set aside on the mere speculation that these allegations might have influenced them to some extent when it is clear that the verdict was entirely justified by the evidence.

The only other ground for review which has been seriously pressed is that Sethirani's evidence in that case (including a statement that Rajkumari's age was fifteen or sixteen) was not proved, and was not admissible in evidence in that case nor was Rajkumari's evidence about it admissible.

Sethirani's statement was that of a witness in a judicial proceeding purporting to be signed by a Magistrate and produced before the Court. It must therefore be taken to be proved under S. 80, Evidence Act read with S. 4.

The fact that Padam Prasad had reason to believe the girl to be below 18 was relevant under S. 11, Evidence Act since it might make it highly probable that he knew that the birth certificate which showed her to be above 18 was forged. The fact therefore that Padam Prasad heard the girl's grandmother

state on oath before a Magistrate that her age was 15 or 16 was relevant and admissible in evidence. Rajkumari's statement in this connexion was necessary and admissible to show that it was this Padam Prasad who was present in the Court interpreting Sethirani's evidence on that occasion and that the Sethirani who deposed was her grandmother and was referring to herself. Rajkumari's evidence as to the statements of Sethirani was only necessary to show that it was this particular occasion to which Rajkumari was referring and her evidence was of course not admissible to prove what statements were made.

It was however urged that the jury were misdirected regarding the application of this evidence in the following passage in the charge;

"Some evidence has been adduced to show that Padam Prasad knew perfectly well that the girl was under 18. That is not very material. But if he knew that she was under 18 that would be an additional reason for supposing that he knew the document to be forged. The evidence of Sethirani, who gave evidence in the Benares Court that the girl was at that time, 15, has been put in with some statements of Rajkumari about her age, one of which deals with a statement made in a petition, not on oath, in which she said she was fourteen. We are not concerned as to whether Rajkumari stated her age correctly or what her age really was. If on that evidence, you are of opinion that Padam Prasad must have known that she was under 18, that would be a reason for concluding that he knew the document was forged."

It must be borne in mind that the jury could have been under no misapprehension as to the purpose for which Sethirani's evidence was admitted inasmuch as this was discussed in their presence when its admission was objected to by the defence, and they were told that it was not admissible in proof of the age of Rajkumari but merely to prove that Padam Prasad heard her grandmother make this statement. This appears from the statement of the learned Crown Counsel which the learned defence advocate has admitted to be correct. Now in this passage in the charge to which objection has been made the jury are directed that if they think that Padam Prasad (having heard her grandmother Sethirani make this statement about the girl's age or on account of statements made by the girl herself) must have considered the girl to be



under 18 that would go to show that he knew the birth certificate was forged. This is what that passage in the charge was obviously intended to convey to the jury and what I believe it did convey to them when taken with the remainder of the charge. It is, I think, in no sense a misdirection.

The jury were told that this evidence was not very material nor was it; for it was not really necessary to support the charge in this case that Padam Prasad should have any opinion as to the age of the girl and, in any case, since Padam Prasad was Rajkumari's uncle by marriage and used frequently to visit Sethirani his mother-in-law while Rajkumari was living with her at Benares, it was clear that he had every opportunity of knowing the girl's age. In these circumstances the admission of Sethirani's statement in evidence can, I think, in no way have affected the decision of the case, for the jury would, most probably, have judged Padam Prasad's belief as to the age of the girl, if they thought it of any consequence at all, by their own opinion of her age on seeing her in the witness box. It was probably her appearance which led to the Court to use in the charge the words "must have known" instead of "must have thought" in reference to Padam Prasad's opinion. Even if it is held that the jurors were wrongly led to conclude that Padam Prasad believed the girl to be under 18 by the direction in the charge regarding the application of Sethirani's evidence, the fact of such belief on his part would only be a very minor point to be considered in deciding whether he knew the certificate to be forged. The jury were, I think, bound to base their finding as to his guilty knowledge almost entirely on the manner in which the certificate was obtained and used by him and, as reasonable men with some experience of human affairs, they would most certainly I think on that evidence, alone conclude that he must have known that the birth certificate was forged.

Under S. 167, Evidence Act, the improper admission or rejection of evidence shall not of itself be a ground for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evi-

dence to justify the decision or that if the rejected evidence had been received, it ought not to have varied the decision.

The section is imperative and applies to any decision in any case and therefore necessarily to the decision of the High Court when exercising its powers under Cl. 26, Letters Patent. It seems to me that the circumstances in which the forged birth certificate was obtained and used in the case make it practically certain that Padam Prasad as well as Sujauddin must have known it to be forged. "*Agents at consentientes paripoenaplect-entur.*" Reference has been made to the fact that the accused had offered to bring evidence to prove the birth certificate. This was I think merely bluff. Padam Prasad was throughout in close consultation with the pleaders conducting the case, and, if he thought the certificate genuine, why did he not put it in evidence to rebut the elaborate expert evidence of the two I. M. S. doctors who said she was under 18. If genuine, this piece of evidence would have made his acquittal certain: in fact the prosecution case must have been withdrawn immediately.

Again great virtue has been attached to the omission of the accused to withdraw the forged birth certificate immediately, but in fact, its withdrawal after the case would by no means have prevented his successful prosecution for filing it, for the fact that it had been filed was on record, and the evidence of forgery was independent of the appearance of the document. On the one hand to leave the certificate on the record would disarm suspicion, on the other hand an application for its return would have reminded the authorities of its existence and of the allegation that it was forged. The defence, in the absence of Sujauddin, have now skilfully thrown the blame on him, and would have the Court believe that Padam Prasad was carefully kept in the dark as to the immense risk his agent Sujauddin was running on his behalf in obtaining and using a forged birth certificate. The jurors did not take this view. On the other hand they naturally concluded that in the circumstances Padam Prasad must have known of the forgery, and their opinion could not, I think, have been influenced by want of detail in the charges. The charge was intentionally abbreviated, as stated in the opening, in



view of the exhaustive manner in which the defence case had been presented to the jury by the learned advocate for the defence.

The powers of the High Court under Cl. 26, Letters Patent are perfectly clear. The Court is to review the entire case or such part of it as may be necessary, and finally determine the point or points of law reserved or certified and thereupon may alter the sentence passed by the trial Court and pass such judgment and sentence as shall seem right to the Court. A statute must be taken to mean what it says, and it must be remembered that, if the words of a statute be plain and clear, it is not for the Court to raise any doubt as to what they mean. I have discussed the case with reference to the probable verdict of a jury had there been no defect or omission in the charge, in deference to the views of the learned Judge who holds that this should be the criterion, but, with very great respect to these views it must always be remembered that it is open to the Court, in the words of the statute, to pass such judgment and sentence as shall seem right to the Court. It would therefore be superfluous to cite decisions such as *Queen-Empress v. O' Hara* (11) showing that the Court can, on review, examine the evidence for itself and determine without reference to the probable verdict of a jury whether excluding the inadmissible evidence, the residue is sufficient to justify the conviction. As pointed out by Sir Asutosh Mookerjee, J., in *Emperor v. Pan-chu* (1)

"The Judicial Committee did not by their decision in *Subramaniam v. Emperor* (12) overrule by implication the series of cases in Calcutta and Bombay where the High Court had in cases reserved or certified reviewed the evidence and determined the guilt of the accused."

In the same case Walmsley, J., being satisfied on the merits that the accused were guilty, said :

"I do not think it necessary to ask what view a jury would take of the evidence except in so far as the opinion of a hypothetical jury affords a standard of reasonableness."

There might be some excuse for hesitating to deprive the accused of the benefit of a jury trial where the demeanour of the witnesses was of any importance,

but in a case like the present, one in which the evidence is entirely circumstantial, no importance is to be attached to the demeanour of the witnesses and we are in as good a position as the jurors to decide on the evidence as to the guilt of the accused. On the one hand the prosecution has been deprived of the right to retrial which would certainly have been ordered had the case been tried in an ordinary Sessions Court and, on the other hand, it is insisted that the case should be determined by the probable verdict of a hypothetical jury. The fact that a retrial cannot be ordered ought to make the Court in the interests of justice, careful to avoid setting aside a conviction on grounds which, however, plausible they have been made to appear, have no solid foundation in fact. Therefore, it was, I think, that by making the terms of the statute so wide the legislature intentionally provided that the Court should be unhampered by technicalities, and any attempt to introduce restrictions on the powers of the Court where there are none in the statute is I think, to be deprecated. Great respect is due to the views expressed by Sir Barnes Peacock, Chief Justice in the case of *Elahee Buksh, In re* (13) and quoted with approval by Sir Francis Maclean, C. J., in the case of *Emperor v. Charu Chunder Mukerjee* (14).

"Although I am of opinion that the legislature intended that the Sudder Court should have the power of setting aside a verdict of guilty pronounced by a jury upon an erroneous or defective summing up of the evidence by the presiding Judge, yet I think it was not their intention that a verdict of guilty should be set aside in every case in which there is a defective or erroneous summing up. It was their intention to provide protection for the innocent but not chances of escape for the guilty if every convict against whom a verdict of guilty is pronounced by a jury has a right to have that verdict set aside upon appeal and to obtain his discharge whenever it can be shown that the presiding Judge has not properly directed the jury as to the degree of weight which ought to be given to particular evidence, a wide door would be thrown open for the escape of guilty men, and the due administration of the criminal law of this country should be placed in the greatest jeopardy *Elahee Buksh, In re* (13)."

This was the interpretation put upon the statute in 1866 and it is well recog-

(11) [1890] 17 Cal. 642.

(12) [1912] 25 Mad. 61=28 I.A. 257=10 M.L. J. 147=8 Sar. 160 (P.C.).

(13) [1866] 5 W.R. 80 Cr.=B.L.R. Sup. Vol. 459.

(14) [1904] 38 C.L.J. 309 (F.B.).



alized that a contemporaneous interpretation is the best and strongest in law.

From this point of view if the Court is convinced on the evidence that the accused is guilty he should not be acquitted merely on account of a defective charge.

I think, therefore, with great respect to the views of my learned colleagues to whom I have submitted this judgment in advance, that this application for review, ought to be refused.

R.K.

*Accused acquitted.*

### A. I. R. 1929 Calcutta 631 Special Bench

RANKIN, C. J. AND AND C. C. GHOSE  
AND B. B. GHOSH, JJ.

*Basana Sen*—Petitioner.

v.

*Aghore Nath Sen*—Respondent.

Declatory Suit No. 7 of 1927, Decided on 6th August 1928, made by the Dist. Judge, Dacca.

(a) Special Marriage Act (3 of 1872 as amended by Act 30 of 1923) S. 17—Bride below 21—No consent of her father—Marriage should be dissolved.

Where the bride at the time when the marriage was entered into is above 14 but below 21 and the girl has not obtained the consent of her father it is but right for the Court to pronounce the order that the marriage was null and be dissolved. [P 631 C 2]

(b) Special Marriage Act (3 of 1872), Sch. 2 Amendment suggested.

The omission in the application prescribed in the Sch. 2 as to statement of actual age of the parties and whether or not each party is of the age of 21 is pointed out and brought to notice and necessary amendments suggested. [P 631 C 2]

*D. N. Sen, Srish Chandra Sen Gupta and Satyendra Kishore Ghose*—for Petitioner.

**Rankin, C. J.**—In this case, the learned District Judge of Dacca has had before him a petition under the Special Marriage Act of 1872, asking that a certain marriage may be declared null on the ground that the woman at the time of the marriage in 1926 had not completed the age of 21 years and had not obtained the consent of her father. It appears that this girl was a pupil of the Eden Intermediate College at Dacca and that the respondent was a person who had been employed as her tutor and that on 9th April 1926, they went before the

Registrar and made declarations under the Special Marriage Act. Both of them are Hindus and the Special Marriage Act would not, therefore, apply to them at all, but for recent legislation, namely, Act 30 of 1923. It appears that the form of the declaration at the end of the schedule to the Special Marriage Act of 1872 contains a paragraph which has to be sworn to when the party has not completed the age of 21 years to say that the consent of the father or guardian has been given. In this case, the declaration was correctly filled up, but this paragraph appears to have been omitted altogether. Neither of the parties appears to have committed perjury, therefore, in this matter. But it is certainly very remarkable that the forms given in Sch. 2 do not require the parties to state what their actual age is, and, in particular whether or not each party is of the age of twenty one years. All that is required is that the bridegroom is to state that he is 18 years old and the bride is to state that she is 14 years old. This appears to me to open the door to great laxity. In this case, it appears to me that there has been some remissness in respect of the fact that the paragraph dealing with the consent of the father has apparently been omitted from the declaration altogether. I think this case is one which might usefully be made an occasion for a careful consideration of the working of this Act, in view of the recent legislation of 1923 and I propose to send a copy of the judgment of this Court in this case to the Government of Bengal in order that they may have an opportunity of considering the matter.

On the merits of the petition, I am satisfied that it has been now properly proved that at the time this pretended marriage was entered into, the girl did not have the consent of her father and, accordingly, under the express terms of S. 17, Special Marriage Act, it was right for the learned District Judge to pronounce the order which he has pronounced and which, in my judgment, ought now to be confirmed. The petitioner will have the costs of this applications. The costs will be assessed at three gold mohurs.

**C. C. Ghose, J.**—I agree.

**B. B. Ghose, J.**—I agree.

V.B./R.K.

*Order confirmed.*



**A. I. R. 1929 Calcutta 632**

SUHRAWARDY AND GRAHAM, JJ.

*Suruj Mian*—Petitioner—Party 2.

v.

*D. Tullock*—Opposite Party—Party 1.

Criminal Revn. No. 49 of 1929, Decided on 6th February 1929.

Criminal P. C., S. 145—Tenants, who attorned to some of the second party, in possession of portion of disputed land—Magistrate declaring the possession of the first party in respect of the whole land—Right of tenants to be maintained in possession was not disturbed.

Where a proceeding under S. 145 was drawn in respect of certain land, a portion of which was in possession of tenants who had attorned to some of the second party and where the Magistrate had declared the possession of the first party in respect of the whole of the disputed property.

*Held:* that in a summary proceeding of this kind the right of the tenants to be maintained in possession of the land of which they were in occupation was not affected and the order of the Magistrate was modified inasmuch as the lands in possession of the tenants were concerned the possession of the first party was declared through those tenants.

[P 632 C 2]

*B. C. Chatterji and Priyanath Dutt*—for Petitioner.

*N. K. Bose, Ambica Pada Chowdhury and Prokas Chandra Mitter*—for Opposite Party.

**Graham, J.**—This rule was issued in connexion with certain proceedings under S. 145, Criminal P. C. in the Court of the Sub-Divisional Officer of Habiganj in the District of Sylhet. Those proceedings related to a large tract of land comprising about 11000 acres, part of which consisted of tea gardens and part of forest lands. Two parties claimed possession of these lands, namely, the Baraoora Tea Co. through Mr D. Tullock of Rashidpur Tea Estate, first party, and one Suruj Mean alias Abdul Rahaman Choudhury and 27 other persons being the second party. Included among the second party there were some Tipras and the present rule was issued in the interest of five of those tipras. The Sub-Divisional Magistrate made a very elaborate and careful enquiry and on a consideration of the evidence, both oral and documentary came to the conclusion that the first party was in possession of the disputed land and made an order accordingly. Thereafter some of the second party moved the Sessions Judge of Sylhet but the learned Judge rejected their application. The petitioners then moved this Court and obtained this rule which was granted

upon ground 2 as set out in the petition to this Court, which is in these terms:

"For that in view of the admitted facts the second party Tipras are in actual possession of a portion of the disputed lands by erecting their homesteads and cultivating jhums the order of the Magistrate directing the first party to be in possession of the disputed lands till evicted by a competent Court of law is improper, illegal and without jurisdiction."

It appears that this same contention was urged before the Sessions Judge who, however, rejected it on the ground that the tipras

"had not claimed possession as tenants of the first party but had put forward a claim to possession which was entirely inconsistent and mutually exclusive of the claim put forward by the first party."

We do not think that the view taken by the learned Sessions Judge can be supported. In proceedings under S. 145, Criminal P. C., all that the Court is concerned with is the actual de facto possession of the land in question. It does not appear to have ever been disputed by the first party that these tipras are, or were at the date of the initiation of the proceedings in possession of certain punjis or homesteads and of certain jhum land as tenants of the first party. Indeed that was also part of the case of the first party before the Sub-Divisional Officer. It may be true that the tipperas did not acknowledge the first party as their landlords and had attorned to the second party. That, however, cannot affect the right of the tipperas in a summary proceeding of this kind to be maintained in possession of the land of which they were found to be in occupation.

So far as petitioners 3 to 7 are concerned this rule must therefore be made absolute and the order of the Sub-Divisional Magistrate declaring the first party to be in possession of the disputed land is confirmed subject to this modification that, so far as the homesteads and jhum cultivation in occupation of petitioners 3 to 7 at the date of the initiation of the proceedings is concerned, the possession of the first party is declared through those petitioners.

The rule is discharged as regards the petitioners other than petitioners 3 to 7.

In view of the order which we have made petitioners 3 to 7 will not be liable for any portion of the costs awarded by Court below in favour of the first party.

**Suhrawardy, J.**—I agree.

P.R./R.K. *Rule partly made absolute.*



**A. I. R. 1929 Calcutta 633**

**SUHRAWARDY AND GRAHAM, JJ.**

*Superintendent and Remembrancer of Legal Affairs, Bengal*—Petitioner.

v.

*Biswambhar Brahmin and another*—Accused—Opposite Party.

Criminal Revn. No. 1064 of 1928, Decided on 25th January 1929, against order of Chief Pres. Magistrate, Calcutta.

(a) Criminal P. C., S. 195—Forged acknowledgment receipt—Suit on its strength in the original side of the High Court dismissed for non-prosecution—Complaint by the complainant before the institution of the suit—Sanction is not necessary.

Where the accused on the strength of a forged acknowledgment receipt instituted a suit in the original side of the High Court claiming equitable mortgage on the basis of it, and allowed the suit to be dismissed for non-prosecution, and where the complainant had lodged the complaint before the institution of the suit :

*Held* : that the accused can be prosecuted for offence under S. 471, I. P. C., though he may have used document prior to the institution of the suit and that no sanction was necessary under S. 195, the complaint having preceded the institution of the suit : 44 Cal. 1002, Dist. [P 634 C 2]

(b) Criminal P. C., S. 195—Some offences requiring sanction, others not requiring—Complainant may proceed only with latter.

When upon the facts the commission of several offences is disclosed, some of which require sanction, and others do not, it is open to the complainant if he so wishes, to proceed in respect of those only which do not require sanction. [P 635 C 1]

*D. N. Bhattacharjee*—for the Crown.

*A. C. Mukerjee, Bireswar Chatterjee and Satindra Nath Mukerjee*—for Opposite Party.

**Suhrawardy, J.**—This rule has been issued on the application of the crown against an order of the Chief Presidency Magistrate of Calcutta discharging the accused persons under S. 253, Criminal P. C. The facts are that on 10th January 1928 one Gulzari Mull Thakur laid a complaint before the Chief Presidency Magistrate against the accused in respect of offences under Ss. 380, 411 and 403, I. P. C. The learned Magistrate ordered the Deputy Commissioner of the Detective Department for enquiry into the matter. On 10th February the police produced the two accused under arrest before the Magistrate who remanded them to hajut. On 13th February 1928 the police submitted

charge-sheet against the two accused. It appears from the charge sheet that accused 1 was charged under S. 380 for stealing a deed of conveyance or in the alternative for dishonestly retaining it in his possession. The first accused was further charged with an offence under S. 471 for fraudulently and dishonestly using as genuine two forged documents namely, one acknowledgment receipt dated 2nd July 1927 and one counterfoil of rent bills book. The second accused was charged under S. 414 read with S. 511 for voluntarily assisting each other in attempting to dispose of the stolen deed of conveyance and he was also charged under S. 471 read with S. 114 for aiding and abetting accused 1 in the fraudulent use of the forged document. On 17th February 1928 accused 1 instituted a suit in the original side of the High Court on the aforesaid acknowledgment receipt claiming equitable mortgage on the basis of it. With the plaint he attached only an English translation of the receipt. On 4th April at the instance of the accused the documents said to be forged were sent to the Registrar, Original Side of this Court. On 2nd May 1928, the suit instituted by the accused was dismissed for non-prosecution. The application for its restoration also failed as the accused did not carry out the condition on which the learned Judge had ordered the restoration of the suit. On these facts the learned Magistrate is of opinion that a suit having been brought in a civil Court on the basis of the document which is said to have been fraudulently used sanction of the Court is necessary and that the prosecution cannot go on without such a sanction. In this view of the matter the learned Magistrate has discharged the accused under S. 253, Criminal P. C.

It is argued on behalf of the Crown that the view taken by the Magistrate is not correct in law, as the offences with which the accused were charged had been taken cognizance of before the suit was brought in the civil Court. With regard to the offences under Ss. 318 and 411 it is conceded by the learned counsel on behalf of the accused that there is no bar, legal or otherwise, to the accused being tried separately although he at the same time contends that all the offences should be tried together. With



regard to the offence under S. 471 he tries to support the view of the Magistrate by saying that when a suit is brought in respect of a document said to have been used as genuine the accused cannot be prosecuted for offences under S. 471 even though he may have used this document prior to the institution of the suit. There is no authority for this proposition but we have been referred to some cases which apparently have no bearing on the question. There are many features in this case which distinguish it from the case of *Nalini Kanto Laha v. Anukul Chandra Laha* (1). In that case the suit was brought before the complaint was made in a criminal Court. There were charges of forgery and of using forged document before the Sub-Registrar subsequently, that document was produced and used in proceeding under S. 105, Criminal P. C., and since an offence of using a forged document was committed in connexion with proceedings in Court the learned Judges were of opinion in view of S. 195-1 (c), Criminal P. C., that for such a user the accused could not be prosecuted for using a forged document before it was used in Court. The learned Judges relied upon some cases which apparently do not support in its entirety the view that was taken and it is not necessary to consider those cases since in the present case the complaint was made by the complainant and the charge sheet was submitted by the police before the institution of the suit by the accused.

Another question was raised in the Court below as to whether calling of the documents from the custody of the Deputy Commissioner of Police by the Registrar is an user within the meaning of S. 471, I. P. C. It is contended on behalf of the Crown that it is not such an user and reliance has been placed on the case of *Muni Sidami Mudaliar v. Rathnam Pillai* (2). In that case the accused was prosecuted for offences among other sections under Ss. 465, 467 and 474. The document in support of which the offences are alleged to have been committed was not actually produced in Court in the suit but was disclosed in an affidavit filed therein and inspection thereof was allowed to the other side

and it was filed in the office of the translator of the High Court for translation. On these facts it was held that it was not used or given in evidence in the suit and that therefore sanction under S. 195 was not necessary. This case apparently supports the view urged by the Crown but it is not necessary to go into this matter as on the facts of the case I am of opinion that the prosecution in the present case can proceed without a complaint by the civil Court. If effect were given to the contention of the accused that because he has brought a suit in the original side of the High Court the criminal Court is incompetent to take cognizance of the offence under S. 471 without sanction from such Court, it will make prosecution depend on the will of the accused. In the present case it may be presumed that the suit was brought in the High Court solely for the purpose of defeating the prosecution. It was not prosecuted and was allowed to be dismissed for default. It is difficult to hold that the prosecution of a party should be in his hand and should depend upon the course he adopts to defeat it. At any rate there was no occasion for the Magistrate to say that the prosecution required sanction under law.

I accordingly make this rule absolute set aside the order of the Magistrate dated 31st August 1928, discharging the accused and send the case back to him for disposal according to law.

Accused 2 who has appeared separately has urged that on the materials before us no substantive offence is disclosed against him. This is a matter with which we cannot deal in the present rule. It is only confined to the legality or otherwise of the order of the Chief Presidency Magistrate discharging the accused on the ground that he could not be prosecuted without sanction from the High Court.

**Graham, J.**—I agree that the rule should be made absolute. Having regard to the facts and circumstances it seems to me that the order of the learned Chief Presidency Magistrate discharging the accused cannot be supported. The main reasons which appear to have actuated the learned Magistrate, as stated by him, are that it is a very serious case involving a charge of forgery, and that as the accused had brought a suit in this

(1) [1917] 44 Cal. 1002=25 C. L. J. 255=39 I. C. 490=21 C. W. N. 640.

(2) A. I. R. 1923 Mad. 136=45 Mad. 928 (F.B.).



Court in which use was made, or is said to have been made of the forged document in question, a formal complaint by the High Court ought to have been made.

It is to be observed, however, that prior to the institution of the suit the accused had already been sent up by the police under Ss. 380, 411, 414, 511 and 471, I. P. C. and cognizance of those offences had been taken. It is difficult to understand why, because a suit was subsequently instituted by the accused, the case should not proceed in respect of the charges referred to above, none of which requires any sanction. Nor is it easy to appreciate why as a consequence of the action taken by the accused at a subsequent stage the complainant should be deprived of his right to redress so far as those charges are concerned. When upon the facts the commission of several offences is disclosed, some of which require sanction, and others do not, it is open to the complainant, if he so wishes, to proceed in respect of those only which do not require sanction.

It appears further that there was no trial of the suit in this Court and that it was dismissed for non-prosecution. The High Court could not therefore, make a complaint under S. 476 or S. 471 without first making an enquiry into the matter. That, however, is perhaps not a very material circumstance. The main point is that the complainant is entitled as of right to have his case tried in respect of the charges previously made, and in regard to which cognizance has already been taken. There does not seem to be any reason why he should be compelled, whether he is willing or not, to add to the other charges, a charge under section 476 in respect of the proceedings before this Court, these proceedings, as I have already said, having arisen in consequence of the action subsequently taken by the accused.

For these reasons I agree to the order which my learned brother has made.

P.R./R.K. *Rule made absolute.*

### A. I. R. 1929 Calcutta 635

MUKERJI, J.

*Benoy Kumar Sen*—Petitioner.

v. ,

*Emperor*—Opposite Party.

Criminal Revn. Case No. 254 of 1929,  
Decided on 24th April 1929.

(a) Press Act (25 of 1867), "S. 13 — Press means press for printing books and papers and must be workable.

The press that is referred to in S. 13 is a press for the printing of books and papers, and so in order to sustain a conviction under S. 13 it is necessary to find that the press was in sufficiently fit condition to enable the printing of books or papers thereby.

[P 635 C 2]

(b) Press Act (25 of 1867), S. 13—Burden of proving that press is workable is on prosecution.

It is for the prosecution to establish that the press was one which required a declaration and in order to do so the prosecution must prove that it was in workable order.

[P 636 C 1]

*Mrityunjay Chattopadhyaya and Bhola Nath Roy*—for Petitioner.

**Order.**—The petitioner in this case has been convicted under S. 13, Press Act 25 of 1867. S. 13 runs thus :

"Whoever shall keep in his possession any such press as aforesaid without making such a declaration as is required by S. 4 of this Act shall etc."

To understand what is meant by "any such press" reference has to be made to S. 4 which says :

"No person in British India shall keep in his possession any press for the printing of books or papers etc."

It is clear, therefore, that the press that is referred to in S. 13 is a press for the printing of books and papers, in other words, to sustain a conviction under S. 13 it is necessary to find that the press was in a sufficiently fit condition to enable the printing of books or papers thereby. The trial Magistrate in the explanation which he has submitted is quite right in referring to his own findings in his judgment which are to the effect that there was printing of certain invitation cards in the press. The learned Sessions Judge who heard the appeal preferred by the petitioner from the conviction by the trial Court, however, has thought fit to disbelieve the evidence relating to such printing. Having done so the learned Judge has referred to the evidence that was adduced on behalf of the defence for the purpose of establishing that the press was at the place where it was found for the purpose of repairs and apparently being of opinion that it was for the defence to establish that the press was out of repairs has upheld the petitioner's conviction. In the view as regards the onus that the learned Judge took I am of opinion that he was wrong.



It was for the prosecution to establish that the press was one which required a declaration and in order to do so it was for the prosecution to show that it was a press in workable order. This has not been done and indeed the evidence that they adduced for that purpose has been disbelieved by the learned Sessions Judge. In this state of facts even if the evidence for the defence be not acceptable the conviction of the petitioner is not sufficiently justified.

The result is that the rule is made absolute, the conviction is set aside and the fine if paid by the petitioner will be refunded.

V.B./R.K.

*Rule made absolute.*

### A. I. R. 1929 Calcutta 636

RANKIN, C. J. AND C. C. GHOSE, J.

*Rajani Kanta Deb and others*—Plaintiffs—Appellants.

v.

*Bashiram Mestari and others*—Defendants—Respondents.

Appeals Nos. 432 to 445 of 1927, Decided on 25th February 1929, from appellate decrees of 1st Sub-Judge. Sylhet, D/- 15th September 1926.

(a) Registration Act (1908), S. 49—Admission in unregistered documents is admissible.

Although under S. 49 document which should be registered and is not registered is inadmissible as evidence of a transaction affecting property, yet when it is put forward as containing an admission it is not being put forward as evidence of a transaction affecting property and so it cannot be said to be inadmissible as evidence of an admission; 39 M. L. J. 382, *Foll.* [P 637 C 1, 2]

(b) Hindu Law—Joint family—Separate property—If owner waives his right and voluntarily throws it into common stock it can become joint property.

Property originally self-acquired may become joint property if it has been voluntarily thrown into the joint stock with the intention of abandoning all separate claims upon it. Question whether he has done so or not is entirely one of fact to be decided in the light of all the circumstances of the case. But a clear intention to waive his separate rights must be established and will not be inferred from acts which may have been done merely from kindness or affection. [P 638 C 1, 2]

(c) Transfer of Property Act, S. 41—"Reasonable care"—It is not enough for party attempting to invalidate sale to show that proper enquiry was not made, but must show what circumstances there were to put purchaser on enquiry, and what facts would

have been revealed—Onus then lies on purchaser to prove reasonable care on his part.

It is not enough to say that proper enquiry was not made. It must be shown that there was something to call attention and invoke an enquiry. It must be shown that there were means of answering the enquiry. It must be shown what enquiry would have revealed. Then it is that to entitle the purchaser to the benefit of S. 41 it must be shown by him to the satisfaction of the Court that he took reasonable care within the meaning of the section. It is when the preliminary burden is discharged by the party attempting to defeat his title that the onus of proving reasonable care lies on the purchaser for value without notice. [P 638 C 1]

*Brojo Lal Chakravarty and Hemendra Kumar Das*—for Appellants.

*Biraj Mohan Majumdar and Birendra Kumar Dey*—for Respondents.

Rankin, C. J.—In this case the plaintiff brings his suit for arrears of rent and he is met with a defence to the effect that the suit for rent is bad because the plaintiff has title only to four annas share of the superior interest and he has not proved or did assert any right to a separate collection of his share of rent. The suit not being brought in accordance with the special provisions of the Bengal Tenancy Act which enable a cosharer by suing the other cosharers to claim a part of the rent the whole suit is defeated unless the plaintiff can show himself to be entitled to sixteen annas of the rent. Mr Brojo Lal Chakravarty for the appellant does not dispute that proposition as a matter of law. The contest in this case is whether or not the learned Subordinate Judge has correctly dealt with the issues which arise upon the question whether or not the plaintiff has made out his title to the whole of the rent.

Now it appears that at first sight there is something startling about the way in which the Courts below have dealt with this case. It would appear that Dolegovinda was a mukhtear and according to the findings of fact he had an elder brother Radha Kanta who had an even larger practice as a mukhtear than himself. He bought this property now in question in 1884. He took the conveyance in his own name. He got it entered in the books of the Collectorate in a separate account in his own name. He took kabuliats from these very tenants or their predecessors in his own name. It appears that at least on one occasion he took for himself the money which represented a land acquisition award. Then



after his death when his representatives had sold to the plaintiff these tenants set up this defence that the whole suit was bad because the property as a matter of fact did not belong to Dolegovinda but belonged to the family of which Dolegovinda was merely one member. That certainly seems to me paradoxical and I must say that I have examined the judgments of the Court below with some care to see whether it is really in accordance with the correct view of the law.

Mr. Brojo Lal Chakravarty for the appellant takes three objections. First of all he says that there is a part of a compromise deed which is void for want of registration but which nevertheless is admissible in evidence as an admission by the brother and cousins of Dolegovinda that this property belonged to Dolegovinda alone. He says that that is a matter which the Court below has brushed aside under the impression apparently that for want of registration the document can be looked at for no purpose. In the second place he says that under S. 41, T. P. Act, the Courts below have brushed aside his client's claim to be treated as a purchaser for value without notice on the ground that he made no proper enquiry into the title. He says that if one looks at the decisions in *Gholam Sidhique Khan v. Jogendra Nath* (1) and in *MacNeil & Co. v. Saroda Sundari Debi* (2) one would find that one cannot defeat a claim to the protection given by S. 41 without definitely showing what circumstances there were to put the purchaser upon enquiry, what facts would have been found out by enquiry and so forth. Complaint is made that this matter has not been properly dealt with as a matter of law. The third complaint which is made is that the judgment of the Subordinate Judge misplaces the onus of proving that the self-acquired property of Dolegovinda was thrown into the common stock.

There is something in each of these objections. In my judgment the document *Nirdeshpatra* as it is called cannot be said to be inadmissible as evidence of an admission. If one looks at S. 49, Registration Act, one finds that documents which should be registered and are not registered are inadmissible as evidence of a transaction affecting the property, but

when they are put forward as containing an admission it does not seem to me that they are being put forward as evidence of a transaction affecting that property. An authority for that proposition is to be found in *Rajangam Ayyar v. Rajangam Ayyar* (3). When one comes, however, to see what the effect of this admission would be together with the other evidence in the case one finds this that a particular term out of a lot of others was that the representatives of the other branch should admit that the land in question—taluk No. 4—was self-acquired property of Dolegovinda.

"We the other parties never had nor have any claim or title thereto. As we are not aware of the details of our properties we filed a written statement alleging that we have title thereto. We shall withdraw our said objection."

The Munsiff in the first Court took the view that this was a part of the bargain. The bargain having gone off there is no great evidentiary force in that paragraph if it be looked at as an admission, and the learned Subordinate Judge has not looked at the matter from that point of view at all. It does seem to me that this admission is something that is being bought, if one may put it so, by the other terms of the deed. At the same time it is just noticeable that the parties do not say:

"we give up claim as one of the terms of this deed, to any title in taluk No. 4."

They go on to explain that they never had a claim and that their pretension to a claim was under a mistake. That I think has to be considered when we come to the question of fact in this case.

The next point that arises is as regards S. 41, T. P. Act. I am quite satisfied that it is idle in this case to say that S. 41 does not apply because Dolegovinda was not a benamdar. What the section deals with is a person with the consent, express or implied, of the persons interested in an immovable property being the ostensible owner of such property. That is just exactly the position of Dolegovinda according to the defendants. The property stood in his name and a separate account was made; and it seems to me therefore, that the only question under S. 41 for our consideration is the question whether the plaintiff having bought from Dolegovinda's representatives

(1) A. I. R. 1926 Cal. 916.

(2) A. I. R. 1929 Cal. 83.

(3) [1920] 39 M. L. J. 382=57 I. C. 18=12 M. L. W. 435.



took reasonable care to ascertain that his transferrer had power to make the transfer.

There, as I have said, the appellant says:

"It is not enough to say that proper enquiry was not made. It must be shown that there was something to call attention and invoke an enquiry. It must be shown that there were means of answering the enquiry. It must be shown what the enquiry would have revealed."

That is quite sound law, but in the present case we have to apply the doctrine to a somewhat peculiar position. It is clearly for the plaintiff to satisfy us that he took "reasonable care" within the meaning of the section, and when we look at the evidence it seems that it is pretty plain that it is impossible to say that the plaintiff has affirmatively shown that he took reasonable care over this transaction at all. He did not even see the main document of title passing the property to Dolegovinda. It is true that he got certain title-deeds from his vendor. Certain title-deeds he got in that way and we have the fact that the property was entered in his name as separate estate No. 41. But in view of the plaintiff's evidence and of the burden of proof being upon him I find it very difficult to see how any Court can say that he has satisfied the burden which lay under S. 41. Both Courts have dealt with the matter rather summarily just for the reason that the plaintiff's evidence is in so perilous a condition. The Munsiff paid a good deal of attention to the fact that shortly before a near neighbour of the plaintiff made an offer for this property and finally the contract for sale went off. I find it a little difficult to gather from the judgment what exactly the facts were about that and whether if the plaintiff had made an enquiry he would have known anything in particular and if so what. Putting that matter on one side altogether, it remains that if the Courts have dealt with this contention somewhat similarly it is because the evidence is in a state which is highly unsatisfactory.

I now come to consider the way in which the learned Subordinate Judge has dealt with the main point. The learned Subordinate Judge finds that this property was bought with Dolegovinda's own money. So far, therefore, it is the self-acquired property of Dolegovinda. It is quite true that it is possible even so to apply the principle that a property originally self-acquired may become joint property if it has been voluntarily

thrown by the owner into the joint stock with the intention of abandoning all separate claims upon it. The learned author Mr. Mayne in his well known book on Hindu Law says:

"The question whether he has done so or not is entirely one of fact, to be decided in the light of all the circumstances of the case but a clear intention to waive his separate rights must be established and will not be inferred from acts which may have been done merely from kindness or affection."

The learned Subordinate Judge in this case having found that the property was self-acquired goes on to say:

"Now the question arises whether he treated this property as his exclusive and separate property. The evidence does not support this theory."

The learned Judge should have asked himself whether there was sufficient evidence to support the opposite theory and to show that Dolegovinda had thrown it into the common stock with an intention to abandon his individual right. There are other passages which seem to show that the learned Judge was equally unhappy in expressing himself. However, when I come to look at the basis of the judgment of the learned Subordinate Judge I find this: I find first of all that the question of the admission in the Nirdehpatra is overlooked. Then I find that there is in the year 1888 in connexion with Dolegovinda's application for mutation of names a very strong piece of evidence to the effect that this property in the name of Dolegovinda was really of the joint family. I regard that piece of evidence as particularly strong and again in the written statement Ex. F—it is true that it is a written statement to a suit by a stranger—Dolegovinda does, unnecessarily it is true but quite clearly, state after reciting his title that he has been in possession of this property along with the other members of his family. These are I think extremely strong pieces of evidence to show that Dolegovinda was putting this property into the joint fund and when I come to look at the circumstances of the case I find this that the elder brother Radhakanta, who was apparently a gentleman with a larger practice of the two had admittedly left his self-acquired property to go to the common stock. Radhakanta was the karta of the family till his death. After him Dolegovinda became the karta; and in these circumstances, it does seem to me that the mere



fact that the property was bought with Dolegovinda's funds is by no means conclusive and there is very strong evidence on the record to show that in any case Dolegovinda did put this property into the common stock. That evidence is assisted in various ways by evidence which by itself, I confess, would not be enough to persuade me. It would appear that so far from keeping a separate clerk and a separate set of books for this particular estate Dolegovinda let it be managed like the other family properties and it certainly appears that from time to time the proceeds of the rent are differently shown to have been applied for the joint family purpose. There was evidence of a gentleman named Dwarakanath Dutta who was a family friend and acted for the brothers; and, as far as I can make out, his evidence was definitely in favour of the defendants.

In these circumstances the real question that we have to consider is this:—Having regard to the fact that the Nir-deshpatra was not treated exactly in accordance with the principles of law and having regard to the fact that the learned Subordinate Judge has expressed himself at times as though the burden were on the plaintiff to show that Dolegovinda did not put this property into the common stock, is it desirable or necessary for us to send this matter back to have another adjudication upon this question of fact. I do not think so for two reasons: first of all because I take very much the same view of the evidentiary value of para. 5 of the Nir-deshpatra as was taken by the Munsiff. I think it would be unsafe to rely upon that as anything except a term of bargain. However that may be having regard to the other evidence to which I have referred I think its weight is comparatively slight. On the other question of onus what I feel is this that while the learned Subordinate Judge has thought that though there was a presumption in the circumstances that this property was bought with Dolegovinda's own earnings he has not sufficiently considered this that the treatment of the property is in itself evidence as to whether or not the property was bought for Dolegovinda alone or for his family including himself. It appears to me that if this case were sent back with the best instructions which we can give on points of law it would be very little likely that

any different result would have been arrived at. We have examined into the evidence ourselves with very considerable care and have spent a good deal of time and I am satisfied from what we gather from the evidence that it is better that we should here bring this matter to a decision and in my judgment the broad finding of fact that the property belonged to the family is on the whole right and we ought not to disturb the conclusion of the learned Subordinate Judge merely because on the two points that I have mentioned it could possibly be criticized. I think the appeals must fail and be dismissed with costs. The application for taking additional evidence in this Court is withdrawn. Let the documents be returned.

**C. C. Ghose, J.**—I agree.

V.B./R.K.

*Appeals dismissed.*

### A. I. R. 1929 Calcutta 639

SUHRAWARDY AND GRAHAM, JJ.

*Basirulla*—Complainant—Petitioner.

v.

*Asadulla and another*—Accused—Opposite Party.

Criminal Revn. No. 1130 of 1928, Decided on 27th February 1929.

(a) Criminal P. C., S. 4—Scope.

Any person who knows about the commission of an offence may make a complaint.

(b) Criminal P. C., S. 439—Exercise of discretion—The Crown not moving against order of acquittal in private prosecution—Interference by High Court on grounds of justice, error or public interest alone is warranted.

In private prosecutions where the Crown does not think it proper to move against the order of acquittal the High Court should not ordinarily interfere and it does so only when it is satisfied that there has been an error of law committed by the acquitting Court or where there has been a gross miscarriage of justice or in public interest. [P 640 C 1]

*Asaduzzaman*—for Petitioner.

*Suresh Chandra Taluqdar*—for Opposite Party.

**Suhrawardy, J.**—In this case the accused were convicted by the trying Magistrate under Ss. 426 and 323, I. P. C. and sentenced to pay fines. On appeal the learned District Magistrate held that the mischief was committed with reference to a hut which had not belonged to the complainant but to his father from whom he was living separately. In this view he acquitted the accused. About the end of his judgment the learned District Magistrate commented upon the evi-



dence of two of the witnesses for the prosecution which he thought was not true. He concludes his judgment with these words :

"As already stated the case fails because the person interested, complainant's father, has taken no interest in the matter."

The real ground upon which the learned District Magistrate acquitted the accused was that the complainant was not entitled in law to make the complaint. Against the order of acquittal this rule has been obtained on the ground that the view of law taken by the Magistrate is erroneous. There can be no question that a complaint may be made by any person who knows about the commission of an offence and not necessarily by the injured party. The definition of "complaint" in S. 4, Criminal P. C. supports the view accepted on several occasions. It has not been seriously contended on behalf of the opposite party before us that the view which the Magistrate has taken that the complainant in this case is not entitled to maintain the complaint is correct.

The next question is whether we should interfere in this matter when the accused has been acquitted by the lower appellate Court. There is no doubt that the principle which we generally keep in view is that in private prosecutions where the Crown does not think it proper to move against the order of acquittal we should not ordinarily interfere and we do so only when we are satisfied that there has been an error of law committed by the acquitting Court or where there has been a gross miscarriage of justice or in public interest. The present case, it seems, is one of these cases. The view of the law taken by the appellate Court is wrong and the case has not been disposed of by that Court upon an examination of the entire evidence in the record. The complainant had several injuries on his person which the medical evidence shows were severe. The defence admitted the occurrence but they accounted for the injuries on the complainant by saying that they were caused by a tin shed falling upon him. This theory, the medical evidence, does not support. Other witnesses were examined for the prosecution some of whom seem to be disinterested and were relied upon by the trying Magistrate. We do not think that there has been a proper enquiry into the facts of

this case and the order of acquittal should accordingly be set aside.

I should note here that with regard to the capacity of the complainant to make the complaint he had undoubtedly such a right for the injuries inflicted on him. There can be no doubt that so far as that charge was concerned the complainant was the proper person to make the complaint. We, therefore, make the rule absolute, set aside the order of acquittal passed by the appellate Court and direct that the appeal be reheard.

**Graham, J.**—I agree that the rule should be made absolute. It is the long established practice of this Court not to interfere with orders of acquittal in revision on the ground that the Local Government can be moved to file an appeal against the acquittal. In this instance the Local Government has been moved and has declined to take action. Speaking for myself I do not think we should in such cases allow our discretion to be fettered in any way, and, where there has been an error of law as opposed to fact I would be prepared to interfere in order to prevent a miscarriage of justice. The learned District Magistrate seems to have formed the opinion that the complainant had no locus standi in the case, and that he could not institute it on behalf of his father. This is not correct as a proposition of law. The general rule is that any one, who is aware of the commission of an offence, may complain. Moreover in this instance the complainant was obviously fully justified in protecting his father's house against aggression and he received several injuries, which, as the learned District Magistrate has himself observed, were proved by the medical evidence, and by some of the defence witnesses. That being so he clearly had every right to complain, and the order of acquittal which is based mainly, if not entirely, upon this erroneous ground, must be set aside.

It is true the District Magistrate has remarked that the prosecution witnesses are practically all interested but he has not dealt with that evidence and has based his decision, as I have said, mainly on the view which he has taken on the point of law. For these reasons I agree with my learned brother and to the order which he has made.

P.R./R.K.

*Rule made absolute.*



## A. I. R. 1929 Calcutta 641

PAGE, J.

*Tea Financing Syndicate, Ltd.* — Plaintiff.

v.

*Chandra Kamal Bezboruah* — Defendant.Original Civil Suit No 568 of 1924,  
Decided on 12th March 1929.

(a) Limitation Act, Art. 85—"Mutual account" means that each party must have received and paid to other party.

"To constitute mutual account it is not sufficient that one of the two parties should have received money and paid it on account of the other. The reason of that distinction is that in the case of proceedings at law, where each of the two parties has received and paid on account of the other what would have to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments, a position of the case, which to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other it becomes a simple case, but it is otherwise where each party has received and paid." *Phillips v. Phillips*, (1852) 9 *Hare* 471, *Foll.*; 6 *M. H. C. R.* 142; 17 *Mad.* 293; 6 *C. L. J.* 158; 34 *Mad.* 513, *Ref.* [P 642 C 1]

Thus where an account and the agreement upon which it was based provided for a loan by the plaintiffs to the defendants to be discharged by the proceeds of goods transmitted by the defendants to the plaintiffs the account is an account for the money paid and received by the plaintiffs and not an open mutual and current account. [P 643 C 1]

(b) Presidency Small Cause Courts Act, S. 22—Scope.

Section 22 is applicable to cases where the sum decreed is within the amount cognizable by Presidency Small Cause Court; 24 *Cal.* 399 *Foll.*; A. I. R. 1924 *Cal.* 405, *Expl.* and held not correct law. [P 644 C 1]

*J. Langford James, S. C. Bose and J. C. Hazra*—for Plaintiff.*N. N. Sircar, B. K. Ghosh, C. Mitter and N. C. Chatterjee*—for Defendant.

**Judgment.**—This is a suit to recover Rs. 69,942-15-0 and interest thereon alleged to be due under an agreement between the parties of 3rd February 1920 as the balance of a mutual open and current account.

The defendant does not pretend that he has not received from the plaintiffs the money for which he is being sued but I do not conceive it to be my duty to pass any comment upon his conduct in relying

upon the defence which has been urged before me. In this connexion I desire to cite and make my own the words of Lord Justice Fry in *Reeves v. Butcher* (1),

"I have not to determine whether the defence here set up is handsome or conscientious but whether it is good in law, and I am of opinion that it is."

Now, the defence is that the claim is barred by limitation.

The suit was brought on 22nd February 1924, and therefore, unless the account in respect of which the claim is made was a mutual open and current account it is barred by limitation under Art. 59, Lim. Act.

This suit originally was tried before my brother Buckland, and a decree was passed in favour of the plaintiffs for Rs. 909-7-0. Against that decree an appeal was preferred, and the case was remanded by an Appeal Bench because the learned trial Judge had decided the case solely upon the form of the account annexed to the plaint, without taking into consideration the agreement of 3rd February 1920, and it was ordered that the suit should be tried de novo.

The Appeal Bench delivered judgment on 5th January 1928, and on 18th May the plaintiffs by petition applied for leave to amend the plaint with a view to alleging that after 18th September 1920 the parties had agreed that the defendant should be given a further year from 3rd February 1921 within which to pay off the loans advanced to him. That petition was rejected.

Again at the retrial an application was made by the plaintiffs for an amendment of the plaint in order that it might be alleged that if this account was not a mutual, open and current account, and prima facie was time barred there had been a part payment of the principal on 25th February 1921 which took the case out of the Statute of Limitation.

Having regard to O. 7, R. 6 and to prevent any embarrassment to the defendant in my discretion I have refused to allow such an amendment of the plaint. The issue to be determined therefore is, whether the account which is the foundation of the claim is governed by Art. 85, Lim. Act, which runs as follows:

"For the balance due on a mutual, open and current account where there have been reci-

(1) [1891] 2 Q. B. 509=60 L. J. Q. B. 619=39 W. R. 626=65 L. T. 329.



procal demands between the parties, three years from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account."

Now, the last item in the account is a credit item in favour of the defendant of Rs. 1,103-11-5 on 25th February 1921; i. e., within three years before the suit was filed. But, what is "a mutual, open and current account where there have been reciprocal demands" within the meaning of Art. 85. At the trial a number of authorities were cited for the purpose of showing that an account in one particular form or another came within the ambit of Art. 85. But an authority is only of value for the principle of law to be extracted from it, and when once the principle is understood it tends to confuse the issue for the Court to consider the special facts of other cases instead of concentrating its attention upon the facts of the particular case to be determined.

The meaning of a mutual account was stated with singular clarity by Vice Chancellor Turner in *Phillips v Phillips* (2) and no better explanation of the meaning of the term mutual account is, I think to be found in any of the authorities:

"I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would have to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments, a position of the case, which to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only as to the receipts on one side and the payments on the other, and it is a mere question of set off; but it is otherwise where each party has received and paid: see also *Hirada Bassappa v. Gadigi Mudappa* (3); *Velu Pillai v. Ghose Mahomed* (4); *Ram Pershad v. Harbans Singh* (5) and *Shivi Gowda v. Fernandes* (6)."

A perusal of the account annexed to the

(2) [1852] 9 Hare 471.

(3) [1871] 6 M. H. C. R. 142.

(4) [1893] 17 Mad. 293=4 M. L. J. 140.

(5) [1907] 6 C. L. J. 158.

(6) [1910] 34 Mad. 513=21 M. L. J. 391=8 I. C. 141=(1911) 1 M. W. N. 1.

plaint by itself would lead to the conclusion that it is not a

"mutual open and current account whether there have been reciprocal demands between the parties."

It is an account of payments made and received by the plaintiffs alone, and does not purport to refer to any receipts or payments by the defendant on the plaintiffs' account. The terms of the agreement of 3rd February 1920, in my opinion, lead to the same conclusion. To my mind it is clear that the object and effect of that agreement was to create a security for the repayment of any sums which might be advanced by the plaintiffs up to Rs. 80,000 by the hypothecation of the tea crop for the current year in which the advances were to be made. It appears that the defendant was anxious to obtain financial assistance in order to exploit the resources of his tea garden during the year 1920-1921, and approached the plaintiffs with that object in view. It was for this purpose that the agreement of 3rd February 1920 was entered into. It is an agreement whereby the plaintiffs agreed to accommodate the defendant to an extent not exceeding Rs. 80,000 subject, inter alia, to the condition that

"advances will be made for so long and to such extent only as you shall, under the condition and circumstances of my gardens and crop in your discretion think fit, and that you may discontinue them as and whenever you consider expedient under such condition and circumstances with one month's notice to me."

It was agreed that the defendant's account in the plaintiff's books should bear interest at 9 per cent per annum with half yearly rests and incidental charges, "and the amount for the time being due to you on the said account will be repaid by me to you on demand, or if no demand be made within one year from the date hereof."

The security was created by a hypothecation of the entire tea crop and produce of the garden, and the defendant agreed to:

"send and transmit the said tea to Calcutta to you for the purpose of same being sold in Calcutta by public auction for such price as you consider reasonable."

Provision was also made to enable the plaintiffs to take steps by seizure of the crop or otherwise to protect their security if the defendant did not hold or transmit the crop to the plaintiff pursuant to the agreement. On 18th September 1920 the plaintiffs gave notice under the agreement, as they were en-



titled to do, demanding repayment of the advances made up till that date :

"with interest thereon within 7 days from date otherwise we shall take such steps to realize same as advised by our solicitors."

It appears from the account, and is not now disputed by the defendant that after 18th September 1920 certain sums were debited against him in the account as having been paid under the agreement by the plaintiffs, and it was proved by oral evidence before me that on 28th December 1920 and the 25th February 1921 two sums of Rs. 999-11-11 and Rs. 1,103-11 5 being the sale-proceeds of tea transmitted by the defendant to the plaintiffs under the agreement, were received by the plaintiffs.

In my opinion upon the evidence adduced at the trial this account was not :

"a mutual open or current account where there have been reciprocal demands between the parties"

within Art. 85, Lim. Act. To my mind the account and the agreement upon which it was based provided for a loan by the plaintiffs to the defendant to be discharged pro tanto by the proceeds of tea transmitted by the defendant to the plaintiffs under the agreement, and the account is what it purports to be, namely, an account of moneys paid and received by the plaintiffs on the defendant's behalf and :

"where one party has merely received and paid moneys on account of the other it becomes a simple case : per Vice-Chancellor Turner, *Phillips v. Phillips* (2) "

I invited learned counsel for the plaintiffs more than once to state whether there was any period of time after the agreement was entered into when the defendant was in a position to say to the plaintiffs : "I have an account against you" and the only answer that I received was that inasmuch as the sales by the plaintiffs must be by public auction the defendant was entitled to claim that the plaintiffs should satisfy him that the tea had duly been sold by public auction. But that is no evidence of a mutual account. The agreement provided that the defendant should not be entitled to challenge the quantum of the proceeds of the sales, and the right to call upon the plaintiffs to satisfy the defendant that the sales had been by public auction is one thing, it is quite another that the defendant

should be in a position to say that having received and made payments on behalf of the plaintiffs he was entitled to demand from the plaintiffs payment of the balance due from the plaintiffs to him in respect of such receipts and payments. In my opinion, the account in suit was not a mutual account; indeed it was not pretended that the account was one in which there had been reciprocal demands made between the parties, for there was no evidence and no argument to the effect that the defendant had ever made or was in a position to make any sort of demand whatever upon the plaintiffs in respect of this transaction. In my opinion the claim in the present case is a claim for money lent under an agreement that it shall be repaid on demand and inasmuch as the demand was made on 18th September 1920 the suit is barred by limitation. It is not uninteresting although in no way do I base my judgment upon it, to recall that on 1st June 1928 after the application for the amendment of the plaint had been dismissed the present plaintiffs became the assignees from the Indian Planters' Agency Company, Limited, of all their rights against the defendant in respect of the agreement of 3rd February 1920 for a consideration of Rs. 5,000, which, however, according to the oral testimony at the trial it so happens has not yet been paid. Learned counsel on behalf of the plaintiffs further urged that even if the account was not a mutual open and current account within Art. 85 the demand of 18th September 1920 was not to be regarded as putting an end to the account and in support of his contention he referred to subsequent entries of payments appearing in the account as having been made on behalf of the defendant by the plaintiffs. But there was no evidence and there was no argument to the effect that these subsequent payments were made under the agreement at the request or with the assent of the defendant. In my opinion the plaintiffs are entitled to receive no more than the amount decreed by my brother Buckland at the first hearing namely, Rs. 909-7-0, and there will be a decree for that amount in favour of the plaintiffs.

As regards costs, this suit is governed by S. 22, Presidency Small Cause Courts Act (15 of 1882). In *Chandanmull*



*Kanoria v. Debi Chand* (7) I held that the question whether 'the suit was cognizable by the Small Cause Court by reason of the amount or value of the subject-matter depended upon the amount or value claimed by the plaintiff and set out in the plaint. I observed that, in my opinion:

"it is not to be supposed that the legislature intended ex post facto to penalize a plaintiff because he had failed to guess correctly which was the proper Court in which to launch his suit."

I still am of opinion that the construction that I then put upon S. 22 was the reasonable one: see per Imam, J. in *Sukumari Ghose v. Gopi Mohan Goswami* (8). In that case, however, my attention was not drawn to the decision of a Division Bench of this Court (Maclean, C. J., Machpherson and Trevelyan, JJ.) in *Ismail Ariff v. Leslie* (9) in which their Lordships determined that S. 22 is applicable to cases where the sum decreed is within the amount cognizable by the Presidency Small Cause Court. My decision in *Chandanmull Kanoria v. Debi Chand* (7) is, I think, inconsistent with *Ismail Ariff v. Leslie* (9) which is binding upon me, and I take this opportunity of stating that the construction which I put upon S. 22 in *Chandanmull's* case (7) was not in accordance with the ratio decidendi of *Ismail Ariff v. Leslie* (9) and cannot be regarded as stating as correctly the law: see also *Shridhan Gopinath v. Gordhandas Gokuldas* (10) and per Buckland, J., in suit No. 1657 of 1922 and per Costello, J. in *Rameswar Prosad Kessur Prosad v. Ramapada Ghose and Sons* (11).

In the present case, the plaintiffs have recovered Rs. 909-7-0 but in my opinion, the case was a fit one to be brought in the High Court and the plaintiffs are entitled to a decree for that amount with costs on the scale that is appropriate to suits in this Court in which sums under Rs. 1,000 are received.

Such costs will be awarded to the plaintiffs up to the date of the decree passed by my brother Buckland on 2nd

December 1926. The costs incurred thereafter by reason of the appeal and the retrial in my opinion have all been thrown away by reason of the fact that the plaintiffs at the retrial have recovered the same amount as was decreed in their favour at the first trial and all the costs incurred after the date of the decree of my brother Buckland, both in respect of the appeal and of the rehearing, must be paid by the plaintiffs to the defendant on scale No. 2, including any reserve costs, and the costs of the commission which have been incurred since the date of the decree in the first trial.

V.B./R.K.

Order accordingly.

### A. I. R. 1929 Calcutta 644

MUKERJI, J.

*Puran Mull Biwani*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 28 of 1929, Decided on 12th February 1929.

(a) Calcutta Police Act, S. 3—Scope.

"Profit or gain" is the cardinal constituent of the definition of a "common gaming house." [P 645 C 1]

(b) Calcutta Police Act, S. 44—Conviction under S. 44 requires sufficient evidence of gain.

For conviction under S. 44 it is necessary to have sufficient evidence of the element of "profit or gain." [P 645 C 1]

*Satindra Nath Mukerjee*—for Petitioner.

**Order.**—The petitioner *Puran Mull Biwani* has been convicted under S. 44, Act 4 of 1866, and sentenced to pay a fine. The offence complained of against him was under the first part of S. 44, viz., that he being the owner or occupier of a room kept or used it as a common gaming house. As I understand the case no question of permitting any other person to keep or use the room as a common gaming house, under the latter part of the section, enters into the case.

The fact that a note book (Ex. 3) was found in the room in which the petitioner's name appeared in print on the pages in the absence of any evidence as to the contents of the notebook (for the police officer says that he could not read the Hindi writing in it and did not have it translated) is very poor evidence to establish that the notebook was an "instrument of gaming." This

(7) A. I. R. 1924 Cal. 405=51 Cal. 62.

(8) [1915] 43 Cal. 190=31 I. C. 662=19 C. W. N. 880.

(9) [1896] 24 Cal 399=1 C. W. N. 183.

(10) [1901] 26 Bom. 235=3 Bom. L. R. 893.

(11) A. I. R. 1929 Cal. 68=55 Cal. 1292.



is a serious difficulty in the way of the prosecution.

A still greater difficulty in upholding the conviction arises when the definition of "common gaming house" is considered. The definition as given in S. 3 of the Act plainly shows that the room must be one in which instruments of gaming are kept or used for the profit or gain of the person owning or keeping the room whether by way of charge for the instruments or for the room or otherwise. The learned Magistrate in his explanation has stated the following:

"It was clear from the facts and the circumstances of the case that the room in question was kept and used for the profit and gain of the man who kept or used it. It is not always possible to get direct evidence of that in such cases. It has been proved that the room was known as the accused's gadi."

Now, I do not find any evidence on the record of "profit or gain" which is the cardinal constituent of the definition of a "common gaming house." It is quite true that it is often very difficult to get direct evidence of this fact, but at the same time it is not enough to satisfy the requirements of the law that two witnesses (P. W's. 2 and 3) should have deposed that it was the accused's gadi. The matter should have been explained further and evidence should have been given, if it was at all possible to do so, to make out this element of "profit or gain" as against the petitioner.

As the evidence shows it must be held that it is wholly insufficient for the petitioner's conviction which as well as the sentence passed on the petitioner, are accordingly set aside.

The rule is made absolute. The fine, if paid will be refunded.

P.R./R.K. *Rule made absolute.*

### A. I. R. 1929 Calcutta 645

MITTER, J.

*Bipin Chandra Majumdar*—Appellant.

v.

*Raj Kumar Sinha and others*—Respondents.

Appeals Nos. 1012 and 1013 of 1928, with Revision Cases Nos. 802 and 806 of 1928, respectively, Decided on 31st May 1929, against appellate decrees of Dist. Judge, Nokhali, D/- 23rd December 1927.

Bengal Tenancy Act (8 of 1885), S. 153—Suit for recovery of rent not exceeding

Rs. 50—Defendants disclaiming liability by pleading transfers—Suit involves question of title within meaning of S. 153.

If in a suit for recovery of rent valued at less than Rs. 50 some of the defendants disclaim their liability to pay rent to the landlord under the cover of transfer in favour of other defendants, then the suit involves a question of title, whether the title lay in the alleged transferees or in the transferring tenants, and liability of such tenants to pay rents and as such there is surely a question of title between persons having conflicting claims thereto within the meaning of S. 153: 31 C. W. N. 140 s.n., *Foll.* [P 646 C 1]

*Radhika Ranjan Guha and Jitendra Kumar Sen Gupta*—for Appellant.

*Upendra Kumar Roy*—for Respondents.

**Judgment.**—These two appeals arise out of the same suit. They are preferred by defendants 1 and 2 separately. The suit in which these two appeals arise was brought by the plaintiffs for recovery of arrears of rent of their eight annas share at the rate of Rs. 8 and odd for the years 1327 to the Pous kist of 1330 B. S. The claim was laid at less than Rs. 50. Defendants 1 and 2 appeared and said that they were not liable for the rent of this period as defendant 1 had made a gift of this property in favour of his sister one Basanta Kumari Sur who is defendant 3 in the present litigation so far back as 2nd Chait 1321 B. S. The defence of defendant 2 was that he sold his interest in the tenure to one Omar Ali who is defendant 4 in the present suit on 26th Sravan 1319 B. S. The Munsif held that the two transfers by way of gift and sale respectively were colourable transactions and that consequently defendants 1 and 2 were liable to the plaintiffs for the rent. The suit was accordingly decreed against defendants 1 and 2 only.

Against this decision two separate appeals were preferred by defendants 1 and 2 to the Court of the District Judge of Nokhali and the learned District Judge came to the conclusion that the two appeals by the two defendants were incompetent as the suit was valued at less than Rs. 50 and the Munsif who tries the suit was vested with final powers under S. 153, Ben. Ten. Act. He accordingly dismissed the appeals on the preliminary ground and held that he would not be justified in exercising his powers of revision under the provisions of that section. The result was that the appeals

Advocate High Court

Jammu & Kashmir

Srinagar,



by the defendants were dismissed on the preliminary ground.

Against this decision of the learned District Judge the two defendants have preferred two separate appeals and the main contention which has been raised by the learned advocate for the appellants is that the lower appellate Court was clearly in error in holding that no appeal lay to him from the decision of the Munsif. It appears to me that this contention is well founded and must prevail. There was surely a question of title as between persons having conflicting claims thereto within the meaning of S. 153, Ben. Ten. Act. Defendants 1 and 2 disclaimed the liability for rent on the ground that they had transferred their interest to defendants 3 and 4 respectively. The question arose, therefore, in this suit as to whether the title as tenant lay in defendants 1 and 2 or in defendants 3 and 4. Plaintiffs were surely concerned with the decision of the question as to who was the person to whom they would look for the rent. There is a clear conflict between the plaintiffs and defendants 1 and 2 with regard to the relationship of landlord and tenant and defendants 3 and 4 whose title as tenant is set up by the appealing defendants are parties to the present case. The case will seem to be covered by a decision to which I was a party which is not fully reported but is reported in short notes in the case of *Lakhi Narayan Das v. Jharu Mohan Santra* (1). That case has been sought to be distinguished by the learned advocate for the respondents on the ground that there one of the tenants claimed a certain share in the tenancy whereas here both the tenants 1 and 2 disclaimed all liability with regard to rent. I fail to see the point of this distinction. There is really no distinction in principle.

The result is that the judgments and decrees of the learned District Judge dismissing the appeals as incompetent must be set aside and the cases remitted back to him in order that he may retry the questions of fact and other questions of law involved in the case. Costs of the appeal will abide the result.

The petitions of revision are not pressed. They are accordingly dismissed without costs.

V.B./R.K.

*Case remanded.*

(1) [1927] 31 C. W. N. 140 s. n.

## A. I. R. 1929 Calcutta 646

PEARSON AND MALLIK, JJ.

*Digendra Behari Roy and others—*  
Petitioners.

v.

*Janaki Nath Roy and others—*Opposite Parties.

Criminal Revns. Nos. 468 and 469 of 1929, Decided on 30th May 1929.

**Bengal Alluvial Lands Act, S. 10—Effect of S. 10 is to stay earlier proceedings under S. 145, Criminal P. C.—Criminal P. C., S. 145.**

Some char lands became the subject-matter of proceedings under S. 145, Criminal P. C., and at the time of the proceedings being initiated an attachment order was made against the lands. Various steps were taken in those proceedings and subsequently the Magistrate after reviewing the situation passed an order directing that the lands be released from attachment under S. 145 and decided to replace those proceedings with others under the Bengal Alluvial Lands Act, 1920. It was contended that S. 10 of that Act was intended to apply to proceedings under S. 145 so far as their institution or carrying on was concerned and not to the attachment order made under that section and that once an attachment was made, S. 10 conferred no right on the Collector to make a further attachment under that Act.

*Held*: that if the contention were sound it would result in nullifying the provisions of the Bengal Alluvial Lands Act of 1920. The provisions of S. 10 were wide enough to apply to all proceedings, including an attachment that may have been had under S. 145. The effect of S. 10, Bengal Alluvial Lands Act, would, therefore, be to stay the earlier proceedings under S. 145, Criminal P. C.: 13 C. W. N. 125; A. I. R. 1921 Cal 631, Dist. [P 648 C 1]

*Gregory, Suresh Chandra Taluqdar and Kiron Mohan Sircar* — for Petitioners.

*N. K. Bose, Pashupati Ghose and R. K. Roy*—for Opposite Parties.

**Order.**—These two rules relate to two orders one of which is dated 9th January 1929 and the other dated 10th January 1929 relating to a considerable area of char lands. These lands became the subject-matter of proceedings under S. 145, Criminal P. C., some months previously. The proceedings were drawn up about the beginning of October and at the time of the proceedings being initiated an attachment order was made against the lands. Various steps were taken in those proceedings up to the beginning of January 1929 and on 9th January 1929 the Magistrate passed an order



after reviewing the situation at some length as a result of which he directed that the lands should be released from the attachment made in the S. 145 proceedings and decided to replace those proceedings with others under the Bengal Alluvial Lands Act 1920 (Bengal Act 5 of 1920). The way he puts it is this :

"The land is released from attachment under S. 145, Criminal P. C. It will be attached under the Alluvial Lands Act tomorrow."

On the following day, proceedings under the Bengal Alluvial Lands Act were instituted and an attachment was made.

The grounds which have been argued on the present rules are that the order of the Magistrate staying proceedings under S. 145 and removing the attachment is an illegal order which he had no power to make and which is not warranted by any of the provisions of S. 145. The contention is that under S. 145, sub-S. (5), there is only one method provided by law by which an order under S. 145 can be cancelled and that is where any party or any other person interested has shown that in point of fact there is no dispute which exists and in such a case, as the section says, the Magistrate shall cancel his said order and shall stay all further proceedings but subject to such cancellation the order of the Magistrate under sub-S. (1) shall be final. Reference has been made to the case of *Tara Charan v. Bengal Coal Co. Ltd.* (1) where the question was whether under certain circumstances proceedings under S. 145 could be quashed and it was held that the Magistrate could only quash the proceedings in accordance with the provisions of sub-S. (5), S. 145, on facts being brought to his notice which were sufficient to satisfy him that no dispute likely to cause a breach of the peace existed. Another case to the same effect, namely, the case of *Ranada Ranjan v. Bharat Chandra* (2) was referred to. But the question raised in that case is entirely different to that which arises in this present case. There the question concerned the procedure as to the correct method of disposal of the proceedings under S. 145. Where the question arises in those proceedings

themselves there was no question, as it is here, of the method of disposal of the proceedings in a case where as in the present the alternative method of procedure has been laid down by another statute. At the time of the cases to which we have just referred the Bengal Alluvial Lands Act 1920 had not yet been passed. It is therefore necessary to decide the present case upon a consideration of the provisions of that statute. In the preamble of that Act it is stated that :

"previous sanction of the Governor-General has been obtained under S. 79, sub-S. (2), Government of India Act 1915"

and the statute is directed towards making provisions to prevent disputes with regard to possession of alluvial or derelict lands in Bengal. S. 3 of the Act confers power on the Collector to attach lands of this nature and provides a procedure which is in some way analogous to the procedure already existing under S. 145. The Collector has power to make any attachment of alluvial lands and then to refer the matter to a civil Court, besides the power of giving certain directions as to costs. S. 10 of the Act is an important one for our present purposes. It provides that when the Collector has attached any alluvial land under S. 3 no proceedings under S. 145, Criminal P. C., 1898 shall be instituted in any Court in respect of the same land or of any part thereof and that any such proceedings already commenced and pending in any such Court shall be stayed. It has been contended that that section is intended to apply to the proceedings under S. 145 so far as their institution or carrying on is concerned, and not to the attachment order which may be made under S. 145 and that once an attachment order has been made in a proceeding under S. 145, S. 10, Bengal Alluvial Lands Act of 1920, confers no right upon the Collector to make a further attachment under the powers under that Act. The answer to that contention, we think, is that it introduced limitation upon the general words in the section itself which was not to be found there. Moreover, it is to be remembered that in most, if not all, of the cases which are instituted under S. 145, Criminal P. C., this order of attachment is commonly made at the time of the institution of the proceedings.

(1) [1909] 13 C. W. N. 125=4 I. C. 354=10 Cr. L. J. 560.

(2) A. I. R. 1921 Cal. 631.



If the contention were sound it would result in nullifying the provisions of the Bengal Alluvial Lands Act of 1920. The position in our opinion is that the provisions of S. 10 are certainly wide enough to apply to all proceedings, including an attachment that may have been had under S. 145. The result, therefore, is as regards these two orders of the 9th and 10th January that assuming that the order of the 9th January was not strictly correct in that the proceeding under the Bengal Alluvial Lands Act should have been instituted first and it is not a matter of substance in the present case because if the order were wrong and if the proceedings under S. 145 had been allowed to continue and a proceeding had then been instituted under the Bengal Alluvial Lands Act the effect of S. 10 of that Act would be to stay the earlier proceedings.

The rules are, therefore, discharged. Let the record be sent down at once.

K.N./R.K. *Rules discharged.*

### A. I. R. 1929 Calcutta 648

C. C. GHOSE AND SUHRAWARDY, JJ.

*Mohan Sardar and others—Appellants.*

v.

*Hem Chandra Mandal and others—Respondents.*

Appeal No. 1681 of 1925, Decided on 7th June 1928.

Civil P. C., O. 22, R. 4—Mortgage suit—Preliminary decree made—Death of one of several mortgagors and one of plaintiffs who was not necessary or proper party before final decree—Non-substitution of legal representative of deceased persons does not abate suit with respect to mortgagors on record.

Effect of non-substitution in a mortgage suit where a preliminary decree was passed in favour of the mortgagees and one of the judgment-debtors mortgagors and one of the plaintiffs who was neither a necessary nor a proper plaintiff died before the final decree, is that the suit does not abate with respect to the mortgagors on record and the mortgagees are entitled to a decree for a proportionate amount of the mortgage money as against the mortgagors on record: A. I. R. 1921 Cal. 554; A. I. R. 1925 Cal. 152; A. I. R. 1921 Cal. 792, Rel. on. [P 649 C 2]

*Panchanan Ghose and Giris Ch. Banerji—for Appellants.*

*Bijan Kumar Mukherji, Baranashibashi Mukerji and Durgadas Roy—for Respondents.*

C. C. Ghose, J.—The facts involved in this appeal, shortly stated are as follows:

One Kushai Sardar for himself and as guardian of his nephew who was then a minor, being defendant 2 and one Amrita Sardarni, as mother and guardian of a minor son, being defendant 3, executed a mortgage in favour of one Nafar Chandra Mandal on 17th Ashar 1310, for a sum of Rs. 525. Kushai had a brother named Kunai, who is dead, and defendant 2 is the son of Kunai. Defendant 3 is the son of one Gadai who was another son of Kunai. The original mortgagee died sometime ago leaving him surviving his three sons being plaintiffs 1, 2 and 3. The plaintiffs including one Poran plaintiff 4 brought a suit on the mortgage on or about 20th February 1918, the total claim being laid at Rs. 997. Defendant 4, Nitai Mandal, was added as a party defendant as the subsequent purchaser of an 8 anna share in the mortgaged premises from defendants 2 and 3.

The suit came on for hearing before the Munsif at Khatra and by his judgment dated 12th February 1919, the learned Munsif decreed the suit with costs, i. e., passed a preliminary decree on the mortgage. There was appeal to the Subordinate Judge of Bankura but the appeal was dismissed with costs on 23rd January 1920. Thereafter an application was made for a final decree and it appears that on 26th August 1922 an ex parte order was made by which the preliminary mortgage decree was made final and absolute. Subsequently it was sought to set aside the ex parte order of 26th August 1922, on the ground that no notice had been served upon the defendants before the final decree was passed and that one of the plaintiffs namely Poran Mandal had died in Pous 1328 and one of the judgment-debtors had died in Ashar 1328, and that, therefore, the suit itself had abated under O. 22, R. 4, Civil P. C. The matter came before the learned Munsif on 29th March 1923, and by his order of that date the learned Munsif refused to set aside the previous order of 26th August 1922. There was an appeal against the last mentioned order and it appeared that substitutions had been made in the records in places of the deceased plaintiff and the deceased defendant on a date which was beyond the usual period of three months from the deaths in question. The learned Subordinate Judge by his order dated 30th July 1923, allowed the appeal and



sent the matter back to the Court of first instance for retrial of the plaintiffs' application for substitution and final decree. Thereafter the matter having come back to the learned Munsif, the latter by his order dated 29th March 1924 held that the prayer for substitution could not be granted and that the suit having abated should be dismissed. The ground of this decision was that no substitution had been made in place of the deceased plaintiff, Poran Mandal, within three months from the date of his death. There was appeal to the Subordinate Judge of Bankura against the last mentioned decision and that officer held by his judgment dated 28th February 1925, that so far as the plaintiffs were concerned, the claim had not abated in the circumstances of the case, and that so far as the defendants were concerned their liability remained intact at any rate to the extent of 5/6th share. The result was that according to the learned Subordinate Judge, the order of abatement was set aside and a final decree passed to the extent of a 5/6th share in the mortgaged premises.

The present appeal is against this last-mentioned order and it is contended on behalf of the surviving defendants that, having regard to the facts disclosed on the record, it ought to have been held that the suit having abated as against one of the plaintiffs mortgagees, it remained improperly constituted and that no final decree could be passed; in other words, the contention is that the mortgaged security being one and indivisible, it can neither be enforced nor redeemed piecemeal.

As will be seen from what is stated above, the contention on behalf of the appellants arises because of the fact that one of the plaintiffs i. e., plaintiff 4 and one of the mortgagors had died and that no substitution had been made in their places. As regards the question of what is the effect of the non-substitution of the heir of one of the mortgagors, the matter has now been set at rest by the decision of this Court about to be referred to. In the case of *Hara Chandra Roy v. Mahomed Hussain* (1) which was a suit on a mortgage in which all the heirs of the mortgagor had not been made parties, it was held that the suit could not be dismissed. Mookerjee, J., observed as follows :

(1) A. I. R. 1921 Cal. 554.

"It is clear that the plaintiffs were at the least entitled to a decree for a proportionate share of the mortgage money as against the defendants who were on the record. Even if it is assumed that the persons who had been left out, could, if joined, have successfully urged the plea of limitation that would not afford a defence in favour of the persons who had been joined as parties within the prescribed time. This view is supported by the decision in *Imam Ali v. Baijnath Ram Sahu* (2). In that case an objection was taken that certain parties had not been brought on the record in time and that if they were added as parties the suit must be deemed as bound by limitation as against them. It was ruled that where the purchaser of a portion of the equity of redemption is added as a party (defendant) not by the Court but upon an application by the mortgagee after the prescribed period of limitation although the mortgage suit is barred as against the added defendants, yet such mortgagee is entitled to succeed in respect of a proportionate part of his claim as against the remaining owners of the equity of redemption."

To the same effect is the decision of the case of *Khirodamayi Dassi v. Habib Shaha* (3). In that case a person having a share in the equity of redemption had not been made a defendant but it was held that there should be a decree proportionate to the shares of the persons actually made defendants mortgagors. My learned brother Suhrawardy, J., went through all the cases and applied the rule laid down in the case reported in *Hara Chandra Roy v. Mahomed Hussain* (1). In this connexion reference may also be made to the case of *Dina Nath v. Nabo Kumar* (4). I am, therefore, of opinion that the present suit in the circumstances which have happened could not fail and there should be a decree proportionate to the shares of the mortgagors who were already on the record.

But it is argued that the matter is complicated by the fact that no substitution was made in place of the deceased plaintiff Poran Mandal who died in Pous 1328. It appears that the suit was properly constituted at the time when it was instituted. Now on the facts in this case it appears that the mortgage in question was in favour of one Nafar, the father of plaintiffs 1, 2 and 3. The plaintiff who had died, i. e., Poran Mandal, was plaintiff 4. He was neither a proper nor a necessary plaintiff, because he was in no way a successor-in-

(2) [1906] 33 Cal. 613 = 10 C. W. N. 551 = 3 C. L. J. 576.

(3) A. I. R. 1925 Cal. 152.

(4) A. I. R. 1921 Cal. 792.



interest of Nafar. The heirs of Nafar being on the record, the suit in my opinion was clearly maintainable, and that it did not matter in the slightest if no substitution was made in place of the deceased plaintiff Poran Mandal.

In this view of the matter the present appeal fails and must be dismissed with costs.

**Suhrawardy, J.**—I agree.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1929 Calcutta 650

B. B. GHOSE AND N. K. BOSE, JJ.

*Durga Prosad Das*—Judgment-debtor—Appellant.

v.

*Kedarnath Nayek and another*—Decree-holders—Respondents.

Appeal No. 430 of 1923, Decided on 21st May 1929, from appellate order of Dist. Judge, Midnapore, D/- 2nd June 1928.

**Limitation Act, Art. 182 (4)** — Decree amended — Limitation for execution runs from date of amendment—Executing Court cannot question propriety of the amendment.

Where the legislature has provided that the time from which period of limitation for execution of a decree should begin to run where a decree has been amended, is the date of amendment, it is not for the Court of execution to enquire whether the amendment was properly made, whether the original decree was capable of execution or whether for any other reason the Court was wrong in making the order for amendment of the decree. The executing Court does not sit as a Court of appeal over the Court which has made the decree or which has made the amendment; but it has only to see whether the decree has been amended in order to decide whether the application for execution was barred by limitation or not. To introduce other considerations as regards the correctness or propriety of the amendment made would be to usurp the functions of the Court of appeal to which the judgment-debtor might have brought the matter of amendment when the Court made the amendment. [P 651 C 1, 2]

*Gopendra Nath Das*—for Appellant.

*Panchanan Ghose and Pulin Behary Das*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the legal representative of judgment-debtor 4 against the order of the District Judge of Midnapur affirming the decision of the Subordinate Judge allowing the execution of the decree in favour

of the respondents. A final decree on a mortgage was made on 8th May 1924. The original judgment-debtor 4 died on 18th August 1924. An application for execution was made on 7th May 1927 against all the judgment-debtors and in which the name of the deceased judgment-debtor 4 was also mentioned. On 28th July 1927 by an ex parte application made by the decree-holder the present appellant was substituted in the place of the deceased judgment-debtor 4. Previous to that, the decree-holder made an application for amendment of the decree of 17th December 1926. A further application was made on 10th May 1927 for certain other amendments of the decree. An order was made by the Court on 6th June 1927 amending the decree in certain particulars. That Court, however, refused to amend the decree by striking out the name of the judgment-debtor 4 who was dead at the time and in place of that name to put in the name of the appellant as his legal representative. This was made on the objection of the present appellant who appeared in support of his objection. Both the Courts below have held that the decree as originally made was incapable of execution and the application for execution now made was not barred. It is unnecessary to mention that the execution was asked for of the amended decree in continuation of the application presented in Court on 7th May 1927. It has been argued on behalf of the appellant that the application for execution of the decree should be held to be barred as against the present appellant. It is urged that when the present appellant was substituted in place of his deceased predecessor by the order of 28th July 1927, more than three years had elapsed from the date of the decree and therefore the execution as against him was barred. It is contended on the other side that the period of limitation should commence from the date of the amendment of the decree under para. 4, Col. 3, Art. 182, Lim. Act, where it is provided that the date of amendment of the decree is the time from which period of limitation begins to run. It is contended on behalf of the respondents that the application for execution was quite within time having been made on 7th May 1927 and reference is made to the last portion of the proviso to Expln. 1, Art. 182,



Lim. Act, where it has been provided that

"where the decree or order has been passed jointly against more persons than one, the application if made against any one or more of them or against his or their representatives, shall take effect against them all."

It is contended that the application having been made in proper form against the surviving judgment-debtors the application against the heir of the deceased judgment-debtor was effective as if made against them all.

With regard to the first point that limitation should begin to run from the date of the amendment it is argued by the learned advocate for the appellant that the amendment must be a proper amendment; and further it is argued that the amendment should be also a necessary amendment, that is to say, that the original decree must be such as to be incapable of execution. It is argued that the present decree as drawn up on 8th May 1924 was one capable of execution and the amendment only made certain alterations as regards the interest and so forth. If the decree was capable of execution the period of limitation should not be allowed to run from the date of the amendment. In support of this contention an unreported case was cited before us. With great respect I am unable to accept the proposition of law laid down in that case. Where the legislature has provided that the time from which period of limitation for execution of a decree should begin to run where a decree has been amended, is the date of amendment, it is not for the Court of execution to enquire whether the amendment was properly made, whether the original decree was capable of execution or whether for any other reason the Court was wrong in making the order for amendment of the decree. The executing Court does not sit as a Court of appeal over the Court which has made the decree or which has made the amendment; but it has only to see whether the decree has been amended in order to decide whether the application for execution was barred by limitation or not. To introduce other considerations as regards the correctness or propriety of the amendment made would be to usurp the functions of the Court of appeal to which the judgment-debtor might have brought the matter of amendment when the Court

made the amendment. In my judgment therefore, the only point which we have to see in deciding the question of limitation is what should be considered the starting point of limitation and under para. 4, Col. 3, Art. 182, Lim. Act, we must take it that the starting point is the date of amendment of the decree which was in this case the 6th June 1927.

I was somewhat pressed by the other point urged on behalf of the appellant that the amendment was made in the absence of the appellant, or in other words, that the deceased defendant could not be served with notice of the amendment and the appellant his legal representative was not brought on the record for the purpose of amendment and therefore the order of amendment should be considered to be invalid. But it seems that notice was served upon the present appellant as the legal representative of the deceased judgment-debtor and on his objection his name was not put in the place of his deceased predecessor. As a matter of fact the amendment was made in his presence and the learned Judge did not substitute the name of the appellant in the place of his deceased ancestor, probably because he thought that the name of the judgment-debtor as drawn up in the original decree should appear in the final decree. Moreover on account of the proviso to the explanation cited above the application for execution of 7th May 1927 was effective and was within time as against the heir of the deceased judgment-debtor. On these grounds this appeal must stand dismissed with costs, hearing fee being assessed at five gold mohurs.

**N. K. Bose, J.**—I agree.

K.N./R.K.

*Appeal dismissed.*

\* **A. I. R. 1929 Calcutta 651**

**MUKERJI AND MALLIK, JJ.**

*Bodardoja and others* — Plaintiffs—Appellants.

v.

*Ajijuddin Sircar and others*—Defendants—Respondents.

Appeal No. 2199 of 1926, Decided on 6th February 1929, against appellate decree of Sub-Judge, Dinajpur, D/- 24th May 1926.



(a) Power-of-attorney—Notice—Power to issue notices may be oral—Transfer of Property Act, S. 106.

Proper execution of am-mukhtearnamas, giving authority to sue in ejectment, confers also power to issue notices but it is not necessary that the authority should be in writing.

[P 653 C 1]

(b) Transfer of Property Act, S. 106—Notice by registered post—Acknowledgment purporting to be signed by addressee—Notice is proved.

Where it is proved that notice was sent by registered post and an acknowledgment purporting to be signed by the addressee and received through post office is produced and proved it should be held that service of notice was proved: *A. I. R. 1918 P. C. 102; (1870) W. N. 119, Rel. on.*

[P 653 C 2]

(c) Cosharer—Notice to one joint tenant is notice to others—Transfer of Property Act, S. 106.

In the case of joint tenants service of notice to quit upon one joint tenant is prima facie evidence that it has reached the other joint tenants: *A. I. R. 1918 P. C. 102, Rel. on. A. I. R. 1925 Cal. 752, Ref.*

[P 653 C 2]

(d) Landlord and Tenant—Notice to quit and suit in ejectment excluded a portion of tenancy—Defendant-tenants in possession—Plaintiffs cannot eject.

If the whole of the land forming the subject matter of the tenancy is included in the notice and suit in ejectment but there is an understatement of the area the defect would not be fatal. But if it be a fact that a part of the land of tenancy was excluded from the notice to quit and from the suit in ejectment and of such part the defendants are in possession as tenants under the plaintiff, the plaintiff cannot possibly obtain a decree in the suit.

[P 654 C 2]

(e) Civil P. C., O. 41, R. 2—Ground not taken in memo should not be gone into—Practice.

Where an objection is not taken in the written statement and the matter is not discussed in trial Court and is not mentioned in grounds of appeal the appellate Court should not go into the question at all.

[P 653 C 1]

*Jadu Nath Kanjilal and Krishna Chaitanya Ghose*—for Appellants.

*Surjya Kumar Guha*—for Respondents.

*Biraj Mohan Mazumdar*—for Deputy Registrar.

**Judgment.**—This appeal has arisen out of suit which was instituted by the plaintiffs for recovery of possession on ejectment of the defendants. The trial Court decreed the suit on contest as against some of the defendants and ex parte against the others. It declared the plaintiffs' title to the land and directed that they would recover khas

possession on evicting the defendants therefrom. The defendants thereupon preferred an appeal. The learned Subordinate Judge who dealt with that appeal dismissed the plaintiffs' claim holding, that although he found in favour of the plaintiffs on the merits, the decree of the trial Court was to be reversed and the suit dismissed on the ground that notices under S. 106, T. P. Act, were neither sufficient nor properly served.

The plaintiffs have then preferred this second appeal and on their behalf the findings of the Subordinate Judge, both on the question of sufficiency of the notices as also on the question of their service, have been challenged in this appeal.

As regards the sufficiency of the notices what has been found against the plaintiffs by the Subordinate Judge is that the notices purported to have been signed by certain persons as am-mukhtears on behalf of certain ladies and that it had not been proved in the case that the persons who purported to sign on behalf of the said ladies as such am-mukhtears had been duly authorized by the said ladies to issue the said notices. The learned Subordinate Judge has found that upon the evidence in the case proper execution of the am-mukhtearnamas had not been duly proved, and further more that although in the am-mukhtearnamas power was given to the am-mukhtears to sue in ejectment there was nothing said conferring any authority to the am-mukhtears to issue notices to quit. As regards this matter it is sufficient for us to say that in the written statement that was filed on behalf of the defendants no question as to the want of a power of this character in the am-mukhtearnamas or as to the am-mukhtearnamas not having been duly executed by the ladies appears to have been raised. If it was the defendants' desire to contest the validity of the notices upon grounds such as these, it was clearly their duty to put forward their objection on this head definitely and specifically in the written statement in order that the plaintiffs could have produced necessary evidence showing due and proper execution of the am-mukhtearnamas and the fact that the power to issue notices on behalf of the ladies was conferred thereby. Moreover even if there was any defect in the am-mukhtearnamas as regards these



matters the plaintiffs could have proved that the notices were issued under authority duly given by the ladies because the law does not say that such authority must necessarily be given in writing. It may also be mentioned that the power to sue in ejectment should ordinarily be taken to include power to take up such action as may be necessary as preliminaries to the institution of such a suit. In view of the fact that the objection was not taken in the written statement and the matter did not form the subject matter of discussion in the trial Court and was not even mentioned in the grounds of appeal which the defendants preferred to the lower appellate Court, it was not right on the part of the learned Subordinate Judge to have gone into this question at all.

As regards service of notices the learned Subordinate Judge has held that the notice that was meant for one Emajuddin had not been duly served. Emajuddin, it appears, denied in the written statement that there was any service of notice on him. But he did not appear as a witness and did not adduce any evidence to the effect that the notice meant for him was not received by him. On behalf of the plaintiffs it was proved that notice was sent by registered post and an acknowledgment purporting to have been signed by Emajuddin and received back through the post office was produced and proved in the case. On these facts the learned Subordinate Judge should have held that the service of notice upon Emajuddin had been proved in view of the decision of the Judicial Committee in the case of *Harihar Banerji v. Ramshashi Roy* (1). In that case their Lordships quoting the decision in the case of *Gresham House Estate & Co. v. Rossa Grande Gold Mining Co.* (2) observed that if a letter properly directed containing a notice to quit is proved to have been put into the post office it is presumed that the letter reached its destination at the proper time according to the regular course of business in the post office and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the

sender has taken the precaution to register and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself. In this particular case as I have already stated Emajuddin had not come forward to deny his signature on oath and in view of the presumption which arises upon the circumstances of the case it must be held that until that presumption is rebutted the service of notice upon Emajuddin had been duly proved. The learned Subordinate Judge in our opinion was wrong in not giving effect to this presumption.

With regard to the service of notice again the second question that arises is with reference to the notice of Foijannessa. The notice meant for Foijannessa was also sent per registered post and served on one Noshan Ali. Noshan Ali has been examined on behalf of the defendants and he has said that he forgot to make over the notice to Foijannessa. The postal peon who delivered the letter to Noshan Ali was examined but he was unable to say that he made over the notice to Noshan Ali at the request of Foijannessa. The learned Subordinate Judge thought that it was the duty of the plaintiffs to go further and to prove that the notice that was served on Noshan Ali had actually reached Foijannessa. He held that her evidence to that effect was not forthcoming and it should be taken that the notice was not served on Foijannessa. The notices that were given in this case were addressed to all the joint tenants and copies of such notice are alleged to have been served upon the joint tenants severally. The Judicial Committee in the case of *Harihar Banerji v. Ramshashi Roy* (1) to which reference has already been made, pointed out that in the case of joint tenants each is intended to be bound and it has long been decided that service of notice to quit upon the joint tenant is prima facie evidence that it has reached the other joint tenants. In view of the fact that we have found that service of notice to quit upon Emajuddin had been established, applying to the case the dictum of the Judicial Committee referred to above it follows as a matter of course that the other joint tenants including Foijannessa had been served with notice. Our attention has been drawn to the decision of this Court.

(1) A. I. R. 1918 P. C. 102=46 Cal. 458=45 I.A. 222 (P.C.).

(2) [1870] W. N. 119.



in the case of *Bejoy Chand Mahatab v. Kali Prosanna Seal* (3) in which, according to the contention of the respondents, some observations have been made which may be taken to have detracted from the correctness or applicability of the dictum to circumstances such as arise in the present case. On examination of the facts of that case, however, it appears that all that has been laid down in that case is that the notice in order to give rise to this presumption must be addressed to all the joint tenants and that where no notice was addressed to one of the joint tenants the mere service of the notice on the other joint tenants is not sufficient notice to quit according to law. In the present case the notices that were issued were addressed to all the joint tenants. On the question of service of notice also therefore the decision of the Subordinate Judge is not correct.

The respondents have then drawn our attention to two passages in the judgment of the Subordinate Judge which are somewhat in conflict with each other and from a perusal of which the conclusion may not unreasonably be arrived at to the effect that the notice as well as the suit excluded a portion of the tenancy which is in the occupation of the defendants. One of the passages runs in these words:

"Derajtulla's land must have been in regard to a portion of it on the north of the District Board Road. . . . The suit is for eviction from the land lying to the south of District Board Road. The plaintiff's case is 2 bighas 12 cottahs of land lying in the south of the road was let out. But this cannot be possibly true as I have seen that Derajtulla had also some land to the north of the road and his brother Muzafar's boitakhana was situated there."

The other passage runs in these words:

"The plaintiffs have sued for all the lands in the possession of Derajtulla's heirs as appertaining to the jote but they have understated the area. They have resorted to this understatement with two objects in view. They would not admit that any land of Derajtulla lay to the north of the District Board Road and had been acquired by Government. In the next place they thought it necessary to minimise the area of the land to make it appear that the land could not have been let out for agricultural purposes."

What exactly was the finding of fact of the Subordinate Judge on this question we are not in a position to appreciate. If it was only an understatement in the area, the whole of the land forming the

subject-matter of the tenancy having been included, the defect in the notice or in the suit would not be fatal to the plaintiff's case. It has been held in the case of *Shama Charan Mitter v. Uma Charan Haldar* (4) that where a notice to quit stated the area of the defendant's holding to be 1 bigha 5 chitaks but the true area was  $1\frac{3}{4}$  cottahs less and no boundaries were given, it was not a defect which would make the notice bad in law. But if it be a fact that a part of the land of this tenancy was excluded from the notice and from the suit and of such part the defendants are in possession as tenants under the plaintiff the plaintiff cannot possibly obtain a decree in the suit.

The question whether the notice and the suit covered the entire tenancy or whether they have left out a part of it which is in the defendants' occupation will have to be re-investigated and in view of the fact that it was not specifically raised in the pleadings and there is not much indication in the judgment of the trial Court showing that it was canvassed there we think that while we shall make an order for remand to the lower appellate Court for proper investigation of that question and for a clear finding on it we shall give the parties an opportunity to adduce such further materials as they may desire to do in connexion with this question. All other questions that arose in the suit have now been concluded and the question referred to above is the only question that will be left open for consideration by the learned Subordinate Judge. On arriving at his finding on that question he will proceed to dispose of the appeal in accordance with law.

Costs of this appeal will abide the result.

P.R./R.K.

*Case remanded.*

(4) [1933] 26 Cal. 33=2 C. W. N. 103.

## A. I. R. 1929 Calcutta 654

MITTER, J.

*B. N. Ry. Co., Ltd.*—Petitioners.

v.

*Moolji Sicka & Co.*—Opposite Party.

Civil Rule No. 710 of 1923, Decided on 14th August 1923, against order of Sm. C. C., Judge, Sealdah.

(3) A. I. R. 1925 Cal. 752.



(a) Provincial Small Cause Courts Act, S. 25—Plaintiff at hearing setting up case at variance from that set out in plaint—Defendants waiving right of adjournment to rebut that case—Decree passed is not wrong.

Where plaintiffs raise a new case at the time of the hearing at variance with the case made in the plaint and the defendants having had notice of the precise grounds on which the plaintiffs led evidence do not ask for adjournment in order that they might furnish evidence to rebut the new case set up, and the Court passes a decree, it cannot be said that the decision was in any way wrong or vitiated so as to necessitate remand by High Court.

[P 656 C 1]

(b) Railways Act (9 of 1890), S. 72—Negligence may be good evidence for misconduct or mismanagement.

Under certain circumstances negligence is good evidence for misconduct or mismanagement of a Railway Company.

[P 656 C 1]

(c) Railways Act (9 of 1890), S. 72 (2)—Risk-Notes A and B — The word "misconduct" makes Company liable for mismanagement in absence of proof that event causing damage was not within Company's control.

Substitution of the word "misconduct" in the Railway risk-notes in place of "wilful neglect" used in risk-notes before 1924 make company liable for mismanagement in the absence of proof that damage was caused by an event or circumstance over which the Railway Company had no control.

[P 656 C 2]

(d) Railways Act (9 of 1890), S. 72 — Damages being presumptive evidence of negligence — Once evidence is led to prove negligence burden shifts on Company to discharge it.

In a suit for damages by way of compensation for loss to goods occasioned by negligence of the Railway Company though prima facie no burden lies on the Railway Company to prove that there was no negligence on their part, since ordinary damages are a presumptive evidence of negligence, once evidence is led to show that goods were carried with negligence the burden shifts on the Railway Company to rebut the presumption.

[P 656 C 2]

*Ramesh Chandra Sen and Jitendra Kumar Sen Gupta*—for Petitioners.

*Surendra Madhab Mallick and Probodh Chandra Mallick* — for Opposite Party.

**Judgment.**—This rule was obtained by the Bengal Nagpur Railway Company, Limited, for the revision of a judgment of the Small Cause Court Judge of Sealdah by which the defendant company were made liable in an action brought by the plaintiffs opposite party for recovery of compensation from the defendant company on account of damage to some goods booked from Tirosa Station to the Shalimar Station belonging to the defendant

company. The case made by the plaintiffs opposite party is that out of a large number of bags of Biri consigned from Tirosa, 11 bags were found to have been damaged by wet and the allegation is that this was due to the fault of the defendant's servants and consequently plaintiffs were entitled to recover damages. It is necessary in particular to refer to para. 3 of the plaint upon which some argument has been advanced before me. Para. 3 of the plaint runs as follows :

"That it was ascertained on enquiry that the said damage was due to the consignment having been evidently carried on a wagon which was defective and that sufficient and reasonable care was not taken by the railway staff."

After the defendant company had filed their written statement the matter proceeded to trial. Evidence was led on behalf of the plaintiffs to show that the Biris were carried in a wooden topped wagon contrary to some rules of the defendant company by which it was the duty of the Company not to carry such goods in monsoon weather in foreign railway wagon with roof other than the iron topped roof. The Subordinate Judge held after examining the evidence on both sides that the goods were carried in a wooden topped wagon. The Railway Company led evidence to show that the goods were not carried in a wooden topped wagon but in an iron topped wagon and this case was not believed by the Small Cause Court Judge and the learned Judge held that as the goods were carried in a wooden topped wagon and that water was dropping from the roof according to the evidence, the goods were damaged by wet and the Railway Company were responsible for such damage. The Small Cause Court Judge granted a decree to the plaintiffs for Rs. 179-10-0 with proportionate costs.

The Railway Company moved this Court and obtained this rule on several grounds. The first ground on which the rule was granted was that the Court below was wrong in allowing the plaintiffs to raise a new case at the time of the hearing at variance with that made in the plaint and in awarding the plaintiffs a decree on the basis of such new case made a case which is inconsistent with that made in the plaint. It has been argued by Mr. Sen who ap-



appears for the Railway Company that his clients have been considerably prejudiced by this change of case and there had been a variance between pleadings and proof and in the circumstances the judgment of the Small Cause Court Judge ought to be set aside and the matter remanded for retrial. It appears, however, from para. 3 of the plaint which has been quoted in extenso in the previous part of my judgment that the plaintiffs pleaded a case of negligence in so far as they stated that the goods were carried in a defective wagon. The Railway Company did not ask for further and better particulars of negligence.

At the time of trial plaintiffs led evidence to show that the wagon, according to the rules, was not suitable to the carrying of goods of the description which were carried. The Railway Company led evidence to show that as a matter of fact the goods were not carried in such wagon namely wooden topped wagon. The Station Master was called and he gave evidence that as a matter of fact the goods were carried in an iron topped wagon, but his evidence was not accepted. I do not think, therefore, that the Railway Company had no notice of the precise grounds on which the plaintiffs led evidence. It is only singular that the Railway Company did not make any application either oral or written before the Small Cause Court Judge asking him to postpone the hearing in order that the Railway Company might furnish evidence to rebut the new case of the carrying of these goods in a wooden topped wagon made by the plaintiffs in evidence. Para. 3 of the plaint sufficiently covered the case of negligence or of misconduct for in certain circumstances a negligence is good evidence for misconduct or mismanagement of the Railway Company.

It has next been argued that the suit ought to have been dismissed as the plaintiffs did not disclose in their plaint that the liability of the Railway Company as a bailee under Ss. 151 and 152, Contract Act, was limited by two risk-notes in the new forms A and B and it is said that as the plaintiffs paid reduced freight, the liability of the defendant company was to carry the goods free from all responsibilities except for any misconduct. It will appear that before

1924 the Railway Company were liable for wilful neglect but since 1924 instead of those words "wilful neglect" the word used in the risk-note is simply 'misconduct' and it cannot be argued now in view of the change in the form of the contract which limits the responsibilities of the Railway Company that the Railway Company were not liable for mismanagement of the kind which has occurred in the present case. The Railway Company certainly had notice of the class of goods which had been carried. The damage, it is not said or proved, is due to any event or any circumstance over which the Railway Company had no control. The ordinary damage itself is presumptive evidence of negligence. The Railway Company might have discharged that burden which although it did not lie *prima facie* on them was shifted on to the Railway Company after evidence was led to show that it was carried in a particular class of wagon to establish or to repel the presumption which arose in the circumstances of this case in favour of the plaintiffs.

I think the decision of the Small Cause Court Judge was right. He holds as a matter of fact that the damage was caused by water dropping from the roof by which these goods were wet and by the fact that the goods were carried in a wagon contrary to the rules of the Railway Company. It is said that those rules are not statutory rules. That may or may not be so but the Railway Company have not denied that these rules existed and that shows that in their view the goods of this class should not have been carried in a wooden topped wagon and the servants of the Railway Company did not conform to the rules as it was their duty to do and the Railway Company are to be held liable. This rule therefore is discharged with costs hearing fee one gold mohur.

V.R./R.K.

*Rule discharged.*



**A. I. R. 1929 Calcutta 657****C. C. GHOSE AND JACK, JJ.***Musa Singh*—Complainant — Petitioner.

v.

*Gostha Behary Chatterjee* — Accused — Opposite Party.

Criminal Revn. No. 777 of 1928, Decided on 28th August 1928, against order of Addl. Dist. Mag., D/- 18th May 1928.

**Criminal P. C., S. 403—A superior Additional Magistrate taking the case on his own file—Stay of further proceedings ordered—Orders not communicated to the lower Court—Lower Court orders acquittal under S. 247, Criminal P. C.—S. 403, is no bar for a retrial.**

Where an Additional District Magistrate took the case on his own file and ordered further proceedings to be stopped but the order was not communicated to the proper Court and where therefore the lower Court ordered acquittal under S. 247, Criminal P. C.

**Held:** that S. 403, Criminal P. C., was no bar for a retrial of the accused : 34 *Mad.* 253 ; 4 *C. W. N.* 346 and 7 *C. W. N.* 711, *Ref.*

[P 653 C 2]

*Khitish Chander Chakrabarti* and *Panchanan Ghosal*—for Petitioner.*Monmathonath Das Gupta* and *Apurba Charan Mukherjee*—for Opposite Party.

**Facts.**—One Musa Singh is a motor lorry driver ; that on the 6th March 1928 when he was driving the motor lorry "Amaya Bhulona" of his master Jung Bahadur, one Gosto Behari Chatterji was also driving another motor lorry "Bijoli" on the Midnapore-Bankura Road within the police station of Garbetta in the District of Midnapore ; that the latter lorry collided with the lorry driven by Musa Singh and his lorry was badly injured. Musa Singh instituted a criminal case under S. 426, I. P. C., against the accused Gosto Behari Chatterjee before the Sub-Divisional Officer of Midnapore Sadar and the accused was duly summoned. Before the accused entered appearance in pursuance of the said summons the Sub-Inspector of Police of Barberta submitted charge sheet under S. 5, Act 8 of 1914 (Motor Vehicles Act) against both the complainant and the accused. These two cases along with the case in which Musa Singh was the complainant were transferred to the file of Babu S. N. Sarkar, Deputy Magistrate, First Class, of Midnapore Sadar ; that the said learned Deputy Magistrate disposed of the two police cases on 16th May 1928 convict-

1929 C/83 &amp; 84

ing Musa Singh and acquitting Gosto Behari Chatterjee.

After the disposal of the said two cases on the same date the same learned Deputy Magistrate wanted to proceed with the trial of the said case under S. 426, I. P. C., the said Musa Singh apprehending that the said learned Deputy Magistrate had already formed an opinion in favour of the opposite party and as such he could not expect a fair and impartial trial at his hands filed a petition praying for an adjournment on the ground that he was going to move the higher authorities for a transfer of his case from his file and the learned Deputy Magistrate adjourned the case to 18th May 1928.

On the next day i. e., on 17th May 1928 Musa Singh filed a petition under S. 528, Criminal P. C., before Mr. S. C. Ghatak, the Additional District Magistrate of Midnapore for the transfer of his case from the file of the said learned Deputy Magistrate to that of any other Magistrate and the said Additional District Magistrate called for the records of the case to his file and stayed further proceedings pending in the Court of the said Deputy Magistrate on the same date i. e. on 17th May 1928.

The complainant came to Court on 18th May 1928 and he was very much surprised to learn that his case was being called on in the Court of the said Deputy Magistrate, though it was stayed by the learned Additional District Magistrate on the previous day and the complainant at once ran to call his muktear who was engaged in some other Court and that when he came back with his muktear to the Court of the said Deputy Magistrate he was informed that his case was dismissed under S. 247, Criminal P. C., owing to his absence.

Being aggrieved by the order of the said learned Deputy Magistrate Musa Singh moved an application before the Additional District Magistrate praying for his kind recommendation to the Hon'ble High Court for the setting aside of the order of acquittal passed by the learned Deputy Magistrate under S. 247 on 18th May 1928.

Musa Singh obtained a rule and the date of hearing of the said rule was fixed on 26th May 1928.

On 26th May 1928 the learned Additional District Magistrate disposed of



the said Rule No. 23 of 1928 and his application for transfer numbered 56 of 1928 together rejecting both the petitions.

### Order of the lower Court

1. I have heard pleader for the petitioner and seen the records. The case being a summons case, the Magistrate's order under S. 247, Criminal P. C., (which evidently in this case was an unfortunate one) stands in the way of a re-opening of the question in view of S. 403, Criminal P. C.

2. That S. 403, Criminal P. C., is a bar to further trial of a case in which an acquittal has been ordered under S. 247, Criminal P. C., will appear from many rulings beginning with olden times and that is the accepted view up to present times : see *Suraiya Sastri v. Venkata Rao* (1), *Panchu Singh v. Unnor Mahomed Sheikh* (2), *Kedar Nath Biswas v. Adhin Manji* (3). This is also the view taken in *Guggilappu Paddyaya, In re* (4) and a contrary view taken (Ayling and Napier, JJ.) in unreported case *Dudekula Lal Saheb, In re* (5) referred under S. 429, Criminal P. C., to the Chief Justice Sir John Wallis on a point of disagreement between Abdur Rahim and Napier, JJ.: see full discussion in *Dudekula Lal Saheb, In re* (5). It will appear from this that the expression "tried" in S. 403, Criminal P. C., affords no ground for re-opening an order under S. 247, Criminal P. C., and that there can be no further trial in cases in which acquittal has been ordered (described as "statutory acquittal") under Ss. 494, 247 and 345, Criminal P. C. I think this is the latest decision on the subject, while valuable light is thrown on the situation by *Guggilappu Paddyaya, In re* (4) which points out that the non-mention of S. 247, Criminal P. C., in the explanation under S. 403, Criminal P. C. shows that it was not intended by anything in S. 403, Criminal P. C., to limit the force of acquittal under S. 247, Criminal P. C.

3. In my opinion there can be no further trial in this case. The application is rejected.

(1) [1886] 2 Weir 457.

(2) [1900] 4 C. W. N. 346.

(3) [1903] 7 C. W. N. 711.

(4) [1911] 34 Mad. 253=3 I. C. 253=12 Cr. L. J. 41.

(5) [1917] 40 Mad. 976=33 M. L. J. 121=45 I. C. 261=6 M. L. W. 175.

**Order.**—We have examined the record and perused the explanation submitted by the Additional District Magistrate and on the facts appearing therein there cannot be any doubt that the order of acquittal passed on 18th May 1928 must be set aside and the case against Gostha Behari Chatterjee retried by a Magistrate other than the Magistrate who passed the orders in the first instance to be nominated by the District Magistrate. The rule is accordingly made absolute.

P.R./R.K.

*Rule made absolute.*

### A. I. R. 1929 Calcutta 658

MITTER, J.

*Gulmatinnessa Chowdhurani*—Plaintiff—Appellant.

v.

*Jago Pali and another*—Defendants—Respondents.

Appeals Nos. 542 and 543 of 1928, Decided on 28th May 1929, against appellate decrees of Dist. Judge, Dinajpur, D/- 15th September 1927.

(a) Interpretation of Statutes—*Maxim de minimis non curat lex*.

The principle of *deminimis non curat lex* has no application to prohibitory statute.

[P 659 C.1]

(b) Bengal Tenancy Act (8 of 1885), S. 29—Enhancement by consent however small in excess of two-annas in a rupee cannot be allowed—There is no escape under *maxim de minimis non curat lex*.

The statute enacts in the most explicit terms that there is to be no enhancement of more than two-annas in the rupee. Ex concessis if there is an enhancement however small over two-annas in the rupee it means violation of the statute and such enhancement cannot be allowed. The principle of *deminimis non curat lex* has no application to a prohibitory statute which says that excess can in no case be more than two annas.

[P 659C 1]

S. C. Basak and Narendra Nath Dalal—for Appellant.

Sitangshu Bhusan Bose—for Respondents.

**Judgment.**—In these two appeals by the plaintiff the facts are not in dispute. The suits in which these two appeals arise were for arrears of rent. The plaintiff alleged that the original rental in one case was Rs. 22-9-0 and that the tenant subsequently agreed to an enhanced rental of Rs. 25-6-5 gds. The holding in question is the holding of an



occupancy raiyat at a money rent and the enhancement exceeded very slightly the enhancement allowed under the law. S. 29, Ben. Ten. Act, prohibits an enhancement by contract of more than two annas in the rupee. So in this case the legal enhancement would have been Rs. 25-6-2½gds. Instead of that it is said that enhancement was agreed to Rs. 25-6-5gds. in other words there is an enhancement of more than 2½gds.

Both the Courts below have granted the plaintiff a decree in this suit at the rate of Rs. 22-9-0 which was the admitted rental. It was argued before them and that argument has been repeated before me that there has not really been a contravention of the provisions of S. 29 seeing that the excess is indeed so slight that the principle of *deminimis non curat lex* should be attracted to the facts of this case and that the Courts below are wrong in not allowing the enhancement at the rate claimed because in spirit there is no violation of S. 29. I cannot agree with this contention. The statute enacts in the most explicit terms that there is to be no enhancement of more than two annas in the rupee. Ex concessis there is an enhancement however small over two annas in the rupee and therefore the statute has been violated. This principle of *deminimis non curat lex* has no application to a prohibitory statute which says that the excess can in no case be more than two annas. I have had to consider this question in another unreported case (*Appeal from Appellate Decree No. 2314 of 1926, Bidhu Bhusan Das Mazumdar v. Ghenu Nasya*) and I came to the same conclusion at which the Courts below have arrived. The learned District Judge rightly points out that it may be a hard case because the enhancement is just over the legal maximum. But he rightly reasons that it is not advisable to stretch the law out of its obvious meaning. There is the plain direction of the law and it would not be right to make a departure however slight from its provision. If once you begin to make a departure with reference to the statute which is in the nature of prohibitory statute you know not where you will stop and you may ultimately come to a position where the very object of the prohibitory statute will be frustrated. I think the Courts below have come to the right

conclusion in allowing a decree at the rate of Rs. 22-9-0 in the suit.

With reference to the other suit the original rental was Rs. 20-5-5gds. The amount which was contracted to be paid as enhanced rent was Rs. 22-14-0. The law allows the increase of only Rs. 22-13-16½gds. So there has been an increase of 3¾gds. The increase is also slight but the reasons which have been given with reference to the other case apply equally to this case and I think the Courts below were right in decreeing the plaintiff's suit at the admitted rate of Rs. 20-5-5gds.

The result is that both these appeals fail and must be dismissed with costs. There will be one set of costs in both the appeals.

V.B./R.K.

*Appeals dismissed.*

### \* A. I. R. 1929 Calcutta 659

RANKIN, C. J., AND S. K. GHOSE, J.

*Binjraj Marwari and others—Appellants.*

v.

*Das Mookerjee & Co. and others—Respondents.*

Appeal No. 1503 of 1927, Decided on 27th June 1929, against appellate decree of Offg. Addl. Sub-Judge, Burdwan, D/- 24th February 1927.

\* Civil P. C., O. 40, R. 1—Person appointed by Court as manager of property in dispute cannot pledge credit of individual party.

Generally speaking a person who is appointed by Court as the manager of the property in dispute, has no power to pledge the credit of an individual party. While in law it is more usual to have that doctrine applied to a receiver and manager, the doctrine is equally applicable to any person appointed by the Court as an officer of the Court.

[P 660 C 2]

*Hiralal Chakraburty for Bankim Chunder Mukerjee and Baidya Nath Banerjee—for Appellants.*

*Sarat Chander Basak, Purna Chandra Chatterji and Jyotish Chunder Sirkar—for Respondents.*

**Rankin, C. J.**—In my opinion, this appeal must be allowed.

It appears that certain persons were owners of a colliery. One of those persons brought a suit for dissolution of partnership and the usual ancillary reliefs. While the suit was pending, the Court



in 1917 made an order, first of all, appointing one Purna Chandra Barman to be the receiver of the partnership assets which had to be administered. On 28th June of that year, defendants 1, 2 and 4 put in an application agreeing to the appointment of Babu Purna Chandra as manager of the disputed colliery on Rs. 50 per month but objecting to his appointment as receiver. Accordingly, the plaintiff's pleader having intimated that his client had no objection to the appointment of Purna Chandra Barman as manager of the disputed colliery on Rs. 50 per month, the order appointing him receiver was cancelled and the Court appointed Purna Chandra Barman manager of the disputed colliery on Rs. 50 a month. That was the order on 28th June 1917. In January 1918 there is an order :

"Manager Purna Chandra Barman is directed not to pay any amount out of the profits of the disputed colliery to any of the partners without the permission of this Court;"

and, later on in February 1918 :

"the manager is directed to deposit in Court at once the profits of the colliery now in his hands as also the future profits."

It would appear that, in 1918, a preliminary decree was passed and it would appear that at some subsequent time a receiver was appointed and that the colliery has since been sold. The time with which we are concerned is December 1921 to February 1923 and, at that time, it would appear that this Mr. Barman had been acting as manager whatever that title may connote for some four years. Some timber was wanted for the colliery and the plaintiff supplied the timber. The plaintiff brings his suit against some five or six persons but does not include among the defendants Mr. Purna Chandra Barman. The plaintiff's case in his evidence, if not in his pleadings, is that he got the order to supply this timber direct from the defendants or some of them themselves. That is entirely disbelieved. The finding of fact is that he got the order straight from this Mr. Barman.

The first Court having dismissed the plaintiff's suit upon the ground, among others, that it was not shown that Mr. Barman had the authority of the defendants to pledge their credit for goods required for the colliery, the lower appellate Court deals with the matter in this way :

"Purna Chandra Barman had been the manager from before; and, after the preliminary decree in the suit referred to above, his appointment was confirmed by the Court with certain directions. In this state, I cannot think that he was only an officer of the Court and not an agent for the parties as well and, that being so, I cannot think that the plaintiff was to seek for payment from the Court or from the manager."

It seems to me that the plaintiff, if he is to be allowed to change his case and to show that the orders were given by some one who had the authority of the defendants to give the orders, has not proved the authority which it is necessary for him to prove. I confess some difficulty in understanding what the Subordinate Judge thought he was doing when he rescinded the appointment of Mr. Barman as receiver and appointed him manager of the disputed colliery. But, on the whole, it appears to me that Mr. Barman was intended to act as an officer of the Court, appointed by the Court and taking his directions from the Court. In these circumstances, it seems to me that it is in no way shown that Mr. Barman had authority from these defendants to pledge their credit for the goods which were required for the colliery. Generally speaking, a person who is appointed by the Court has got no power to pledge the credit of an individual party. While in law it is more usual to have that doctrine applied to a receiver or what is called a receiver and manager, the doctrine is equally applicable to any person appointed by the Court as an officer of the Court. In my opinion, the lower appellate Court was wrong in thinking that Mr. Barman was shown to sustain the dual capacity of being an officer of the Court and at the same time an agent for the parties. I do not think that the plaintiff has made good his case as alleged in the plaint or that he has made good his case as it was presented in Court.

In my opinion, this appeal must succeed and the plaintiff's suit must be dismissed with costs in all the Courts except the costs of defendant 4 in this appeal.

S. K. Ghose, J.—I agree.

V.B./R.K.

*Appeal allowed.*



**\* \* A. I. R. 1929 Calcutta 661**

**Full Bench**

RANKIN, C. J. AND C. C. GHOSE, B. B.  
GHOSE, MUKERJI AND MITTER, JJ.

*Brojendra Sundar Banerji*—Objector  
—Petitioner.

v.

*Niladrinath Mukerjee and others*—  
Applicants—Opposite Parties.

Full Bench Ref. No. 1 of 1929, in Civil Rules Nos. 150 to 152 of 1929, Decided on 29th July 1929, against orders of Dist. Judge, 24-Parganas, in Misc. Appeals Nos. 305, 306 and 307 of 1928.

**\* (a) Succession Act (39 of 1925), S. 373**  
—Scope—In proceedings under S. 373 Court has power to confine itself entirely to question of right to certificate and not to decide upon title, reality and character of claim.

In the proceedings under S. 373 it is not open to the Judge to allow the exact character of the applicant's claim to be litigated. He has only to see if there is ground for entertaining the application. He is not required to ascertain whether the debts were due to the deceased within the meaning of S. 214 nor can he go into the question whether the succession certificate will be necessary or exigible under S. 214. He has to decide in a summary manner the question of right to certificate. A reasonable and sensible claim to be enabled to proceed against a person as being a debtor of the deceased is sufficient for the purpose of clothing the Court with jurisdiction under S. 373 and may be regarded as a ground for entertaining the application: 9 W. R. 240; 24 W. R. 211, *Foll.*; 8 W. R. 317; 24 W. R. 203; 28 Bom. 119; (1914) 26 M. L. J. 365, *Ref.*; 23 Cal. 431, *Dist.*; 25 Cal. 320, *not Appr.* [P 663 C 2; P 664 C 1]

**\* \* (b) Succession Act (39 of 1925), Ss. 289 and 291**—Certificate taken by Hindu widow in respect of husband's estate—Death of widow—Certificate by husband's heir can be obtained.

On the death of the widow of the deceased who had taken out a succession certificate to the estate of the deceased and long after the death of the owner his heirs applied for succession certificate with respect to three items; one of which was (1) a sum of deposit in Court as compensation money with respect to land acquired under Land Acquisition Act during the lifetime of the owner. The application was dismissed as it was made after considerable delay after the death of the deceased and also on the ground that it should have been made for entire estate of the widow, but the Court of appeal allowed the application and ordered that the certificate may be granted with respect to the item claimed.

*Held*: that the decision was correct: 15 C. W. N. 1018, *held rightly decided but its reasoning not approved.* [P 666 C 1]

**\* \* (c) Succession Act (39 of 1925), S. 373**—Application by reversioners of estate of deceased, on death of widow who, had taken out letters of administration with will annexed, for their share in deposit in Court with respect to land compulsorily acquired under Land Acquisition Act during the lifetime of widow—Land Acquisition Court directing applicants to obtain succession certificate—Subsequent application for succession certificate objected to by other heir who insisted upon litigating title and claim—Court overruling objection granting certificate—Court held entitled to grant certificate.

B, a Hindu died leaving him surviving his widow and two daughters. In due course the widow got the letters of administration with the will annexed. One of the daughters predeceased the widow while other died after her. On the death of all the three, sons of the predeceased daughter applied for withdrawal of their share in deposit under S. 31 (2) for lands compulsorily acquired under Land Acquisition Act. The Land Acquisition Judge directed them to obtain succession certificates. The land was acquired during the lifetime of widow. Thereupon they applied for succession certificate with respect to the deposit. The application was objected to by a son of other daughter who insisted upon litigating the title and demanded the Court to decide the same before granting the certificate. The Court overruled the objection and granted the certificate. The objector made an application in revision to the High Court.

*Held*: that the Judge had jurisdiction to entertain the application and make the order granting the certificate and further the objector's opposition was misguided. [P 666 C 1]

*Sarat Chandra Roy Choudhury and Santi Kumar Roy Choudhury*—for Petitioner.

*Rupendra Coomar Mitter, Bijon Behari Mitter for Shyama Prosad Mukhopadhyaya, Someswar P. Mukerji and Prokash Chandra Bose*—for Opposite Parties.

**Rankin, C. J.**—Rai Bankim Chandra Chatterjee Bahadur died in 1894 leaving a widow and two daughters. The first daughter had four sons and the second three sons. The widow and both daughters are now dead. In his will no mention was made of the land with which this case is concerned. The widow in due course got letters of administration to his estate with the will annexed. In 1926 land acquisition proceedings began and certain land was compulsorily acquired in the widow's lifetime. The compensation money Rs. 2,000 was kept in deposit under S. 31 (2), Land Acquisition Act. In 1919 the widow died. One



daughter had predeceased her and the other died in 1927. Thereupon, in 1928, three sons of the daughter who had first died made applications to the Subordinate Judge for succession certificates with reference to the share due to each in the compensation money. A son of the other daughter objected to these applications but the certificates were granted. Thereupon he appealed to the District Judge, 24-Parganas, who dismissed his appeals with costs. He then applied for and obtained from a Division Bench of this Court three several Rules each calling on the applicant for certificate to show cause why the order of the District Judge should not be set aside. These rules were granted in the revisional jurisdiction and under the powers conferred by S. 115 of the Code.

It may be as well that it should here be explained that before making applications for succession certificates the applicants had petitioned the Land Acquisition Judge for payment to them of their share of the money. That Judge had on 18th April 1928, directed them to obtain succession certificates for withdrawal of the amount from the Court.

The rules granted by this Court came on for hearing before my learned brothers Suhrawardy and Jack, JJ. It was contended before them that a succession certificate could only be granted in respect of a debt due to the deceased and that the compensation money, even if it was a debt, was not a debt due to the deceased. This was the ground upon which the objector had resisted the grant of these certificates before the Subordinate Judge and before the District Judge. It has now been elaborately discussed in four Courts. In support of the decisions of the Courts below, the case of *Abinash Chandra v. Probodh Chandra* (1) was relied on. The learned Judges of the Division Bench disagreed with this decision and in their order of reference have discussed various other cases in which a similar question has come before the Courts: *Bancharam v. Adya Nath* (2); *Annapurna v. Nalini Mohan* (3); *Bishnu v. Mungul Doss* (4); *In re, Mt. Tripura*

*Sundari* (5); *Ranchordas v. Bhagubhai* (6) and *Umesh v. Mathura* (7). They have referred the following questions to the Full Bench:

(1) If a property is acquired under the Land Acquisition Act after the death of the owner when it was in the hands of his widow or a person having a life-estate and the compensation money is kept in deposit in the Land Acquisition Collector's Office under S. 31, Land Acquisition Act, 1894, is such amount a debt within the meaning of S. 214, Succession Act 1925, for which a certificate under Part 10 of that Act has to be obtained?

(2) Was the case of *Abinash Chandra Pal v. Probodh Chandra Pal* (1) rightly decided?

The reasoning of the learned District Judge was to the effect that if it was proper and necessary for him in this proceeding, and in the absence of the person or authority by whom the sum claimed was alleged to be payable, to determine whether or not in strictness the claim of the applicants for certificate was a claim for a debt due to the deceased, he would be disposed to answer that question in the negative; nevertheless it was not incumbent upon him before making the grant of a certificate to enquire too closely into the questions whether the sum of money claimed was due and whether it had been due to the deceased within the meaning of the provisions of the Succession Act.

The order of reference in my judgment does not at all points succeed in keeping separate two questions which are different. One question which can be raised is the question whether under S. 214, Succession Act, the Land Acquisition Judge was entitled to refuse an order for payment of any portion of the money unless a succession certificate was produced by the applicant. This question does not arise in the present case. Nor could it be decided between the present parties. The only question which in this proceeding is open for discussion is the question whether the Subordinate Judge, finding that the applicants desire, for the purpose of prosecuting their claim to be formally clothed with the character of representatives of the deceased, was entitled in all the circumstances of the case, and upon the usual safeguards, to give them a certificate which would have this effect for what it was worth; or whether, on the other hand, he was obliged to decide in the presence of these parties

(1) [1911] 15 C. W. N. 1018=10 I. C. 357.

(2) [1909] 36 Cal. 936=13 C. W. N. 966=3 I. O. 492=10 C. L. J. 180 (F.B.).

(3) [1915] 42 Cal. 10=23 I. C. 556=18 C. W. N. 836.

(4) 24 W. R. 203.

(5) 22 W. R. 45.

(6) [1894] 18 Bom. 394.

(7) [1901] 28 Cal. 246=5 C. W. N. 607.



and in the absence of the person or authority from whom the money was claimed, the question as to the character and reality of the claim; and whether, if he reached the conclusion as a result of the evidence adduced, that the compensation money was not a debt due to the deceased, he was obliged thereupon to act upon this view and to refuse a certificate which would enable the applicants to put themselves forward to the Land Acquisition Judge in a representative character.

If the compensation money was not a debt due to the deceased no succession certificate could operate as giving title to the money. Before the Land Acquisition Judge a succession certificate would in no way prevent the objector from contending that the compensation money was not a debt due to the deceased and from putting forward his own title thereto. Indeed in any case in which there is room for serious controversy as to the nature and character of the claim to a sum of money, it is manifestly more convenient, and more in accordance with familiar notions of procedure, that the controversy as to this matter should be carried on and decided after the party desiring to do so has been put in a position to assert any claim of the deceased, rather than that it should be decided in the absence of the party who is interested in getting a good discharge and upon an issue whether or not a right to stand in the shoes of the deceased should be accorded to the person who asks leave to prosecute the claim in that character.

Section 372, Succession Act, provides that an application for a succession certificate must be verified like a plaint and shall set forth inter alia the right under which the petitioner claims and the debts and securities in respect of which the certificate is applied for. S. 373 provides that if the Judge is satisfied that there is ground for entertaining the application, he shall fix a date for hearing and issue certain notices and upon the date fixed or as soon thereafter as may be practicable "shall proceed to decide in a summary manner the right to the certificate." Cls. 2 and 3 are as follows ;

"(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to

the certificate without determining questions of law or fact which seem to him to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto."

An examination of this section leads me to the conclusion that the legislature contemplated first that the District Judge should be satisfied not that a succession certificate will be necessary or exigible under S. 214 or otherwise, but that there is "ground for entertaining the application." That is to say, that it is a serious and sensible application by a person who desires to make a claim in the representative character which he seeks. Cls. 2 and 3 contemplate that the Judge shall endeavour to determine whether applicant is the proper person or a proper person to be clothed with the representative character and it is made abundantly clear that any intricate questions of fact or law bearing upon this question may be solved in a summary manner. The legislature by exacting fees and by making provision for the requirement of a bond would seem to have taken away all temptation to apply for a succession certificate save in cases where a succession certificate will enable the grantee to prosecute a claim as a representative of the deceased with greater advantage than he would have been able to do in the absence of this representative right. S. 387 provides that no decision under this part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties. In my opinion nothing could be more misguided, unnecessary and objectionable than that questions of the exact character of an applicant's claim should be litigated upon an application for a succession certificate and in the absence of the party or authority against whom the claim is made. The objector in the present case, for example, is in no way damaged by the grant of the certificate. He is entitled to object before the Land Acquisition Judge to any order for payment out of the compensation money upon any ground which he can establish showing that the money was not due to the deceased but is money which, in the events that have happened, is payable to him. If he has any grievance against the order of 18th April 1928, he has his



remedy. To insist upon litigating the questions at issue between the parties under the provisions of S. 373, Succession Act, is merely the tactics of obstruction.

On the other hand it would clearly be inconvenient if in a case such as this the Land Acquisition Court should take the view that the nature and character of the claim was such as to entitle it to require the production of a succession certificate, while at the same time the Judge to whom application for such certificate must be made purported to decide between these parties that the debt in question could not be regarded as having been due to the deceased and that accordingly no right to represent the deceased for the purpose could be given to any one. In my opinion it is not the law that the Court upon an application for a certificate has to decide for itself, as a condition of granting the certificate, that the case is one in which the debt was due to the deceased person within the meaning of S. 214. A reasonable and sensible claim to be enabled to proceed against a third party as being a debtor of a deceased person is sufficient for the purpose of clothing the Court with jurisdiction under S. 373 and may be regarded as ground for entertaining the application.

As regards the case of *Abinash v. Probodh* (1) I desire to observe that I do not think that questions of this character can be decided merely upon the principle that it is not necessary or advisable

"to place a narrow and restricted construction upon the provisions of the Succession Certificate Act."

If this case were a case in which it was proper or necessary to decide the question whether the Land Acquisition Court was entitled to refuse payment to the applicants under S. 214 of the Act, it would I think be very necessary to point out that this section is a restrictive section and must be carefully and accurately construed. I demur very strongly, for example, to a contention that arrears of rent accruing due in respect of premises comprised in the deceased's estate in respect of a period subsequent to his death cannot be recovered without a succession certificate. There can be no question under S. 214 of treating something as due to the deceased or to his estate by any kind of legal fiction or

analogy. The question before us is to be settled in my judgment by a careful consideration of the summary procedure laid down by the legislature in S. 373. This shows with great clearness that the issue of a succession certificate may be justified without the Court arriving at a conclusion to the effect that such a certificate is a necessary condition without which the claim could not succeed, or that the debts were due to the deceased.

Under Act 27 of 1860 the effect of a certificate was not limited to the particular debts mentioned in the application. It was conclusive of the representative title against all debtors to the deceased. In *Bhugobutty v. Bholanath* (8) it was contended that there could be no debts due to the deceased and it was laid down that this was not a matter for the Judge's consideration. "I am inclined to think" said Jackson, J. :

"it would be convenient if the law provided that all applications for certificate should state that there are debts due to the estate and that the Judge should satisfy himself that there are grounds for making the application."

In a later case *Loch, J.*, observed ;

"It might so happen that the applicant is not aware of the existence of debts, but applies for a certificate as a precaution. *Shurut v. Thakoor Monee* (9)."

In 1875 we find *Glover, J.*, repeating the same rule and in the same way as *Jackson, J.*, had done :

"The current of decisions in this Court..... seems to lay it down that the petitioner for a certificate need do nothing more than prove his title to collect the debts if there are any. I should certainly have thought that it was first necessary to show that there was a need for the certificate by giving at least *prima facie* evidence of the existence of debts; but as I have not been shown any decisions going to that length I am willing to follow the rulings mentioned above, and to hold that the petitioners' title was the thing to be looked to. *Beemul v. Shibur* (10)."

The basis of these decisions was that the language of S. 3 of the Act of 1860, on which it appeared that the one thing which the Court had to do was to "determine the right to the certificate." "It may be" as *Jackson, J.*, observed in the case already cited :

"that the person who obtains such certificate obtains an entirely barren title, and that he would derive no benefit from it whatever, but that is his affair."

(8) [1867] 8 W. R. 317.

(9) [1868] 9 W. R. 240.

(10) [1875] 21 W. R. 211.



Now *Bishnu v Mandal* (4) which has been greatly relied upon by the objector in this case was decided under the Act of 1860 and the observations of Mitter, J., were made with reference to the construction put upon the Act by the cases to which I have referred and by other cases decided in the same sense. He says of them :

"It is sufficient to observe that they merely lay down that . . . it is not the business of the Judge to enquire into the question whether there were debts due to the deceased person or not. Granting that to be the case, it does not follow that when without any inquiry it is admitted by the parties that there were no debts due to the deceased the Court would still be bound to grant a certificate under Act 27 of 1860."

Mitter, J., was dealing with the case upon appeal ; he gives no support to the theory that there has to be a finding as to the existence of debts due to the deceased as a condition of the Judge's jurisdiction to grant a certificate. He is only saying that the Court is not helpless and is not bound to grant an application which can be seen without further enquiry to be baseless.

When the legislature came to amend the Act of 1860 it took occasion in the new Act (7 of 1889) to effect several changes. The most important change was that it permitted an applicant to confine his application to those debts which he chose to include and gave the certificate effect only as regards the particular debts specified therein. It made more clear that the Judge's enquiry was to be summary but it retained as the description of the subject-matter the phrase "the right to the certificate." There is every reason to think that the line of decisions from which I have cited had not escaped its attention. It seems indeed to have adapted, if not adopted, the language of Jackson, J., in *Bhugbutty v Bholanath* (8) (above cited). It required the Judge not to decide upon contest whether the particular debts included in the application were really due at all or were really due to the deceased but to satisfy himself before he fixed a day for hearing or issued notices "that there is ground for entertaining the application." To my mind there is both logic and policy in this. I do not say that the Judge may not change his mind and in the end dismiss the application as baseless altogether but the contest after notices have issued is still

to be confined to "the right to the certificate." Prima facie a person disputing the title of the deceased to the debts in question is only putting himself out of Court, showing good reason why some willing person other than himself should be authorized to assert the claim in the right of the deceased. No doubt there may be baseless claims for a certificate and it is right that the Court should not be helpless to resist them. But I demur altogether to any doctrine which involves the Judge in finding upon contest at the enquiry that there is good prima facie evidence that the debts were due to the deceased. If *Radu Rani v. Brindaban* (11) involves this then I think it should be overruled. There the certificate had been granted without any evidence at all although it was opposed. The Judge would seem to have refused to consider at any stage whether there was any ground for entertaining the application. Maclean, C. J., said :

"I think he is bound to enquire into the matter and require at least some evidence to show that there is a prima facie case that the property "belonged to the deceased person."

This does not seem to mean that he must hear the objectors' evidence and argument upon the point and decide whether in the end a good prima facie case has been made out upon the evidence as a whole. In the present case for example the Judge if he thought the order of the Land Acquisition Court was "ground for entertaining the application," would have been entirely within his rights. *Hurri Krishna v. Balabhadra* (12) was a very different case ; It was an appeal by an applicant who claimed as adopted son and whose application for certificate had been dismissed without any enquiry at all as to his right to the certificate. I do not find in the judgments in *Bai Kashi v. Parbhu Keval* (13) any reference to the legislature's provision for the Judge being satisfied that there are grounds for entertaining the application, but the reasoning of Chandavarkar, J., in that case is unanswerable in so far as it shows that an enquiry into the existence of the debt is a useless proceeding. The question there was precisely as here whether the debt belonged to the de-

(11) [1897] 25 Cal. 320=2 C. W. N. 59.

(12) [1896] 23 Cal. 431.

(13) [1903] 28 Bom. 119=5 Bom. L. R. 721.



ceased or to the objector in an independent right. The same view has been taken in *Madras Srinivasachariar v. Gopalan* (14).

Of the two questions which have been put to the Full Bench I would observe that the first question together with a considerable portion of the order of reference deals with a matter which in this case does not arise. We are not here concerned with the question whether a certificate "has to be obtained." We are only concerned with the question whether the learned Judge had jurisdiction to issue the certificate. As regards the question whether *Abinash's* case (1) was rightly decided, I am of opinion that it was open to the Court in that case to make the order which it made, namely, to send the case back to the District Judge for retrial in accordance with law. But I am not prepared to say that I approve of the reasoning by which this order was supported.

In my opinion the Subordinate Judge had jurisdiction to make the order in this case and the opposition on the part of the objector has been misguided throughout. In my judgment the case is not one, on any view of it, which calls for our interference under S. 115 of the Code and the correct order to make is that we should discharge the Rules with costs before the Division Bench and before us. Consolidated hearing fee before both Benches five gold mohurs.

**C. C. Ghose, J.**—I agree.

**B. B. Ghose, J.**—I agree.

**Mukerji, J.**—I agree.

**Mitter, J.**—I entirely agree in the judgment delivered by my Lord, the Chief Justice.

V.B./R.K.

*Rule discharged.*

(14) [1914] 26 M. L. J. 365=23 I. C. 424=  
(1914) M. W. N. 323.

## A. I. R. 1929 Calcutta 666

PAGE AND MALLIK, JJ.

*Prasanna Kumar Sarma and others*—  
Plaintiffs—Appellants.

v.

*Satish Chandra Sarma and others*—  
Defendants—Respondents.

Appeal No. 2529 of 1926, Decided on  
10th September 1928, against decree of  
Sub-Judge, 1st Court Sylhet, D/- 31st  
July 1926.

**Partition—Suit for — Rights determined must be between parties qua cosharers.**

In a partition suit the rights of the parties are to be determined qua cosharers and the right which one cosharer may have against the rights and interests of another under a mortgage cannot be enforced as the parties qua cosharers have no interest whatever in the mortgage. [P 667 C 1]

*Hemendra K. Das*—for Appellants.

*Gunada Ch. Sen. and Paresh Lal Shome*—for Respondents.

**Judgment.**—This appeal was adjourned in order that the parties, who are close relations, should have an opportunity of considering their position, and arriving at some sensible and reasonable solution of the problem. Unfortunately they have been unable to agree as to what course they would invite the Court to take, and claim the rigour of the law. They shall have it.

The suit is one for partition, and the parties are the descendants of three brothers, the plaintiffs, the descendants of one; defendants 1 to 3, of the second, and defendant 4 of the third brother. It is not disputed that defendants 1 and 3 are entitled to eight annas share; neither was it challenged that defendant 4 was entitled to four annas and the plaintiffs to four annas. In 1902 the plaintiffs purchased two annas from defendant 4, and in this suit they claimed a declaration that they were entitled to a six annas share, that the property be partitioned by metes and bounds, and they be allotted khas possession of that share in the property which fell to them. Defendant 2, however, has raised this objection to the allotment of the full six annas to the plaintiffs, viz., that in 1881 the predecessor of the plaintiffs executed a *kat kabola* in favour of the mortgagees, the Shyam Chaudhuris, who were really the benamidars for the father of defendants 1 to 3, that under that *kat kobala* defendants 1 to 3 are entitled to possession, and under those circumstances the plaintiffs ought not to be given upon partition, khas possession of more than two annas. Now the Shyam Choudhuris are not parties to this suit, and any decree made which might affect their interest would be null and void as against them. Nevertheless, the lower Courts have held in truth and in fact the money advanced to the plaintiffs under the *kat kabola* was paid not by the Shyam Chaudhuris but by the predecessor of defendants 1 to 3, and that



the Shyam Chaudhuris had executed the kat kabola merely as benamdars for the father of defendants 1 to 3. Pursuant to that finding the lower appellate Court refused to pass a decree in favour of the plaintiff. In our opinion the decision of the lower appellate Court cannot stand. This being a partition suit the right of the parties has to be determined qua co-sharers, and it is not disputed that the plaintiffs were entitled to a four annas share and to a further two annas share by reason of the purchase of two annas from defendant 4 in 1902. It may or may not be that defendants 1 to 3 have some rights and interests in the four annas share which formed the subject matter of the kat kabola as against the plaintiffs, but as qua co-sharers they have no interest whatever in the mortgage. Whether they have any rights under the mortgage will depend upon circumstances which it is neither proper nor necessary to consider in the present suit in which Shyam Chaudhuris are not impleaded. If defendants 1 to 3 have any rights as against the plaintiff's four annas share under the kat kabola, they will take such steps to enforce their rights as they may be advised. As to whether they had any rights, or if they had any rights whether they have now lost them, we express no opinion.

The result is that there will be a declaration that the plaintiffs are entitled to a six annas share in the ejmali property, that upon partition being effected, allotment of six annas shall be made to the plaintiff in khas possession as against the defendants as co-sharers. The plaintiffs are entitled to their costs from the contesting defendant 2 in all the Courts.

V.B./R.K.

*Order accordingly.*

### A. I. R. 1929 Calcutta 667

JACK AND MITTER, JJ.

*Ram Krishna Sardar*—Appellant.

v.

*Sree Kanta Mondal and others*—Respondents.

Appeal No. 455 of 1927, Decided on 8th February 1929, against appellate decree of 4th Addl. Dist. Judge, 24-Parganas, D/- 24th August 1926.

Civil P. C., O. 1, R. 3 — Suit for specific performance — Agreement by father to sell

land held in jama — Father in conjunction with son selling part of jama in contravention of contract—Father dying pending suit —Son is necessary and proper party.

There was an agreement to sell land held in jama and it was not performed but on the contrary the part of the jama was sold by the party in conjunction with his son to a third person. The party affected by the non-performance filed a suit against the person who agreed to sell, his son and the vendee. During the pendency of the suit the person who entered into agreement died. The son contended that he could not be made a party to the suit as he held the jama under a title different from his father and the performance of contract was not maintainable against him.

*Held*: that the suit necessitated going into the question of whether son was interested in the subject-matter of the contract or not and he was a necessary and proper party to the suit: 10 Cal. 1061, *Rel. on. Cases Ref.* [P 669 C1]

*Rupendra Coomar Mitter and Khitindra Nath Bose*—for Appellant.

*Santi Coomar Roy Choudhury* — for Respondents.

**Mitter, J.**—This is an appeal in a suit for specific performance of a contract. The facts, on which the question of law raised by this appeal depends lie within a short compass. It appears that defendant 1 held a jama of Rs. 5 for two and half bighas of land under the superior landlords Ramsebak Sana and others. He contracted to sell this jama to the plaintiff for a sum of Rs. 250 on 29th Magh 1329 B. S. and executed a bainanama after taking an advance of Rs. 85. He promised further to execute a deed of sale within 15th Chaitra 1329 B. S. He, however, failed to perform his part of the contract notwithstanding repeated requests from the plaintiff and, instead of performing the said contract, he as the plaintiff alleged in his plaint, joined with his son defendant 2 who is the appellant in this Court in settling one bigha out of the two and half bighas of land in suit with defendant 3. The present suit had consequently to be instituted by the plaintiff. Defendant 1 died during the pendency of the suit in the primary Court. The main contention of defendant 2 who is the appealing defendant was that, as he was claiming under a title different from that of his father defendant 1, the suit for specific performance and for recovery of possession of the disputed land as against him was not maintainable, and that he had been improperly joined in the suit.

This objection was taken in the Court of first instance; but the Munsif nega-



tived it and decreed the plaintiff's suit against defendants 1 and 2 and dismissed the claim for khas possession as against defendant 3 on the ground that he took his lease without notice of the contract for sale, in favour of the plaintiff. The plaintiff, it was ordered by the decree, was to get khas possession of one and half bighas of land and, with regard to the remaining one bigha leased out to defendant 3, the suit for khas possession was dismissed and the plaintiff was declared entitled to rent. The Court of first instance found that the land belonged to defendant 1 and that he was competent to enter into the contract for sale. On appeal to the lower appellate Court, the learned District Judge affirmed the finding of the trial Court on the question of fact as to the plaintiff's title and also held that the objection of the defendant that the suit was bad for multifariousness or misjoinder of parties and causes of action must be overruled, as having no substance in it.

A second appeal has been preferred to this Court by defendant 2 and the main contention advanced by the learned advocate for the appellant is that, as defendant 2 was claiming under a distinct title to that of his father, the suit was not maintainable as against him and that he ought either to have been dismissed from the suit or that the suit should have been dismissed as against him. In support of this contention, reliance has been placed on several decisions both of the English Court of Chancery and of the Indian Courts. It is argued that the general rule is that a person who is a stranger to a contract is not a proper party to a suit for specific performance of the said contract. It may be conceded that that is the ordinary rule as it is founded on the ground of convenience. But here the plaintiff's case being that defendant 2 in conjunction with his father defendant 1 set up a title in himself to a portion of the property contracted to be sold, in those circumstances, the ordinary rule, in my opinion, has no application to the facts of the present case. This case really resembles the case which was before this Court and is reported in *Mukund Lal v. Chhotey Lal* (1). It was pointed out by Romesh Chunder Mitter, J., that the plaintiff in that case:

"charged defendant 1 with having resorted to certain devices in concert with defendant 3 to defeat his rights arising out of the contract under which he was suing; he called defendant 3 a mere benamidar and there was no admission on the face of the plaint or in the plaintiff's case that defendant 3 had a separate or distinct interest from that of defendant 1."

That was the ground on which the English cases to which I will presently refer and the case reported in *Luckumsey Oakerda v. Fazulla Cassumbhoy* (2) on which reliance was placed were distinguished by Mitter, J.

The first case relied on is the case of *De Houghton v. Money* (3), in which it was admitted by the plaintiff that there was a conveyance in favour of Money, but it was said that the conveyance was executed under such circumstances as would make it a voidable one. Similarly, in the case of *Luckumsey Oakerda v. Fazulla Cassumbhoy* (2), it was distinctly admitted by the plaintiff that the third party who was not a party to the contract had a distinct interest. The position taken up by the plaintiff in the present case as appears from his allegations in the plaint is similar to the position of the plaintiff in the case reported in *Mukund Lal v. Chhotey Lal* (1). It has been argued by the learned advocate for the appellant that defendant 2 set up a case of distinct interest from that of his father. But it is plain that the case of the plaintiff does not rest upon the defence set up. The application of the case of *De Houghton v. Money* (3) to the present case, as contended for by the appellant, could not be justified seeing that, in that case, the plaintiff himself distinctly alleged in the plaint that the third party who was not a party to the contract had a distinct interest in the land contracted to be sold or conveyed. Piggot, J., who delivered a separate judgment in the case of *Mukund Lal v. Chhotey Lal* (1) also pointed out that: "it does appear to me that the point at which the rule in *De Houghton v. Money* (3) would be applicable would not be reached in this case. The question is: Are not defendants 1 and 3 identical and that question in itself, if answered in the affirmative, as it has been, precludes the application of these cases."

Reliance has also been placed on another decision of the English Court, namely, the case of *Tasker v. Small* (4).

(1) [1884] 10 Cal. 1061.

(2) [1890] 5 Bom. 177.

(3) [1833] 2 Ch. A. 166.

(4) [1871] 3 My. & C.R. 63.



There what was contracted to be sold was the equity of redemption in a certain estate on which there was a previous mortgage and it was held, as is pointed out by Fry, L. J., that the mortgagee was not a necessary party in the suit for specific performance. Whatever the rule of the Court of Chancery might have been in early times, that rule, as Lord Justice Fry points out in his Treatise on Specific Performance of Contract at para. 175, has been considerably modified by S. 49, Chancery Procedure Act of 1852. The learned author remarks :

"In the Court of Chancery persons having adverse or inconsistent rights in the subject-matter of the suit could not be joined as plaintiffs : nor could a person who had no interest be joined as plaintiff with one who had. The importance of the doctrine of misjoinder was, however, diminished by S. 49, Chancery Procedure Act, 1852."

"In some cases," says the learned author, "persons claiming adversely might be made defendants." Again, in para. 192, the learned author remarks with regard to the matter in hand as follows :

"The plaintiff may unite in the same action and in the same statement of claim several causes of action, subject to a power in the Court or Judge to direct separate trials of any of such causes of action. Further, the Court or a Judge may at any stage of the proceedings order the name of any party, plaintiff or defendant, who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, to be added."

It seems to me, having regard to the allegations in the plaint in the present case, that it was essential that the question as to whether defendant 2, who subsequent to the contract in favour of the plaintiff leased out a portion of the land to defendant 3 along with his father, was interested in the subject-matter of the contract or not should be gone into and decided and that the decision could only be arrived at effectually in the presence of defendant 2. In this view of the matter, I am of opinion that the Courts below are right in holding that defendant 2 was a necessary and proper party to the suit. This is the only contention which has been urged in appeal before us and, as this contention fails, the appeal must be dismissed with costs.

Jack, J.—I agree.

V.B./R.K.

*Appeal dismissed.*

**\* A. I. R. 1929 Calcutta 669.**

MUKERJI AND MALLIK, JJ.

*Mokshud Mandal and others*—Defendants—Appellants.

v.

*Khedu Mondal* — Plaintiff — Respondent.

Appeal No. 765 of 1928, Decided on 6th February 1929, against the appellate decree of Sub-Judge, Murshidabad, D/- 11th November 1927.

(a) Ejectment—Suit for — Co-trespassers are necessary parties—Decree against defendants in the absence of other necessary defendants illegal.

Suit for khas possession on declaration of title is not maintainable in the absence of defendants who are co-trespassers and the decree passed against the defendants present is one not warranted by law: *A. I. R. 1928, Cal. 138, Foll.* [P 670 C 1]

\* (b) Civil P. C., S. 96—Suit decreed against defendants present and dismissed against defendants unrepresented—Plaintiff's appeal barred.

Where a suit is decreed against some of the defendants and dismissed against the minor defendants as they were not represented it is not at all open to the plaintiff to prefer a cross-appeal against such dismissal as it does not amount to a decree.

[P 670 C 1, 2]

\* (c) Civil P. C., S. 2 (2)—Suit dismissed against some defendants on account of non-representation — Plaintiff not responsible for non representation — Dismissal is not-decree.

The dismissal of a suit against some defendants on account of non-representation for which plaintiffs are not to blame is not a decree within the meaning of S. 2 (2). As regards these defendants there is no adjudication, far less any expression of an adjudication determining the rights of the parties with regard to any of the matters in the suit. It merely struck those defendants out of the suit as being persons who were not really before the Court and is widely different from an order which purports to strike out a defendant on the ground that no cause of action has been made out against him, or an order striking out from the array of parties a defendant as an unnecessary party and dismissing the suit as against him which orders clearly fall within that definition.

[P 670 C 2]

*Benoyendra Prosad Bagchi and Durga Charan Mitter*—for Appellants.

*Bijan Kumar Mukherji*—for Respondent.

**Judgment**—This appeal has arisen out of a suit which was instituted by the plaintiff for khas possession on declaration of his title. The allegations in the plaint were that the land in suit formerly belonged to one Domon Sheikh,



that by successive transfers it eventually came to belong to the plaintiff and he was in possession of it till he was dispossessed by the defendants. The defence was that the holding was a non-transferable occupancy holding and the plaintiff acquired no title by his purchase, nor was he in possession thereof. Two of the defendants were minors, whose natural guardian did not appear though served with summons, and through some mistake on the part of the officers of the Court the matter was not put up before the Court for proper orders and the plaintiff being unaware of the fact that the natural guardian had not appeared did not take steps to have a guardian appointed by the Court. The trial Court overruled the defence on the merits and finding the facts in plaintiff's favour dismissed the suit as regards the minor defendants namely defendants 3 and 7 as they were not represented and decreed the suit as against the other defendants declaring the plaintiff's title and ordering that the plaintiff do get possession by eviction of those defendants. An appeal was preferred by the defendants against whom that decree was passed, but it was unsuccessful. They have then preferred this second appeal.

The contention of the appellants is that the suit was not maintainable in the absence of defendants 3 and 7, who were co trespassers as parties defendants and that the decree passed against the appellants is one not warranted by law. The contention is amply supported by the decision of this Court in the case of *Arunodoy Chakravarti v. Mahommed Ali* (1) and must be given effect to.

The question then arises as to the proper order that should be passed. The Subordinate Judge appears to have been of the view that if the plaintiff has preferred a cross appeal he would have allowed the plaintiff an opportunity to proceed with the suit after getting defendants 3 and 7 properly represented therein. While we agree with the Subordinate Judge in holding that the plaintiff was not to blame for non-representation of defendants 3 and 7 in the suit and consequently that such an opportunity should be given to him, we are unable to hold

that it was necessary or at all open to the plaintiff to prefer a cross-appeal. It is true that in the formal decree that was drawn up the suit against defendants 3 and 7 was dismissed, but the dismissal in our opinion was not a decree within the meaning of S. 2(2) of the Code. As regards these defendants there was no adjudication, far less any expression of an adjudication, determining the rights of the parties with regard to any of the matters in the suit. It merely struck those defendants out of the suit as being persons who were not really before the Court and is widely different from an order which purports to strike out a defendant on the ground that no cause of action has been made out against them, *Idan Khan v. Mendi Lal* (2) or an order striking out from the array of parties a defendant as an unnecessary party and dismissing the suit as against him, *Rama Rao v. Raja of Pittapur* (3), which orders clearly fall within that definition. No appeal therefore in our opinion lay from that part of the Munsiff's decision and the plaintiff could not have preferred a cross-appeal.

In our judgment therefore the proper order to pass in this case is to set aside the decrees of both the Courts below and remand the suit to the trial Court so that the plaintiff may now get defendants 3 and 7 properly before the Court and proceed with it.

Costs incurred in this litigation up till now shall be costs in the cause.

V.B/R.K.

*Suit remanded.*

(2) [1910] 8 I. C. 409.

(3) [1919] 42 Mad. 219=36 M. L. J. 163=49 I. C. 835=9 M. L. W. 320.

\* A. I. R. 1929 Calcutta 670

B. B. GHOSE AND PANTON, JJ.

*Dwijendra Krishna Dutt and another*—Defendants—Appellants.

v.

*Kedar Nath Poddar*—Plaintiff—Respondent.

Appeal No. 398 of 1927, Decided on 11th March 1929, against original order of Sub-Judge, Pabna, D/- 15th December 1926.

\* Civil P. C., S. 47—Execution case dismissed on certification of satisfaction—



**Mutual mistake—Order can be reopened—Unilateral mistake of fact (mistake by decree-holder in calculating amount due)—Order dismissing execution application on decree-holder's certifying full satisfaction cannot be reopened.**

Where an order of dismissal of execution case is made on account of mutual mistake, the order by consent may be reopened. There is no authority that any order or proceeding can be reopened on the ground of mistake of fact of one of the parties to it.

An execution case was dismissed on the application of the decree-holder stating that the decree had been satisfied in full. Subsequently the decree-holder applied to have the execution proceedings reopened on the ground that the decree-holder made a mistake in calculating the amount due to him under the decree as a result of which the decree-holder got much less than what he was entitled to.

*Held*: that the execution proceedings could not be opened. It would be against all fundamental rules of relief on the ground of mistake to say that the mistake due to the negligence of one of the parties is sufficient to relieve him of his own agreement. [P 672 C 1, 2]

*Sarat Ch. Rai Chowdhury, Hemendra Chandra Sen, Surendra Nath Bose (Sr.) and Satyendra Chandra Sen*—for Appellants.

*Jogesh Chandra Roy and Krishna Kamal Maitra*—for Respondent.

**B. B. Ghose, J.**—This is an appeal by the judgment-debtors against an order of the Subordinate Judge reopening an execution proceeding on an application made by the decree-holder on 22nd March 1926. The ground on which the Court below has granted his application for reopening the execution proceeding and allowed him to execute the decree again for a sum of Rs. 2150-5-0, was that the decree-holder made a mistake in calculating the amount due to him under the decree and in stating in his petition dated 22nd March 1926 that the decree was satisfied on payment of Rs. 5,300 by the judgment-debtors on that date. The learned Subordinate Judge who was the predecessor of the Subordinate Judge who finally decided the case held that the Court had jurisdiction to reopen an execution proceeding on the ground of mistake on the authority of the case of *Nil Ratan Khasnobish v. Ram Rutton Chatterji* (1) on which the respondent also relies in this Court in support of the judgment of the Subordinate Judge. The Subordinate Judge who decided the case finally went into the question as to how much was due to the decree-holder on

22nd March 1926 on account of the decree that he had obtained against the judgment-debtors. He went into the evidence as regards the different payments made by the judgment-debtors and came to the conclusion that a certain payment of Rs. 2,000 which the judgment-debtors alleged to have made was not true and, therefore, the amount stated in the application for execution of the decree-holder which was made on 16th June 1925 was less by about Rs. 2,000 on account of a mistake made by the decree-holder and he held that the order of dismissal on satisfaction should, therefore, be set aside.

On appeal by the judgment-debtors it was contended on their behalf that the Court was functus officio and that their case came within the ruling of *Fakaruddin Mahomed Ahsan v. Official Trustee of Bengal* (2). It may, however, be conceded that the Court can reopen an order or decree on the ground of fraud, misrepresentation or mistake; and where an order has been made by consent of parties, it is well settled that that order can be reopened on grounds on which a contract may be set aside or rectified. The application made by the decree-holder on 22nd March 1926 stated that in the execution case of the decree-holder:

"out of the entire sum due to the judgment-debtor Rs. 5,300 was settled as payable to the decree-holder after deduction of the amount remitted"

and as this sum was paid, nothing remained due on account of the decree. Upon this application the execution case was dismissed on full satisfaction by the order of the Court. The question is: can the execution proceedings be reopened on the ground stated by the decree-holder that he did not desire to make a remission of more than Rs. 114 while his dues on the decree were over Rs. 7,000. In our opinion, it cannot. Strong reliance has been placed by the respondent on the case of *Nil Ratan Khasnobish v. Ram Rutton Chatterji* (1), cited above. In that case, the only question that was debated was whether the Court had jurisdiction either under S. 244, Civil P. C., of 1882 (corresponding to S. 47 of the present Code) or under S. 623 of the old Code (as a matter of review) to reopen an order made of dismissal of an execution proceeding on full satisfaction. It appears

(1) [1901] 5 C. W. N. 627.

(2) [1884] 10 Cal. 538.



from the judgment that some other points were sought to be raised on behalf of the appellants in that case before the Court; but the learned Judge disallowed the endeavour to raise them. What appears in that case is that both sides had represented to the Court that the decree had been satisfied and I think it must have been held by the Court of appeal below that the order of dismissal was made on account of mutual mistake of the decree-holder and the judgment-debtor. In such a case, as I have already stated, an order by consent may be reopened. No authority has been shown nor can it be urged, in my opinion, that any order or proceeding can be reopened on the ground of the mistake of fact of one of the parties to it. The general principle as to mistakes of fact is codified in S. 22, Contract Act, where it has been laid down that

"a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact."

What appears in this case was that in the application for execution which was made by the decree-holder on 16th June 1925 it was stated in the Col. 7 that the amount of the decree was Rs. 12,000 and odd. The amount credited was Rs. 8,000 and odd. Therefore deducting this amount the sum of Rs. 4,234 was stated by the decree-holder to be due. To it, he said, the interest and the costs of the previous execution should be added. It was urged in the Court below on behalf of the decree-holder that the mistake in calculation was due to the execution clerk. But that can hardly be put forward as a ground. It was not for the execution clerk to say how much was paid to the decree-holder by the judgment-debtors on previous occasions. He found in the petition for execution which asked for Rs. 4,234 as the principal amount due and upon that the execution clerk made some calculations. If he found that Rs 5,414 was due to the decree-holder and if any mistake was made by him, that mistake was made in favour of the decree-holder and not against him and the pleader for the judgment-debtors simply said, if the decree-holder's evidence is to be believed, that what has been calculated by the clerk has been correctly calculated. It has not been pointed out that taking the decree holder's figure as given in the

petition for execution, the calculation would be wrong. However that may be, the sole ground upon which the decree-holder sought for reopening the proceedings was that there was a mistake, which must have been due to his own negligence or to the negligence of his own agents. This cannot be a ground for reopening the proceedings. It would be against all fundamental rules of relief on the ground of mistake to say that mistake due the negligence of one of the parties, is sufficient to relieve him of his own agreement. This appeal will, therefore, be allowed with costs, hearing-fee being assessed at five gold mohurs.

**Panton, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

### \* A. I. R. 1929 Calcutta 672

CUMING AND PEARSON, JJ.

*Asmatullah Pramanik* — Plaintiff — Appellant.

v.

*Gamir Pramanik and others*—Defendants—Respondents.

Appeal No. 2642 of 1926, Decided on 25th February 1922, against appellate decree of Sub-Judge, Bogra, D/- 27th August 1926.

(a) Civil P. C., O. 34, R. 1—Person having title adverse and paramount to mortgagor or mortgagee cannot be made party.

As a general rule the proper scope of a mortgage suit is to cut off the equity of redemption and bar the rights of the mortgagor and those claiming under him. The only proper parties to such a suit being the mortgagor and the mortgages and those who have acquired an interest under them subsequent to the mortgage. In such a case a stranger setting up an adverse claim of title cannot be made a party for the purpose of litigating that in the mortgage suit: 33 Cal. 425, *Folk*. [P 673 C 2]

\* (b) Civil P. C., S. 11—Mortgage suit—Defendant with interest in equity of redemption has also independent paramount title—Latter not impeached—Claim decreed by default—Decree does not operate as res judicata in subsequent suit as regards paramount title.

Where in a mortgage suit brought for realization of the mortgage security, and the barring of the equity of redemption a party, who is impleaded as defendant by virtue of his interest in the equity of redemption and not in his other distinct capacity as possessing a paramount and independent title to the mortgaged property, does not appear and the claim is decreed, he is not precluded by



res judicata from setting up his independent and paramount title in a subsequent suit: 38 C. L. J. 183, Dist.; 12 Cal. 414; 8 C. W. N. 365; 23 C. L. J. 587; 40 All. 584; A. I. R. 1927 Mad. 301; 20 Cal. 79; A. I. R. 1924 Cal. 138; A. I. R. 1920 P. C. 81, Ref. [P 675 C 1, 2]

*Atul Chandra Gupta and Jitendra Kumar Sen Gupta*—for Appellant.

*Nasim Ali*—for Respondents.

**Pearson, J.**—The facts here are as follows: The land in suit was a non-transferable occupancy holding belonging to one J. N. Moitra and held under him by two brothers Jadab and Madhab in equal shares. The holding was brought to sale by the landlord for arrears of rent and purchased by himself in 1915. In 1916 Jadab mortgaged his  $\frac{1}{2}$  share to plaintiff. In February 1917 the two brothers sold a portion of the jote to defendant 1 and defendant 2 in the present suit. In 1918 plaintiff sued on his mortgage against Jadab making defendant 1 and defendant 2 also parties: the suit was decreed in March 1919 on compromise against Jadab and ex parte as regards defendant 1 and defendant 2. On 22nd June 1921 Jadab's half share was brought to sale in execution and purchased by the plaintiff. Upon his going to take possession he was resisted by defendant 1 and defendant 2 on the ground that they had taken a settlement from the landlord in January 1918. Hence the present suit. This settlement has been found as a fact by the lower appellate Court, which dismissed the suit with costs.

The main argument before us has been upon the question whether defendant 1 and defendant 2 are not now estopped from raising this question of paramount title in the settlement of 1918 seeing that they failed to raise it in the previous mortgage suit brought by the plaintiff against Jadab to which defendant 1 and defendant 2 were also made parties, though they did not appear. The question was not argued in the lower appellate Court for it was there conceded that no estoppel existed in the present case. The rule of res judicata is set out in S. 11, Civil P. C., 1908, which provides that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title, in a Court competent to try such subsequent suit, and has been

heard and finally decided. If this part of S. 11 were in itself exhaustive it would be impossible in the circumstances of the present case to support the plea. But then comes Explan. 4 which lets in the principle of constructive res judicata by explaining that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. In the circumstances of the present suit it is conceded that the matter of the paramount title might have been made a ground of defence in the previous mortgage suit, and the dispute is narrowed down to the question whether it ought so to have been.

It is clear enough that as a general rule the proper scope of a mortgage suit is to cut off the equity of redemption and bar the rights of the mortgagor and those claiming under him; the only proper parties to such a suit being the mortgagor and the mortgagee and those who have acquired an interest under them subsequent to the mortgage. In such a case a stranger setting up an adverse claim of title cannot be made a party for the purpose of litigating that in the mortgage suit: *Jaggewar Dutt v. Bhuban Mohan Mitra* (1). In *Nila Kant v. Suresh Chandra* (2) certain defendants impleaded in a mortgage suit as being interested in the equity of redemption subsequent to the mortgage set up a title paramount and claimed not to be proper parties; they were accordingly dismissed from the suit, and the Judicial Committee agreed that that was the correct view; otherwise it was said, the suit would have been multifarious and confused in the highest degree if it had gone on in that shape, as the defence raised was quite foreign to the scope of a mortgage suit. Certain other decisions are to be found in the reports bearing upon this question where, as in the present case, the person subsequently setting up a claim of paramount title is a party to the former litigation in another capacity which brings him within the legitimate arena of the mortgage suit.

Thus *Hare Krishna v. Robert Watson & Co.* (3) is a case where the question of

(1) [1905] 33 Cal. 425=3 C. L. J. 205.

(2) [1886] 12 Cal. 414=12 I. A. 171=4 Sar. 685 (P.C.).

(3) [1901] 8 C. W. N. 865.



paramount title had been raised by a defendant whom the mortgagee had made a party as being interested in the equity of redemption; the plaintiff accepted the issue on that footing, and was not allowed subsequently to maintain that it should not have been raised. In *Girja Kanta v. Mohim Chandra* (4) the facts were that three brothers A, B and C were owners of the disputed property. A and B executed a mortgage of the entire property to the plaintiff. Then A died and subsequently the mortgagee sued B and C to enforce his security. B was made a party as an original mortgagor and as one of A's representatives: C only as the representative of his deceased brother A. There was no suggestion that the mortgage was operative otherwise against C. A decree was then made ex parte in the mortgage suit and the property was brought to sale and purchased by the plaintiff. He failed to get actual possession and sued to eject B and C. It was held that C was entitled to plead his paramount title and was not bound by the doctrine of res judicata; that as C was a party to the previous suit only as representing his brother A the question whether the mortgage was operative against him in his personal capacity was not and could not have been raised in that litigation, as the suit was framed. The principle of this case was followed in *Gobardhan v. Munna Lal* (5) where a puisne mortgagee holding also a paramount title in one instance did not appear, and in the other attempted to set up his paramount title but was not allowed to do so: see also *Ramanna v. Venkatanarayana* (6). In the case of *Srimanta Seal v. Bindubasini* (7) the facts were very similar to those in the present case and the position is thus summarized, that:

"the plaintiff was joined as a defendant in the suit instituted by the mortgagees to enforce their security. At that time he had a twofold character ..... He was no doubt joined as a defendant as the purchaser of the equity of the redemption. But he could also set up his title paramount derived from the landlords."

The learned Judge (who was also a party to the decision in *Girja Kanta's*

case (4) case above cited) then refers to the case of *Hare Krishna v. Robert Watson & Co.* (3) and continues:

"Here the plaintiff was a defendant in the mortgage suit. He had a twofold character. As purchaser of the equity of redemption he was properly before the Court; as settlement holder from the superior landlord, he could set up a defence that the mortgage could not be enforced against the property in his hands. He did not take that defence and the result was that a decree was made for sale of the mortgaged property in his presence. The decree is operative against him and he will be bound by the result of the sale in execution. In the present litigation, he seeks to avoid the decree and to make it inoperative, though it was passed in his presence and is obligatory upon him. Clearly such a course is not permissible: if this suit were allowed to be maintained, the only possible result would be a multiplicity of litigation."

This decision in *Srimanta v. Bindubasini* (7), has been strongly urged on behalf of the appellant in the present case. It is a matter for observation, however, that throughout the judgment the mind of the Court is directed entirely towards whether the defence of the paramount title "could" be set up in the mortgage suit; nowhere does it appear that the Court applied itself to the consideration of the question whether that was a matter which not only might but also ought to have been made a ground of defence in the former suit, within the meaning of Expln. 4, S. 11, Civil P. C. Unless both conditions are satisfied the rule will not apply.

The question whether a matter ought to have been made ground of defence or attack in a previous suit is one which has been said to depend upon the particular facts of each case; and where matters are so dissimilar that their union might lead to confusion the construction of the word becomes important: *Kameswar Pershad v. Rajkumari* (8). *Nilakant v. Suresh* (2), has been already mentioned as a case of a mortgage suit where a defendant being impleaded as having purchased subsequent to the mortgage set up a title paramount by way of defence, and was dismissed from the suit and their Lordships of the Judicial Committee approved that procedure. It is true that there were other parties in the suit also claiming paramount titles in respect of other portions of the property, which would have served to accen-

(4) [1916] 23 C. L. J. 587=35 I. O. 294=20 C. W. N. 675.

(5) [1918] 40 All. 584=46 I. O. 559=16 A. L. J. 639.

(6) A. I. R. 1927 Mad. 301.

(7) A. I. R. 1924 Cal. 138.

(8) [1892] 20 Cal. 79=19 I. A. 234=6 Sar. 241 (P.O.).



tuate the multifariousness and confusion to which reference is made, but there is no indication that a Court must go into a question of title paramount, even if raised in a mortgage suit by only one defendant who is impleaded in another capacity as having an interest in the equity of redemption. In *Radha Kishan v. Kurshed Hossein* (9) already referred to, where a prior mortgagee was made a party in a suit on a subsequent mortgage and did not set up his title, their Lordships say, at p. 15:

"The rule is clear; the controversy is narrowed down to the question whether the facts invite its application. It becomes necessary therefore to see what the position (of the prior mortgagee) was in the former suit."

The position as their Lordships proceed to show was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of *res judicata* it was incumbent on the subsequent mortgagee in the circumstances of that case to show that they sought in the former suit to displace the prior mortgagee's title and postpone it to their own, which meant that it would have been necessary for them as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of the paramount claim of the prior mortgagee.

I think these matters above set out afford a guide for the decision here. It must be seen what the position of defendant 1 and defendant 2 was in the former suit as framed. So far as the plaint was concerned there was no case made in derogation of any paramount claim: on the contrary, it was an ordinary mortgage suit brought for the realization of the mortgage security and the barring of the equity of redemption, defendant 1 and defendant 2 being impleaded therein as possessing an interest in the equity of redemption and in no other capacity. They did not appear. In my opinion in order to sustain the plea of *res judicata* in the present case it would have to be shown that in the previous suit the question of paramount title had been alleged in order to displace it: and that is not the case. Had defendant 1 and defendant 2 appeared and endeavoured to raise the question themselves in the suit as framed, it is possible that the plaintiff

might have objected and it would have been open to the Court to sustain the objection and refuse to enlarge the scope of the suit. If, as I think, the Court had at any rate the discretion, if not the duty, to refuse, it cannot now be contended that the matter was a ground which ought to have been raised. If admitted, it might open the door to the addition of other parties concerned, in this case, for instance, the landlord through whom the paramount title was claimed. It would have altered the whole character and scope of the suit by the introduction of matters outside the limits assigned to the controversy by the plaintiff himself, within which the relief he sought was confined. Having chosen those limits, I do not think that in the circumstances here existing it is permissible for him to contend, as he does, that because the doctrine of *res judicata* has its root in the policy of avoiding multiplicity of suits, therefore it was obligatory on the defendant in the previous suit to raise the question of title which the plaintiff himself might have endeavoured to put in issue by his pleading had the suit been differently framed and properly framed for that purpose. I would therefore reject the contention that in the circumstances of this case the matter is one which ought to have been raised in the previous suit, and hold that the facts do not attract the operation of the principle of *res judicata*.

A further point has been raised in the appeal, that in deciding whether the landlord did or did not recognize the old tenant after the rent sale the Court has wrongly placed the burden of proof. The appellant seems to argue that it was for the plaintiff to get from the landlord's man any explanation of the entry of four annas in the landlord's register. He argues that the entry of four annas was a piece of evidence in his favour and it was for the opposite party to explain it away, inasmuch as it would by itself show recognition by the landlord. What the Judge says in that the so called payment of four annas only was extremely curious and no explanation was sought for from the landlord's man who was examined. By this I think the learned Judge means that the fact that only four annas was paid in two years was curious and that plaintiff did not attempt to get from the landlord's man why only four

(9) A. I. R. 1920 P. O. 81=47 Cal. 662=47 I. A. 11 (P.O.).



annas was paid. What the plaintiff was asked to explain was not why four annas had been paid which was a fact in his favour but why only four annas had been paid and not more. The important word in the judgment is the word "only." There is no substance in this contention.

The result is that the appeal is dismissed with costs.

**Cuming, J.**—I agree.

V.B./R.K.

*Appeal dismissed.*

**\* A. I. R. 1929 Calcutta 676**

RANKIN, C. J. AND B. B. GHOSE, J.

*Nagendra Nath Banerjee—Appellant.*

*v.*

*Ambica Charan Chakrabarty and others—Respondents.*

Appeals Nos. 101 and 134 of 1928, Decided on 14th May 1929, against the appellate orders of Dist. Judge, Zillah 24 Parganas, D/ 7th November 1927.

(a) Limitation Act, Art. 182—Appeal from amended decree is same as other appeal and postpones execution.

Upon strict construction of Art. 182 or in principle, case of an appeal from amended decree is in no way different from case of an appeal from any other decree and as in the other case, appeal from an amended decree postpones the date from which limitation runs for execution purposes: *A. I. R. 1928 Cal. 646, (S.B.), Dist.* [P 677 C 2]

(b) Limitation Act, S. 5—Date of decree whether amended or not is date of judgment and amendment does not extend time for appeal.

Whether a decree is amended or is not amended the date of the decree is the date of the judgment and the fact that the decree is amended does not operate of itself to extend the time for appealing: *3 C. L. J. 188, Ref.* [P 677 C 2]

(c) Limitation Act, S. 5—Amendment of decree—Time for appeal may be extended under S. 5.

When there has been an amendment of decree and it is reasonable that the time for appealing should be extended recourse has to be had to the power of the Court under S. 5. [P 677 C 2, P 678 C 1]

(d) Civil P. C., S. 104—No appeal lies from order granting amendment unless it is considered as question of review.

There can be no appeal from an order granting an amendment as such unless indeed it be considered as sometimes it has been considered as a question of review in which case it may be possible to maintain an argument that there can be an appeal from that order. [P 678 C 1]

\* (e) Civil P. C., O. 21, R. 16—Mortgage of mortgage decree—Subsequent mortgagee agreed to be competent to realize sum of mortgage by being made party to execution or by withdrawing deposit or on failure by

suit or execution of mortgaged decree—Mortgagee can apply for execution as transferee.

If a mortgagee who has obtained a decree upon the mortgage, mortgages the decree with specific provisions that the subsequent mortgagee should be competent to realize the sum of his mortgage by being made a party to the execution proceedings, and should have full powers to withdraw the deposit by the mortgagor judgment-debtor and that if the original mortgagee failed to pay the money lent within a certain period the subsequent mortgagee would be competent to realize the sum due by bringing a suit against his borrower or by execution of the mortgaged mortgage decree the subsequent mortgagee has the decree assigned to him within the meaning of O. 21, R. 16. [P 679 C 2]

(f) Limitation Act, Art. 182—Appeal does not operate as stay of execution but only postpones it.

In execution purposes an appeal by itself never operates as a stay. There is the right to execute the moment the decree is passed; but if there is an appeal the time of limitation is postponed and does not run until the decree determining the appeal is made. So the broad principle in India as regards execution matters is that time is not computed from the date when the right to apply accrues but is postponed in cases where there is an appeal. [P 678 C 2]

\* (g) Limitation Act, Art. 182—Decree amended long after judgment—Appeal preferred from amended decree—Amended decree modified—Second appeal preferred to High Court dismissed—Correct date for determining time for execution is date of dismissal of second appeal.

A decree which appeared to be a final mortgage decree was passed on 10th October 1917 and on 8th April 1919 on the application of the decree-holder it was amended upon more than one point. From the decree as amended the judgment-debtor appealed and the decree was modified in this way that while part of the matter added by way of amendment was retained part was set aside. On further appeal to the High Court the appeal was dismissed on 24th July 1924. The application for execution was presented on 18th November 1925.

*Held:* that the application was not barred for the correct date for determining the time of limitation was 24th July 1924. [P 678 C 2]

(h) Practice—Amendment of decree should not be allowed after considerable delay.

On a mere question as to whether they should get such and such a sum of money or a little more the Court should refuse to entertain application for amendment of decree after a considerable delay such as of 18 months unless there is a reason justifying delay. [P 679 C 1]

*Asita Ranjan Ghose for Pramatha Nath Mukerjee and Urukramdas Chuckerburty—for Appellant.*

*Brojo Lal Chuckerburty, Hira Lal Chuckerburty and Dwijendra Nath Dutt—for Respondents.*



No. 101.

**Rankin, C. J.**—In this case, it appears that one Nagendra Nath Banerji has appealed from an order dismissing the application for execution of one Kartik Chandra Sen. This appeal cannot be sustained and must be dismissed with costs. Hearing fee two gold mohurs.

No. 134.

In this case, an application for execution has been made by one Kartik Chandra Sen who is a sub-mortgagee of the decree of which execution is sought. The first question is the question of limitation. The lower Court has found that execution is time barred. The facts are these: The decree in question which appears to have been a final mortgage decree was passed on 10th October 1917. On 8th April 1919, on the application of the decree-holder that decree was amended. It was amended upon more than one point. It was amended in respect of interim interest; it was amended upon some questions of costs and there was further question of post diem interest at six per cent upon which it was also amended by the trial Court. From that decree as amended, the judgment-debtor appealed and the learned District Judge modified the amended decree in this way that, while a part of the matter which had been added to the decree by way of amendment was retained, another part, namely, that relating to post-diem interest was set aside. From that decision of the District Judge an appeal was taken to this High Court which was dismissed on 24th July 1924.

Now, the petition for execution in this case was presented on 18th November 1925. The question is what is the terminus a quo from which time has to be computed under Art. 182, Sch. 1 to the Limitation Act of 1908. It seems reasonably clear that the date 10th October 1917, the date of the original decree cannot be the period of time from which limitation runs because that decree was modified in various ways by subsequent orders, and so to hold would be contrary to Cl. 4, Art. 182. The next date which may be considered is 8th April 1919 on which date the decree was amended. It has been contended before us, that, on a strict interpretation of Art. 182, that really is the correct date. I am of opinion that that too cannot be

the correct date because it is quite clear that, from that amendment or from the decree as amended on 8th April 1919, an appeal was brought and the decree was subsequently modified so that it ceased to be in all respects the test of the liability of the parties. The question, therefore, is whether the next date 21st January 1922 the date on which the District Judge modified the amended decree can be regarded as the date from which limitation runs. No doubt, it would be the date from which limitation would run but for the fact that an appeal was brought from that decree of the District Judge which appeal was dismissed on 24th July 1924. We have to consider whether it is true to say that the case of an appeal from an amended decree is different from the case of an appeal from any other decree so that, while it is clear law that an appeal from any other decree postpones the date from which limitation runs for execution purposes, an appeal from an amended decree has no such operation.

In my judgment, there is no ground either upon a strict construction of Art. 182 or in principle for that contention. The matter may be looked at in this way: when a decree is amended and for this purpose it matters nothing whether in amending the decree the Court has confined itself within the powers given by S. 152, Civil P. C. or not the only decree that exists is the decree as modified by the amendment and the only decree from which an appeal can be brought is the existing decree by which the proposed appellant is aggrieved. For the purpose of computing limitation for appeals the law is clear enough. Under the Civil Procedure Code a decree has to be dated as of the date of the judgment. The appeal has to be brought within a certain time from the date of the decree. Whether a decree is amended or is not amended, the date of the decree is the date of the judgment and the fact that the decree is amended does not operate of itself to extend the time for appealing. That goes back to the date of the judgment and not to the date either of the drawing up of the decree or of the date of the amendment. Accordingly, when there has been an amendment and it is reasonable that the time for ap-



pealing should be extended recourse has to be had to the power of the Court under S. 5, Lim. Act. There is no appeal from an order granting an amendment as such, unless indeed it be considered, as sometimes it has been considered, as a question of review in which case it may be possible to maintain an argument that there can be an appeal from that order. But the view taken in such a case as *Brojo Lal v. Tara Prosanna* (1), is that the correct course is to get an extension under S. 5, Lim. Act and that the appeal that is brought, is brought from the decree that is to say, from the amended decree because there is no other decree in existence. In this case, we have to remember that, when the appeal was brought to the District Judge, it was an appeal from the final decree of 10th October 1917, the circumstance that it had been amended being a circumstance which has no fundamental importance in this case though it might have had importance if any question had arisen about the appeal being in time. The District Judge when on 31st January 1922 he modified the amendment really modified the decree dated 10th October 1917 the only decree that existed in the case.

Under these circumstances, we have to ask ourselves whether there is any ground in logic or in the language of the Limitation Act for refusing to apply the broad general principle that a decree operates as *res judicata* but when it is appealed from the matter becomes again *sub-judice*, and for execution purposes the party, although he is allowed to levy execution notwithstanding an appeal, is not, as a matter of limitation, required to do so until the appeal has been disposed of, a principle which dates so far back as 1871 and was enunciated in the judgment of Dwarkanath Mitter, J., in *Ram Charan v. Lakhi Kani* (2). The sole special feature is that the decree which the District Judge modified was a decree which had been amended. I am of opinion that on principle such a decree is exactly like any other decree and it is of no materiality for the present purpose whether the decree of 10th October 1917 had been amended or had

not been amended. If we look at the language of Art. 182, it is quite true that Cl. 4 merely says that where a decree has been amended the time runs from the date of the amendment, but there is provision in Cl. 2 which deals with the question of appeals to say that appeals in the case of amended decrees are any different in their effect upon limitation from appeals in the case of other decrees. The only thing that was necessary in 1908 was to deal with the simple case of a decree which afterwards was amended and to give an extension of time for that. Mr. Brojo Lal Chuckerburtty in a very able argument has referred to the case of *Hari Mohan Dalal v. Parameswar* (3). That was a case where the question arose under Art. 181, Sch. 1. Lim. Act. Now there is this broad contrast between Art. 181 and Art. 182 that under the residuary Art. 181 time runs from the date, to use the exact language of the statute, "when the right to apply accrues." In execution matters, that is not usually the case. It never is the case of execution purposes that an appeal by itself operates as a stay. There is the right to execute the moment a decree is passed but if there is an appeal the time of limitation is postponed and does not run until the decree determining the appeal is made. So, the broad principle in India as regards execution matters is that time is not computed from the date when the right to apply accrues, but is postponed in cases where there is an appeal. It does not, therefore, seem to me that any case under Art. 181 can be expected to throw light upon the true position on a question of execution under Art. 182. The case in question was a case under S. 144 of the Code and the question was whether the right to apply for restitution arose under Art. 181 on the date of the order or on the date of the decree dismissing the appeal. It seems to me that there is a very broad distinction which would prevent us from regarding that case as being in point. In my judgment, therefore, there is no escape from the conclusion that the correct date for determining the time of limitation is 24th July 1924.

I would here observe that the fact that to amend a decree has consequences under Art. 182 and otherwise is very well worth bearing in mind when Courts

(1) [1906] 3 O. L. J. 188.

(2) 7 B. L. R. 704=16 W. R. 1 (F. B.).

(3) A. I. R. 1928 Cal. 646 (S. B.).



are asked after an interval of eighteen months to amend a decree. On a mere question as to whether the plaintiff should get such and such a sum of money or a little more, I should have thought that no application to amend a decree ought to be entertained after so much as eighteen months. If a person came three weeks afterwards, I would not be surprised that his application was entertained. If he came three months afterwards, one might think it a bad case, but be open to consider whether there was reason which could justify the delay, when a person comes eighteen months afterwards to ask that a provision about interest be added to his decree, it would be a very good thing if the lower Courts would appreciate the consequences of entertaining such an application and would refuse to entertain an application of this character. If it be true that the appeal to the District Judge was an appeal from the amended decree bearing date 10th October 1917 though amended by an order of the Court dated 8th April 1919 it may be the right view that the Court of appeal had only to consider whether the decree as it stood was a proper decree to have been passed. I understand that in this case the view which was ultimately taken by the High Court was not that post-diem interest was an improper thing to order in itself but that it was a thing which was improperly added under S. 152, Civil P. C. Whether that is a matter proper to be considered when an appeal is brought from an amended decree is a question of some importance upon which I do not desire now to pronounce any opinion.

The next question which we have to determine is whether Kartik Chandra Sen is a proper person having regard to O. 21, R. 16, Civil P. C., to make an application in execution. If he is, then a further question will arise in the course of the execution proceedings as to whether Nagendra Nath Banerjee who appears to have been a subsequent transferee of the decree has or has not got priority. We have only to decide whether Kartik Chandra Sen is a proper person at whose instance the decree can be executed, in other words, whether he is a person to whom the decree has been transferred by an assignment in writing. We have before us the document

under which he takes his interest in this decree. It is a mortgage for a certain sum of money Rs. 900 carrying a certain rate of interest and the mortgage is not a mortgage in general terms but has a certain specific provision. At the time apparently an application for execution had been made by the original mortgagee and the mortgage provided that Kartik Chandra Sen would be :  
"competent to realize the above sum by being added as a party to the above execution case jointly with us."

It was further provided that, if the defendant deposited the sum due under the decree, Kartik Chandra Sen would be competent to withdraw the sum due to him together with interest and costs. It was further provided that should the original mortgagees fail to pay the money lent within a certain period Kartik Chandra Sen would be competent to realize the sum due to him by bringing a suit against his borrowers or by execution of the above decree in his own name. In these circumstances it appears to me that Kartik Chandra Sen is within the description of persons given by R. 16, O. 21, Civil P. C., and that his application for execution cannot be dismissed on the ground that he has no sufficient interest in the decree.

In these circumstances, this case must go back to the Court of execution and it will be for that Court of execution to see that any sum that is recoverable in the process of execution is properly distributed between the parties entitled to get it and to make such order as regards payment of money out of Court as may seem necessary.

The present appeal must succeed. The appellant must have his costs against the judgment-debtor. The hearing-fee in this Court is assessed at three gold mohurs.

**B. B. Ghose, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

**A. I. R. 1929 Calcutta 679**

SUHWARDY, AND JACK, JJ.

*Kalipada Roy and another* — Appellants.

v.

*Mukunda Lal Roy and another*—Respondents.

Appeal No. 1877 of 1927, Decided on 12th June 1929, from appellate decree of Addl. Dist. Judge, Dacca, D/- 2-4-1927.



(a) Bengal Public Demands Recovery Act (3 of 1913), S. 9—Certificate must be made against and served on proper persons from whom debt is due.

Section 9 gives a valuable right to the certificate debtor and therefore it is necessary that the certificate should be made against and served on proper person from whom the amount of debt is due. [P 681 C 1]

(b) Bengal Public Demands Recovery Act (3 of 1913), S. 20—To ensure indefeasible title certificate must be made against proper person.

Under S. 20 what purchaser gets in a sale under the Act is the right, title and interest of the certificate debtor. Therefore in order that the sale may pass title to the purchaser it is necessary to make the certificate against proper person. [P 681 C 1]

(c) Bengal Public Demands Recovery Act, (3 of 1913) S. 41—Certificate has same effect as decree of civil Court—Decree against person as representing minors is inoperative against minors unless person is entered as such in Collectorate Register.

A certificate under the Act is considered as equivalent to a decree of a civil Court. Therefore a decree against a person as representing minors without any mention about the same in Collectorate Register must undoubtedly be held not binding on the minors. [P 681 C 2]

(d) Bengal Public Demands Recovery Act (3 of 1913), S. 37—Section presupposes existence of valid certificate against proper person.

Section 37 presupposes the existence of a valid certificate for it is the existence of a valid certificate against the proper person that gives jurisdiction to the certificate officer to sell the property of that person. [P 682 C 1]

(e) Bengal Public Demands Recovery Act (3 of 1913), S. 4—"Manager."

Manager is not a person from whom a public demand is due. [P 681 C 2]

*Rajendra Chandra Guha*—for Appellant.

*Naresh Chandra Sen Gupta, Jahnabi Charan Das Gupta, Surendra Nath Guha and Syed Nasim Ali*—for Respondents.

**Judgment.**—The suit out of which this appeal has arisen was for recovery of possession of the plaintiff's moiety share of touzi No. 12713 of the Dacca Collectorate and also for mesne profits. The plaintiffs are the minor sons of one Sudhanya Chandra Roy deceased. It appears from examination of the papers of the Collectorate produced in this case that the touzi originally belonged to two brothers Arun Chandra Roy and Sudhanya Chandra Roy who owned eight annas share each. This was the state of things in 1919. In 1920 Sudhanya was recorded as the sole proprietor. Certificate was issued by the Certificate Officer on 16th September 1919 under the

Public Demands Recovery Act in respect of cesses due from the estate. In the certificate the certificate debtor's name was mentioned as Joylakshmi Debya manager on behalf of (ka) Arun Chandra Roy and (kha) Sudhanya Chandra Roy. This certificate was duly filed and the property was ordered to be sold. In 1920 it was brought to the notice of the Certificate Officer that Sudhanya had become the sole proprietor and he ordered the sale proclamation to be issued in his name only. The property was subsequently sold for Rs. 50 and purchased by one Krishna Kishore who conveyed it later to defendant 1. This suit was instituted in April 1925 for declaration that the sale under the Public Demands Recovery Act did not pass any title to the purchaser and for recovery of possession of the property from defendant 1. Both the Courts below have found against the plaintiffs and dismissed their suit.

The only question raised before us is that the certificate having been issued in the name of a wrong person the right, title and interest of the owner did not pass by the sale and the purchaser accordingly obtained no title to the property. This question was not raised in this form in the Courts below. There is no reference to it in the judgment of the trial Court; but in the lower appellate Court it was urged on the ground that at the time the certificate was issued Sudhanya Chandra Roy was major. The question, however, is of some importance and does not depend upon any extraneous evidence but has to be decided on the documents filed in this case. We have therefore to consider as to whether the certificate was properly made in this case and was duly filed. Under S. 4, Public Demands Recovery Act (3 of 1913 B. C.), when the Certificate Officer is satisfied that any public demands payable to the Collector is due, he may sign a certificate in the prescribed form being form No. 1 in the Appendix to the Act. Col. 3 of the form requires that the name and address of the certificate-debtor should be given. Under S. 6 the Certificate Officer has to file the certificate in the prescribed form and shall cause the certificate to be filed in his office. On the filing of the certificate further execution will issue under S. 7 and notice under that section shall be served on the certificate debtor in the prescribed form. The



notice should specify that a certain sum has been found to be due from the certificate debtor on account of some demand from him under S. 4 or 5 of the Act. The service of the certificate upon the certificate debtor has the effect under S. 8 of an attachment by civil Court and any transfer thereafter of the property or any of his immovable property is to be deemed bad in law. S. 9 is an important section and has to be considered in this connexion. If a certificate is duly made and filed by service of notice effected on the certificate debtor, he may within 30 days from the service of notice under S. 7 or from the date of execution of any process for enforcing the certificate present to the Collector or the Certificate Officer a petition denying his liability in whole or in part. This section gives a valuable right to the certificate debtor and therefore it is necessary that the certificate should be made against and served on the proper person from whom the amount of the debt is due. Part 3 of the Act deals with execution of certificates. S. 20 declares that if a property is sold in execution of a certificate, there shall vest in the purchaser merely the right, title and interest of the certificate debtor against whom the certificate has been issued, at the time of the sale. The following sections deal with the steps to be taken by the certificate debtor for having the sale set aside. Now under S. 20 what the purchaser gets in a sale under the Public Demands Recovery Act is the right, title and interest of the certificate debtor. It is therefore necessary in order to pass any title to the purchaser to make the certificate against the proper certificate debtor.

Now to come to the facts of the present case. As we have said, the certificate was issued against the mother of the minors in which she was described as the manager on behalf of her minor sons. The objection has been thus answered by the learned District Judge in appeal:

"Arun and Sudhanya never registered their names in the Collectorate and allowed their mother to represent them in the Collectorate. Therefore the certificate made was legal and binding upon Sudhanya the father of the plaintiffs."

The accuracy of this statement was challenged before us and we had therefore to send for the original D Register of the Collectorate and the original certificate issued. We have now looked in-

to these papers and we find that in 1919 in the Collectorate Register the names of Arun and Sudhanya stood in respect of 16 annas of this touzi. There is no mention in the register of the name of the mother Joylakshmi Debi as representing the minors. There is nothing on the record to show at to how she came to be described as the manager of the minors. The District Judge therefore is not right in his observation that these minors allowed their mother to represent them in the Collectorate and that therefore the certificate was binding upon them. A certificate under the Public Demands Recovery Act is considered as equivalent to a decree of a civil Court. A decree in the form in which the certificate was issued if made by a civil Court must undoubtedly be held not binding on the minors whose interest is sought to be affected by it.

In the case of minors there is a provision in the Public Demands Recovery Act which has been held to be a complete Code in itself except on points to which the Civil Procedure Code has been made applicable. S. 41 of the Act lays down that when the Certificate Officer is satisfied that the certificate debtor is a minor or of unsound mind he shall in any proceeding under the Act, permit him to be represented by any suitable person. The certificate does not show that Arun and Sudhanya were minors at the time when it was issued and if minors that their mother was allowed to represent them in the proceeding. She has been described as the manager. Under S. 4 of the Act a manager is not a person from whom a public demand is due. If they were treated as minors, there is no order by the Certificate Officer permitting the mother to represent them in the certificate proceeding. In *Mt. Raj Koer v. Ganga Singh* (1), it was held that the effect of a sale under the Public Demands Recovery Act being to pass to the purchaser merely the right, title and interest of the person named as judgment-debtor in the certificate, the purchaser acquires no right if the person appears to have no interest in the property at the date of the sale. In that case the registered debtor had lost his interest before the sale by

(1) [1909] 10 C. L. J. 201=1 I. C. 197=13 C. W. N. 750.



the Collector and it was held that the purchaser did not get any title under it.

Reference has been made to Ss. 36 and 37 of the Act. S. 36 prescribes the period of one year within which a suit has to be brought if the sale is sought to be set aside on the ground that no notice under S. 7 was served and that the plaintiff has sustained substantial injury by reason of the irregularity. The present suit is not of that character and does not come within the purview of the section. S. 37 says that every question arising between the certificate holder and the certificate debtor shall be determined, not by suit but by order of the Certificate Officer excepting that a suit may be brought in a civil Court on the ground of fraud. This section presupposes the existence of a valid certificate for it is the existence of a valid certificate against the proper person that gives jurisdiction to the Certificate Officer to sell the property of that person. It is well settled that when there are no arrears the Certificate Officer has no jurisdiction to issue certificate and to sell any property under it on the ground that the Act comes into operation on the existence of a public demand for the recovery of which action has to be taken. On the same principle the Certificate Officer is entitled to take action under the Act when there are arrears but he has no jurisdiction to sell the property of a person unless he has made and filed a proper certificate charging that person with liability.

As regards the merits of the case, it has been found by the learned District Judge that there is no evidence of service of notice under S. 7 and that the value fetched at the sale was certainly very low. But the learned Judge does not give effect to these findings on the ground that there is nothing to show that the inadequacy of price was due to non-service of notice under S. 7 and that the suit was not brought within one year from the date of sale under S. 36 of the Act.

Giving our anxious consideration to the facts of this case we have come to the conclusion that the certificate as made was not a proper certificate to charge the plaintiffs' predecessor with liability and that the sale under it did not pass any title.

The result is that this appeal succeeds, the decree of the Court below is set aside and the plaintiffs' suit decreed with costs

in all the Courts against defendant 1. The case is remanded to the trial Court for ascertainment of mesne profits.

V.B./R.K.

*Appeal allowed.*

## A. I. R. 1929 Calcutta 682

MUKERJI AND MITTER, JJ.

*Ahasanulla—Plaintiff—Appellant.*

*v.*

*Nejabatali and others—Defendants—Respondents.*

Appeal No. 1628 of 1927, Decided on 7th June 1929, against appellate decree of Dist. Judge, Dacca, D/- 28th March 1927.

(a) Mahomedan Law — Legitimacy — Acknowledgment by father—Court disbelieving direct evidence of marriage—Opposite party is not absolved from rebutting presumption of marriage by disproving it or proving impossibility of it.

A declaration by a person that another person is his legitimate son born of his loins and in the womb of his married wife is an acknowledgment not merely of sonship but of legitimate sonship. And if direct evidence of marriage is adduced and the Court disbelieves it the effect of presumption arising from the acknowledgment is not lost and the failure does not absolve the opposite party from disproving or proving the impossibility of marriage and thereby rebutting the presumption: *A. I. R.*, 1922 P. C. 159; *A. I. R.* 1916 P. C. 27; *A. I. R.* 1918 P. C. 11, *Foll.*: 10 C. L. R. 293, *Ref.* [P 683 C 2, P 684 C 1]

(b) Mahomedan Law—Legitimacy—Daughter of a woman by the same man got dowry exactly the same as by admittedly legitimate daughter strengthen presumption.

The fact that the daughter of a woman whose marriage is disbelieved, obtained a dowry exactly the same as in case of admittedly legitimate daughter immensely adds to the presumption of marriage. [P 684 C 2]

(c) Mahomedan Law—Marriage—Kabinamah.

Failure to prove kabinamah does not disprove marriage. [P 684 C 2]

*Sarat Ch. Basak and Nirmal Ch. Chakravarty*—for Appellant.

*Prakash Chandra Pakrasi*—for Respondents.

**Judgment.**—This appeal arises out of a suit for establishment of title to and recovery of possession of certain properties and also for accounts. The plaintiff being unsuccessful in both the Courts below have preferred this second appeal.

Abdul Azim and Abdul Gani were two brothers. Abdul Gani died in 1318 B.S. leaving two sons, Makram Ali and Nizam Ali, the latter having been defen-



dant 1 in the suit and he having died his heirs were substituted in his place. Abdul Azim had two daughters whose names were Kali Bibi and Choto Bibi. The plaintiff claims that he and the pro forma defendant Lal Bibi were the son and the daughter of Abdul Azim by his second wife Najibannessa. Abdul Azim died in 1328 B. S.

In 1295 Abdul Gani and his wife and Abdul Azim made a wakf in respect of their properties, providing that the sons of Abdul Gani and their heirs were to be mutwallis. On the death of Abdul Gani in 1318, Makram Ali instituted a suit in 1914 for a declaration that the wakfnama was invalid and for establishment of his title by inheritance to an eight-anna share of the properties left by his father. This suit was disposed of in 1919, the wakfnama being declared invalid, and amongst other declarations made it was declared that the properties mentioned in Sch. Ka and Kha of the plaint and some other properties were the properties of Abdul Azim. The plaintiff alleged in his plaint that after his decision Abdul Azim demanded possession of all his properties till his death in 1328 B. S.

There were various defences taken, which necessitated the framing of no less than 18 issues. Of these only one, namely issue 6, was really tried and it being decided against the plaintiff the suit has been dismissed. That issue was worded thus:

"Was plaintiff's mother married wife of Moulvi Abdul Azim deceased and is plaintiff his legitimate son?"

The proof that the plaintiff adduced falls under the following heads: (1) Acknowledgments made by Abdul Azim himself. (2) Evidence showing legitimacy of the plaintiff's sister Lal Bibi, as on the proof of her legitimacy the plaintiff's legitimacy follows as a matter of course. (3) Evidence of conduct on the part of other members of the family. (4) Direct oral evidence of marriage between Abdul Azim and Najibannessa. In disproof of the plaintiff's legitimacy the defendants have relied on: (a) the absence of a kabinnamah in respect of the alleged marriage between Abdul Azim and Najibannessa; (b) the fact that Abdul Azim joined with Abdul Gani and his wife in creating a wakf which was to be administered by Abdul Gani's sons and their heirs, (c) the evidence of a

witness who happened to be the Sub-Registrar of Dacca. (d) The evidence afforded by the absence of the plaintiff from a photograph representing the family group. (e) Positive evidence to the effect that the plaintiff's mother was the kept woman of somebody else for some time and that she was but a woman who tended cattle in the house of Abdul Azim and Abdul Gani and of the latter's son, and (f) some evidence of the treatment she received from the family.

Now, of the different items of evidence adduced on behalf of the plaintiff, item (1) is of the utmost importance. Leaving aside the evidence of oral acknowledgment (as spoken to by P. Ws. Nos. 2, 3, 4, 7 and 10) and such documentary evidence of acknowledgment as may be said to be of doubtful import, describing the plaintiff merely as a son and not as a legitimate son (e. g., Exs. 5, 6, 10, 18, 72, 76 (a), 76 (b), 76 (d) and 80 (a), there are four pieces of documents the importance of which cannot be overrated. They are Exs. 13, 2, 3 and 4. In these the plaintiff was declared by Abdul Azim to be his legitimate son born of his loins and in the womb of his last married wife Najibannessa. These acknowledgments exactly fulfil the requirements of the law as explained by their Lordships of the Judicial Committee in these words:

"This acknowledgment must be not merely of sonship, but must be made in such a way that the acknowledgor meant to accept the other not only as his son, but as his legitimate son: *Habibur Rahman v. Altaf Ali Choudhury* (1)."

Now item (4) of the evidence, namely, the direct evidence of the marriage has not been accepted as reliable by either of the Courts below, and in second appeal it cannot possibly be relied upon. But what is the legal effect of this position? It has been so summarized by the District Judge:

"But direct evidence of marriage has been put in, and I think that, in such circumstances when the appellant has put forward a definite marriage on a definite date, if the Court disbelieves that, then the respondent can rightly claim that some progress has been made towards the disproof of marriage, for it is recognized that it is for the respondent to disprove marriage."

(1) A. I. R. 1922 P. C. 159=48 Cal. 856=48 I. A. 114 (P.C.).



This was precisely the position in the case of *Imambundi v. Mutsaddi* (2), in which their Lordships of the Judicial Committee found the direct evidence of marriage by no means satisfactory and still proceeded to give effect to the legal presumption arising from acknowledgment holding that such presumption was not rebutted. Their Lordships thus observed:

"But their Lordships find clear evidence of a reliable character regarding the acknowledgment of her children. Her case thereupon comes within the rule of Mahomedan Law to which Garth, C. J. and Wilson, J. (afterwards Sir Arthur Wilson) gave expression in *Mahatala Bibi v. Prince Ahmed Haleem-ooz-zaman* (3)."

To hold that when the plaintiff has failed to add to the presumption by proving the marriage aliunde the effect of the presumption is lost in whole or in part, or in other words that the defendant has by such failure on the plaintiff's part made some progress for themselves is contrary to the view expressed as above by their Lordships of the Judicial Committee. The learned District Judge was, therefore, not right in his appreciation of the law in this respect.

It is as well here to consider what is the true effect of this legal presumption. In *Sadik Husain Khan v. Hashim Ali Khan* (4), Lord Atkinson delivering the judgment of the Board said as follows:

"If this be so the rule of the Mahomedan Law applicable to the case is well established. No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy is possible."

Much to the same effect are the words of the judgment in the case of *Mt. Nawabunnissa v. Mt. Fuzloonissa* (5), which was quoted by Garth, C. J. and Wilson, J., in the case of *Mahatala Bibi v. Prince Ahmed Haleem-ooz-zaman* (3), a case cited approvingly by the Judicial Committee as already mentioned. It was said in that case:

"When a man has openly, and for a long course of time, lived with a woman, as a man lives with his wife, and has habitually and openly treated the children as his children

before the world or whom he has publicly and advisedly said, of a boy begotten by himself, "this is my son," then the presumption takes its full effect. In that case, we think that the law not only raises a presumption of marriage, but in practice prohibits any counter proof short of establishing a legal impossibility. In such a case we may not really believe that there was an actual celebration of marriage; we may have little doubt that there was nothing of the kind; but marriage is legally possible, and it must be presumed, not as much by presumption of fact, as by presumption of law."

If item (1) creates a presumption of which the plaintiff can avail notwithstanding that item (4) has not been accepted, let us examine the effect of the other two items, viz. (2) and (3). As regards item (2) it appears that Lal Bibi married the brother of the wife of defendant 1's brother and the dower was exactly the same as in the case of Kali Bibi an admitted legitimate daughter of Abdul Azim and in the kabinnamah she is described as daughter of Abdul Azim and designated Khanum. All this immensely adds to the presumption and the District Judge was also of opinion that it is weighty. As regards item (3) the account books as well as the signature of the plaintiff as an identifier do not go very far, but that certainly does not take away from the presumption.

To rebut the presumption the defendants have adduced evidence which has been classified above under six heads, (a) to (f). The plaintiff's failure to prove the kabinnamah which is item (a) is something which cannot possibly be held to disprove the marriage. Item (b) is sufficiently explained by the fact that the plaintiff was not born at the date and the consideration that weighed with the District Judge, namely, that if there was hope of a lawful issue Abdul Azim would not create such a wakf, may be explained on more hypotheses than one. Item (c) is a mere matter of opinion, and hardly any evidence in disproof of legitimacy. The District Judge himself has set no store by item (d) and has definitely disbelieved item (e). As regards item (f), two witnesses for the defendant have deposed to the effect that Najimannessa was not buried in the family burial ground. The trial Court relied on these witnesses, but the District Judge has not referred to them. Their evidence, on other points, is scarcely believable for they deposed that Najimannessa tended cattle and slept in the baitakkhana,

(2) A. I. R. 1918 P. C. 11=45 Cal. 878=45 I. A. 73 (P.C.).

(3) 10 C. L. R. 293.

(4) A. I. R. 1916 P. C. 27=38 All. 627=43 I. A. 212 (P.C.).

(5) 2 Hay. 479=Marsh 428.



which she would never do in any view of the case. In any event, the District Judge does not appear to have been impressed with their evidence, for he says that Najimannessa had some sort of footing in the household.

None of these items of evidence, (a) to (f), nor all of them together disprove the marriage or make the marriage an impossibility. The presumption in plaintiff's favour stands un rebutted and must have its effect.

The result is that issue 6 must be answered in the affirmative, with the result the other issues framed would require trial.

The appeal is, therefore, allowed, and the judgments of the Courts below being set aside the case will be sent back to the trial Court for trial and determination of the other issues in the case, and on that being done the suit will be disposed of by that Court.

Costs heretofore incurred will be costs in the cause. The cross-objection is dismissed but without costs.

V.B./R.K.

*Appeal allowed.*

## A. I. R. 1929 Calcutta 685

MUKERJI, J.

*Jamiraddin—Appellant.*

v.

*Khadejanessa Bibi and others—Respondents.*

Appeal No. 1642 of 1926, Decided on 26th March 1928, against appellate decree of Offg. Sub-Judge, First Court, Tippera, D/- 10th February 1926.

(a) Bengal Tenancy Act (8 of 1885), S. 105—Decision on rate of enhancement only—Decision does not operate as res judicata on question of correct rent.

Where the decision under S. 105 does not determine what the correct rent of the holding is but merely decides what the rate of the enhancement should be, the decision will not operate as res judicata in the investigation of the question as to what the true rent was at the date of the entry in the khatian: 44 Cal. 783; A. I. R. 1926 Cal. 822; Ref. [P 686 C 1]

(b) Civil P. C., S. 11—Subsisting judgment set up as res judicata—It can be impeached on ground of fraud and collusion in the same suit—Decree—Setting aside.

When a subsisting judgment, order or decree is set by one party as a bar to the claim of other party, it is not necessary for the other party to bring a separate suit to have the same set aside, but it is open to him in

the same suit in which it is sought to be used against him to show that it was obtained by fraud or collusion: A. I. R. 1926 Cal. 167, Dist.; 27 Cal. 11; 26 Cal. 591; 21 C.W.N. 594; 24 All. 242; 28 Bom. 630, Ref. [P 686 C 2].

*Nripendra Chandra Das and Nikunja Behari Ray—*for Appellant.

*Upendra Kumar Ray—*for Respondents.

**Judgment.**—The plaintiffs who are dar-ijaradars of a mahal instituted this suit for recovery of arrears of rent at the rate of Rs. 38-6-6 for the years 1327 to 1330 B. S. for a certain holding. The defendant alleged that the rent was Rs. 26 and was recorded as such in the settlement khatian and that as a result of proceedings under S. 105, Ben. Ten. Act, the said rent was enhanced to Rs. 29-10-6 the enhancement operating from 1328. There was also a plea of deduction which, however, was given up.

The Munsif decreed the suit at the rate of Rs. 38-6-6 for the year 1327 B. S. and at the rate of Rs. 29-10-6 for the years 1328 to 1330 B. S. The Subordinate Judge on appeal by the plaintiffs gave them a decree for all the years at the rate of Rs. 38-6-6. The defendants have then appealed to this Court.

The Subordinate Judge has found the following facts: The mahal in which the holding in suit is situate is in the hands of a receiver who lets it out in ijara for terms, and the ijaralar in his turn also sub-lets it in dar-ijara for similar terms, that although there was abundant evidence in the shape of contested decrees, etc., for rent showing that the rent of the holding was Rs. 38-6-6 the dar-ijaradar who preceded the plaintiffs in collusion with the defendants got the rent of the holding to be recorded in the settlement khatian as Rs. 26 and also collusively got a decree for rent passed for the years 1325 and 1326 B. S. at that rate, that the receiver being ignorant of the real facts took the said rent as recorded in the khatian to be real rent and on the footing of that entry instituted proceedings under S. 105, Ben. Ten. Act, and an order was passed by the Assistant Settlement Officer in the said proceedings allowing enhancement at the rate of 2 annas 3 pies in the rupee and thus the rental was enhanced from Rs. 26 to Rs. 29-10-6, the said enhancement to take effect from 1328. Being of opinion that the decision of the Assistant Settle-



ment Officer was vitiated by fraud and collusion the learned Subordinate Judge decreed suit at the real rate, namely, of Rs. 38-6-6.

The contentions urged in support of the appeal are that there was no duty cast upon the defendants to bring the real rate of rent to the notice of the Assistant Settlement Officer who dealt with the proceedings under S. 105, Ben. Ten. Act, and there was no fraud or collusion in those proceedings, that the decision under S. 105, Ben. Ten. Act cannot be challenged collaterally in the present suit for rent and that effect must be given to the said decision as contemplated by S. 107, Ben. Ten. Act.

Reading the decision of the Assistant Settlement Officer under S. 105, Ben. Ten. Act, it appears that the question as to what was the then existing rent of the holding was never put in issue before him, but that all that was decided by him was what the rate of enhancement should be. Quite apart from any question of fraud or collusion the decision under S. 105, therefore, will not operate as a bar to the investigation of the question as to what was the rate of rent at the date of the khatian for no such question was raised or decided in the proceedings under S. 105 *Nawab Bahadur of Murshidabad v. Ahmad Hossain* (1) and *Priyambada Debi v. Priya Nath Banerjee* (2). The present suit being one in which the plaintiffs have asked for a decree at the old rate of rent, and they having succeeded in establishing by evidence notably, contested decree for rent previously obtained against the defendants which in the opinions of both the Courts below was sufficient and satisfactory what that rent was and in thus proving that the entry in the khatian was incorrect the decision under S. 105 cannot stand in the way of their getting a decree at the correct rate. This conclusion, in my opinion, is sufficient for the disposal of the appeal.

I shall now turn to the line of reasoning upon which the learned Subordinate Judge has proceeded and deal with the grounds upon which that reasoning has been assailed. In the proceedings under S. 105, Ben. Ten. Act, there may not have been a duty cast upon

the defendants to tell the Assistant Settlement Officer what the real rent of the holding was when the receiver had asked that officer to proceed on the footing of the rent as recorded in the khatian but it is clear beyond doubt that the collusion between the outgoing dar-ijaradar and the defendants which was productive of the erroneous entry in the khatian had also for its object the perpetration of a fraud, the laying in of a trap in which the defendants' opponent, whoever it may happen to be, would fall and by keeping the opponent as well as the Court in ignorance of the real facts by means of a mediated contrivance secure to the defendants an unfair advantage which would bring about an erroneous decision when the question would arise as to what the real rent was. This sort of collusion and fraud is quite different from mere production of perjured evidence and satisfies the requirements of the decision in the case of *Nanda Kumar v. Ramjiban* (3); and is, in my opinion, sufficient to vitiate the order of the Court that is procured thereby. When a subsisting judgment, order or decree is set up by one party as a bar to the claim of the other party, it is not necessary for the latter to bring a separate suit to have the same set aside but it is open to him in the same suit in which it is sought to be used against him to show that it was obtained by fraud or collusion. *Rajib Panda v. Lekhan Sendh* (4), *Nistarini Dassi v. Nundo Lall Bose* (5), *Aswini Kumar Samuddar v. Banamali Chakrabarty* (6), *Bansi Lal v. Dhapo* (7) and *Rangnath Sakham v. Govind Narasivu* (8). That the same principle is applicable to decisions of Settlement Courts has been held in the case of *Hare Krishna Sen v. Umesh Chandra Dutt* (9). The case of *Fazuluddin Muhammad v. Khetra Ghorai* (10); and the line of cases upon which it proceeds is entirely distinguishable from the present case because the plaintiff in this case was not a party or privy to the settlement pro-

(1) [1917] 44 Cal. 783=25 C. L. J. 556=35 I. C. 695=21 C. W. N. 1004.

(2) A. I. R. 1926 Cal. 822.

(3) [1914] 41 Cal. 990=18 C. W. N. 581=23 I. C. 337=19 C. L. J. 457.

(4) [1900] 27 Cal. 11=3 C. W. N. 660.

(5) [1899] 26 Cal. 591.

(6) [1917] 21 C. W. N. 594=40 I. C. 607.

(7) [1902] 24 All. 242=(1902) A. W. N. 38.

(8) [1904] 28 Bom. 639=6 Bom. L. R. 592.

(9) A. I. R. 1921 Pat. L. J. 193=6 Pat. 373 (F.B.).

(10) A. I. R. 1926 Cal. 167.



ceedings, and he has acquired from the receiver who was a party to the decision under S. 105, Ben. Ten. Act, not the right to realise the particular rent of the holding. Once collusion and fraud is established the decision loses all its force and effect which otherwise it would have of a decree of a civil Court and the finality that S. 107, Ben. Ten. Act, attaches to it. The appellant's contentions, therefore, are not well founded.

The appeal fails and is accordingly dismissed with costs.

V.B./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 687

( B. B. GHOSE AND S. K. GHOSE, JJ.

*Hridoymohan Sanyal*—Appellant.

v.

*Khagendra Nath Sanyal and others*—Respondent.

Appeal No. 85 of 1929, Decided on 22nd July 1929, from appellate order of 1st Sub-Judge, Pabna and Bogra, D/- 15th September 1928.

(a) Civil P. C., S. 48—Compromise entered into during execution proceedings by which part of claim was given up and part agreed to be paid in instalment—If default in payment on specified date decree-holder entitled to execute for whole—Application for execution made on default—Application filed for execution of substituted decree and held not barred under S. 48.

A decree-holder applied for execution of his decree. There were more than one execution proceedings. At one such proceedings the parties came to terms and a compromise was entered into between them by which the decree-holder gave up part of his claim and judgment-debtor promised to satisfy the remaining claim in instalments. It was further agreed that in default of payment of instalment on specified dates decree-holder would be entitled to realize entire sum by execution. The first instalment was not paid on the specified date, and so the decree-holder made an application for execution. The application was made within three years of the default but more than 12 years after the passing of decree.

*Held*: that the application was an application to execute the substituted decree and the provisions of S. 48, Civil P. C., did not operate as a bar to it provided the application was otherwise sustainable: 27 C. W. N. 43n, Dist. [P 689 C 1]

(b) Civil P. C. O. 21, R. 2—For execution of adjusted decree adjustment must be certified—No limitation applies to decree-holder's application.

In order to enable an executing Court to execute an adjusted decree the only require-

ment is that the adjustment should be certified under O. 21, R. 2. The decree-holder can certify such adjustment at any time as there is no limitation with regard to his application. [P 689 C 1]

(c) Jurisdiction—Provided there is no want of jurisdiction in Court agreement between parties can invest Court with jurisdiction for certain proceedings contrary to ordinary *cursus curiae*.

Provided there is no inherent want of jurisdiction in the Court with regard to the subject matter before it or with regard to person, parties should be held to the agreement that the questions between them should be heard and determined in proceedings quite contrary to the ordinary *cursus curiae*. If, therefore, there is an agreement that the money due under an agreement was to be realized by execution rather than by regular process of separate suit, the agreement can be given effect to: *Pisani v. Attorney General Gibraltar*, 5 P. C. 516; 2 I. A. 219; 20 Cal. 22 and 11 All. 228, *Foll.* [P 689 C 1]

*Surajit Chandra Lahiri*—for Appellant.

*Birendra Kumar Le*—for Respondents.

B. B. Ghose, J. — We have heard learned advocates on both sides at some length and we must express our acknowledgment to them for the very careful way in which this case has been argued before us.

This is an appeal by the decree-holder or rather the person who has applied for execution of an agreement against the judgment and order of the learned Subordinate Judge affirming the decision of the Munsif by which the application of the appellant was dismissed. The facts are shortly these:

The appellant obtained a decree for money against the respondents dated 17th December 1913. There were intermediate executions which it is unnecessary to relate now. In one of the execution proceedings the parties came to terms and a compromise was entered into between them dated 16th September 1922, by which the decree-holder gave up a part of his claim and it is alleged in the petition of compromise that the judgment-debtor entreated the decree-holder to accept only Rs. 350 in satisfaction of the decree including costs. They paid Rs. 100 in cash and the balance was agreed to be paid in certain instalments. It was further agreed that if there was default in payment of one of the instalments, the decree-holder would be entitled to realize the entire sum by way of execution against the properties of the



judgment-debtors. The first instalment was due in October 1923. The present application was made on 8th November 1926. It has been found by both the Courts below that this application was made within three years of the due date, as holidays intervened. Both the Courts below have dismissed this application on the ground that it is barred under the provisions of S. 48, Civil P. C., as it was made more than 12 years after the date of the original decree passed in the year 1913. It was argued in the Court below that the present petition is a continuation of the petition of 1922 which ended in the compromise. That argument the learned Subordinate Judge refused to accept and, in my judgment, he gives good reasons for rejecting it. He held that the nature and the scope of the two petitions of 1922 and 1926 are quite different and, therefore, the last petition cannot be considered as a continuation of the previous proceedings. It was also argued that under the circumstances of the case it falls within proviso (b), sub-S. (ii), S. 48, Civil P. C. The Subordinate Judge also rejected that contention. The learned advocate for the decree-holder, however, while not giving up the points that were urged in the Court below has presented the case in a different aspect. His argument amounts to this, that the decree was adjusted by the compromise dated 16th September 1922 and the result of the adjustment was that the original decree was extinguished. That being so, the appellant might have brought a suit upon the agreement dated 16th September 1922; but as both the parties agreed that the money should be realized by execution, the executing Court was given jurisdiction to proceed with the execution of the claim and give relief to the appellant. In support of his contention he has relied upon the case of *Thakoor Dyal Singh v. Sarju Pershad Misser* (1), *Sheo Golam Lall v. Beni Prosad* (2) and *Subramania Pillai v. Corera* (3). The learned advocate for the respondent naturally takes exception to the case being presented in this new form. If the appellant can support his contention from the records of the case, it would only be a matter for costs.

What the appellant did in the trial

(1) [1893] 20 Cal. 22.

(2) [1880] 5 Cal. 27=4 C. L. R. 29.

(3) A. I. R. 1925 Mad. 457.

Court was to ask for the execution of what he stated to be an instalment decree on compromise dated 16th September 1922. The question therefore resolves itself into this: can the appellant realize the money under the compromise by way of execution on the allegation that he is entitled to the money by that compromise of 1922. If the decree-holder has sought for execution of the decree of 1913, there is no question that that application would be barred by limitation. But the question is whether it is an application to execute that decree. The Court below has referred to the case of *Rani Syama Sundari Devi v. Sree Raj Gopal Acharya Gossami* in M. A. 328 of 1920 which the learned Subordinate Judge cited from 27 C. W. N. Notes portion, p. 43. That case has a strong resemblance to the present but is not quite like it. There a decree was passed on 14th December 1905. Parties came to certain terms in adjustment of the decree in 1910 for payment of the decretal amount in instalments. The application for execution was filed on 16th September 1919 and it was held by the Court that this application was barred under S. 48 of the Code. In so deciding, Sir Lancelot Sanderson, C. J., who delivered the judgment of the Court, stated that in his judgment the application was clearly one for execution of the decree dated 14th December 1905. If that was so, then an application made for its execution on 16th September 1919 was clearly barred under the provisions of S. 48, Civil P. C. The reason why the learned Chief Justice held that the application in that case was for execution of the decree of 1905 is clear from the terms of the compromise entered into by the parties. One of the terms ran as follows:

"As long as the amount due under the instalments remains unpaid, the said original decree shall remain in force."

From these words it is quite clear that the original decree was not superseded by the compromise but it was only an intermediate arrangement for payment of the original decree and it seems to me that on that ground it was held in that case that the decree-holder desired to execute the original decree of December 1905 in September 1919. Therefore although there is some sort of resemblance of that case with the present, they are quite different because in this case the



original decree is altogether superseded and a new arrangement has been entered into and as I have pointed out that in his execution petition the decree-holder wanted to execute the substituted decree of 16th September 1922. The provisions of S. 48 cannot bar that application if that application is otherwise sustainable.

The objection raised by the learned advocate for the respondent is that the appellant cannot ask for execution because the parties by entering into a contract cannot give jurisdiction to a Court to realize any money due under a contract by way of execution. The point is not quite free from difficulty. It has, however, been held in a series of cases following the well known case of *Pisani v. Attorney General for Gibraltar* (4) that where there is no inherent want of jurisdiction in a Court in the subject-matter before it or with regard to the person, the parties by agreement may arrange their own procedure and give jurisdiction to the Court to adopt that procedure. *Pisani's* case was followed in an Indian case by the Privy Council in *Sadasiva Pillai v. Ramalinga Pillai* (5), and then in a series of cases in the High Courts of India. In the case of *Dyal Singh v. Sarju Pershad Misser* (1) a Division Bench of this Court following the Privy Council case held that the parties should be held to the agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiae* and applying this rule to the case, they held that the money due under the agreement there could be realized as in execution of a decree rather than by a recourse to a separate suit. In the case of *Muhammad Sulaiman v. Jhukki Lal* (6), Mahmood, J., at p. 233 discussed this question in detail. It is necessary, however, to mention that in these cases S. 257-A was referred to because under the Code of 1882 it was necessary to have the sanction of the Court with regard to any adjustment of a decree as without such sanction the adjustment would be void in law. There is no such provision in the present Code and therefore the decree-holder and the judgment-debtor can enter into any ag-

reement for adjustment of a decree. In order to enable the executing Court to execute the decree as adjusted, the only requirement is that the adjustment should be certified under O. 21, R. 2 of the Code. The decree-holder can certify such adjustment at any time as there is no limitation with regard to his certification. But the only question in this case is that if the decree-holder might have brought a separate suit on the agreement, can he not ask for relief in execution by reason of the agreement entered into between the parties that the money should be realized in execution? The cases that have been cited above are authorities for that proposition.

The result is that the order of the Court below is set aside and the case sent back to the trial Court for allowing the appellant to proceed with the execution of the agreement and to recover the money due under it in the usual way as in the case of a decree. As, however, the case was not presented in the Courts below in the way that it has been done here, the appellant is not entitled to his costs hitherto incurred in any of the Courts. Future costs will abide by the discretion of the Court.

S. K. Ghose, J.—I agree.

V.B./R.K.

*Appeal allowed.*

### \* \* A. I. R. 1929 Calcutta 689 Full Bench

RANKIN, C. J., C. C. GHOSE, BUCKLAND, B. B. GHOSE AND MUKERJI, JJ.  
*Taleb Ali and another*—Decree-holders—Appellants.

v

*Abdul Aziz and others*—Respondents.

Full Bench Ref. No. 1 of 1929, Decided on 2nd September 1929, in appeal from appellate order No. 423 of 1928, against order of Dist. Judge, Tipperah, D/- 14th May 1928.

\* \* Civil P. C., S. 97—Appeal from preliminary decree after final decree is not incompetent—Appeal against final decree is not necessary for maintaining appeal against preliminary decree.

An appeal from a preliminary decree is not incompetent even if a final decree is made

[Note.—Another F. B. consisting of the same Judges relying upon this F. B. disposed of Full Bench Ref. No. 1 of 1929, in appeal from Original Decree No. 202 of 1926 as the point involved was the same.]

(4) [1874] 5 P. C. 516=22 W.R. 900=30 L.T. 729.

(5) [1874] 2 I. A. 219=24 W. R. 193=3 Sar. 519 (P.O.).

(6) [1899] 11 All. 228=(1899) A. W. N. 53.



before the appeal is presented. Nor is it necessary for a party aggrieved by a preliminary decree to appeal both from that decree and against the final decree in order to maintain his appeal against the preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct: 36 *All.* 532 (*F. B.*), *Rel. on*; 17 *C. W. N.* 868, *Appr.*; (*Case law considered.*) [P 697 C 1, 2]

*Shailendra Mohan Das*—for Appellants.

*A. C. Gupta and Bhagirath Chandra Das*—for Respondents

**Rankin, C. J.**—The plaintiff brought a suit in the Court of the Munsif on the allegation that the defendant was in possession of certain land under a mortgage by conditional sale made to him by the plaintiff and claimed to redeem the mortgage and to recover possession of the land. The defendant contended that the mortgage was not genuine, and that the land was his own. A preliminary decree for redemption was made on 8th December 1924 and on 19th December a final decree for redemption was made, the defendant not appearing. The defendant, on 6th January, preferred an appeal to the lower appellate Court against the preliminary decree. When this appeal came on for hearing no objection was raised that the appeal was incompetent, and on 14th December 1925, the appeal was allowed and the plaintiff's suit was dismissed altogether. Two years afterwards the plaintiffs applied to the Court of the Munsif for execution of the final decree. The defendant objected to the execution on the ground that the preliminary decree upon the basis of which the final decree had been passed, having been set aside, the final decree was not a subsisting decree of which execution could be had. The Munsif, and, on appeal from him, the District Judge, have upheld this objection. On second appeal to the High Court by the plaintiff a Division Bench has expressed the opinion that the judgments of the lower Courts are correct, but, in view of certain previous decisions of this Court, has referred the case to a Full Bench for final decision and has formulated the following questions:

(1) Whether an appeal from a preliminary decree is incompetent if a final decree is made before the appeal is presented?

(2) Whether it is necessary for a party aggrieved by a preliminary decree

to appeal both from that decree and the final decree in order to maintain his appeal against the preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct?

In the present case no question arises of the defendant having by his conduct subsequent to the passing of the preliminary decree precluded himself from exercising any right of appeal therefrom conferred upon him by the general law. It is not necessary, therefore, to discuss such cases as *Baikuntha Dey v. Salim-ulla Bahadur* (1) or *Sheik Salim v. Hajira* (2) or to enquire what kind of conduct will debar a litigant from exercising a right of appeal given to him by Statute. The mere fact of a final decree is not evidence of such conduct or even of laches. Again, whether or not the defendant, after the passing of the preliminary decree, ought to have preferred an appeal from the final decree as well, it is by no means manifest that the lower appellate Court was without jurisdiction to hear the appeal from the preliminary decree. As it did, in fact, dismiss the plaintiff's suit, it may well be contended that this decision must govern the parties' rights even if it be supposed that the appeal ought not to have been decreed. Indeed the decision in *Abdul Jalil v. Ameerchand* (3) is an authority to this effect.

I propose, however, to examine the two questions referred to us. In practice they have been found to give rise to much difficulty both in this Court and in the lower Courts.

The terms "preliminary" and "final" decree were probably in general use before 1908, but S. 2, Civil P. C., of that year introduced them as technical expressions and provided a definition:

"A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

Under the present Code suits to redeem or to enforce a mortgage, suits for partition, partnership suits, suits for accounts and other classes of suits are now disposed of by means of two decrees, the preliminary decree which usually

(1) [1907] 12 *C. W. N.* 590=6 *C. L. J.* 547.

(2) *A. I. R.* 1928 *Cal.* 325=55 *Cal.* 506.

(3) [1913] 18 *C. L. J.* 223=21 *I. C.* 510.



settled the rights of the parties, and in this sense is final, (cf. *Rahimbhoy v. Turner* (4), but which looks forward to a further decree to be made after the rights of the parties, thus declared, have been worked out by subordinate enquiries and other means. Under the Code of 1882, different provisions were made for different classes of suits. Thus, as regards suits for possession of immovable property and for mesne profits, S. 212 provided that :

"the Court may, however, determine the amount by the decree itself or may pass a decree for the property and direct an enquiry into the amount of mesne profits and dispose of the same on further orders."

As regards administration suits the provisions of S. 213 was that :

"the Court before making the decree shall order such accounts and enquiries to be taken and made and give such other directions as it thinks fit."

As regards suits for dissolution of partnership S. 215 provided that :

"the Court before making its decree may pass an order fixing a date on which the partnership shall stand dissolved and directing such accounts to be taken and other acts to be done as it thinks fit."

So too, under S. 215-A, in a suit for accounts between principal and agent, "the Court shall before making its decree pass an order directing such accounts to be taken as it thinks fit."

In suits to enforce a mortgage the provisions of the Transfer of Property Act did not require that a mortgage decree under S. 88 should be followed by any supplemental decree, but only, if necessary, by an application for an order absolute for sale under S. 89. This was clearly brought out by Sir Lawrence Jenkins in *Amluk Chand v. Sarat Chandra* (5). The order absolute for sale was regarded as an order for the realization of the decree or as an order giving the plaintiff execution for the amount of the decree. Under the Code of 1882, however, the general definition of decree was wide enough to cover orders, if these were formal expressions of adjudication upon any right, claim or defence set up in a civil Court when such adjudication, so far as regards the Court passing it, decided the suit or appeal so that many orders were appealable as being decrees. Other orders were made appealable by S. 588 and by

S. 591 it was provided as regards all orders that :

"if any decree be appealed against, any error, defect or irregularity in any such order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal."

The Code of 1908, by providing for preliminary and final decrees introduced a uniform practice for many different classes of suits, and by S. 97 provided that :

"where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

This last provision is also applied, by S. 105, Cl. (2), to orders of remand from which an appeal lies. The difficulties which have been referred to us for solution arise from these provisions. A litigant, aggrieved by a preliminary decree, cannot seek remedy for his grievance in an appeal from the final decree; a litigant aggrieved by an order of remand from which an appeal lies, must appeal therefrom directly or be precluded from disputing its correctness.

The decisions from which the Division Bench has in this case dissented are decisions which purport, in the altered circumstances, to apply or adopt principles which the Court had applied under the Code of 1882. Under the old Code the first decision to be noticed is that of *Jatinga Valley Tea Co. v. Chera Tea Co.* (6). The suit was for possession of land. The first Court had given the plaintiff a decree and the lower appellate Court had remanded the case for a local investigation. Thereupon, it would seem that the plaintiff appealed to the High Court against the order of remand and that subsequent thereto, the trial Court had proceeded with the case and passed a decree dismissing the plaintiff's suit. Whether this decree was made before or after the presentation of the appeal to the High Court is not quite clear from the report and the original record of the appeal throws no light on the question. It may be taken, however, that the presentation of the appeal preceded the dismissal of the suit. In the High Court it was contended that the existence of the final decree was a bar to the hearing of the appeal. This contention was rejected on the ground that S. 588 of the

(4) [1890] 15 Bom. 155=18 I. A. 6 (P.C.).

(5) [1911] 39 Cal. 913 (920)=11 I. C. 943=16 C. W. N. 49.

(6) [1885] 12 Cal. 45.



Code gave an appeal in such a case. Field, J. said :

"that provision is not in any way qualified. The Code does not say that there shall be an appeal only if the case has not been finally decided in the Court of first instance before that appeal is preferred or comes on for hearing."

The Court not only set aside the order of remand but set aside the decree which had been made upon it and which was held to be based upon it.

Twenty years afterwards, in *Madhusudan Sen v. Kamini Kanta Sen* (7) the question again arose in a suit for ejectment. The Munsiff had dismissed the suit ; the Subordinate Judge had ordered a remand for the trial of certain issue : before the defendant appealed to the High Court from the order of remand, the Munsiff had tried the suit for the second time and had made a decree in favour of the plaintiff ex parte. Maclean, C. J. and Mitra, J., held the appeal to be incompetent and the decision in this case lies at the root of the present difficulty. The Court distinguished the *Jatinga Valley* case (6) on the ground that the appeal from the order of remand had been presented before the suit had been dismissed. Maclean, C. J., reasons that the orders specified in S. 588 comprise first of all some whose force lasts only as long as the suit is pending and that the right of appeal from such orders should cease with the disposal of the suit. He admits, however, that other orders do affect the decision on the merits and that an order of remand is of this nature. He observes that S. 588 makes no distinction between these two classes and that : "a party failing to appeal from an order of remand is not without a remedy. He may appeal from the final decision and on that appeal take exception to the validity of the order of remand."

He concludes therefore :

"If a party desired to avail himself of the privilege conferred by S. 588 in relation to an order of remand, he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then appeal from the interlocutory order without appealing from the decree in the suit."

Now the judgment of Field, J., in the *Jatinga Valley* case (6) had pointed out that S. 588 contains no such qualification of the right of appeal. In subsequent cases the reasoning of Sir Francis

Maclean has on this ground been condemned as a matter of construction : see *Laxmi v. Maru Debi* (8), *Kanahaya Lal v. Tirbeni Sahai* (9) per Champier, J., at 537. Again, to say that S. 588 of the Code deals with two classes of orders: those which do not affect the decision of the case and those which do, is to give no very strong reason for laying down a rule for both which is appropriate to the former only. There is no doubt a distinct convenience to be gained by requiring a litigant when he brings his appeal, to attack the final decree if such a decree has been passed. This, however, depends entirely upon the right of the appellant to challenge the previous decree in his appeal from the later one, and it has to be remembered that in a case where the appeal has been brought before the final decree had been passed, the advantage aimed at by this decision is unattainable. It may here be observed that the language of Maclean, C. J. though clear enough with reference to the Code of 1832, has given rise to some confusion. When it was said that the appellant cannot be permitted to wait until after the final disposal of the suit and then to appeal against an interlocutory order without appealing from the decree in the suit, it was not meant that one appeal would be competent or incompetent according as another had been brought or not brought. What was meant was that after a final decree had been passed, an appeal from an interlocutory order was incompetent as such, but that in an appeal from the decree an interlocutory order could be reversed or varied if it affected the decision of the suit. Maclean, C. J., was not arguing for two appeals but for one appeal in which the whole case would be disposed of.

The next case was that of *Mackenzie v. Narsingh Sahai* (10). This was a partition suit and the appeal from the preliminary decree (so to call it though it was made in 1907), was not preferred until the final decree had been passed. A Division Bench held that a preliminary decree was subject to the rule laid down

(8) [1914] 37 Mad. 29=12 I. C. 664=21 M. L. J. 1063.

(9) [1914] 36 All. 532=24 I. C. 827=12 A. L. J. 876 (F. B.).

(10) [1909] 36 Cal. 762=1 I. C. 413=10 C. L. J. 113.



in *Madhusudan's* case (7) for interlocutory orders. This was said to be obvious and to follow from the application of a simple test. The test was as follows :

"If the appeal is heard on the merits and the preliminary judgment of the Subordinate Judge set aside, what would be the position of the parties ? The final decree which up to present moment, has not been questioned by way of appeal, would still stand and that decree would entitle the plaintiff to eject the appellant. If the appeal is heard and decided in favour of the appellant, in order to give him any relief, the final decree, against which no appeal has been preferred, would have to be indirectly set aside. It is difficult to appreciate how such a state of things could possibly have been contemplated by the legislature."

This case, though decided in 1909 was decided under the Code of 1882 and it appears to be the first case to treat a preliminary decree as on the same footing as an interlocutory order made immediately appealable by S. 588 of the old Code. The basis of the reasoning is that the final decree, unless directly and formally attacked, will remain unaffected though the preliminary decree be set aside. The case does not explain the principles upon which the presentation of an appeal from the preliminary decree before the final decree is passed enables a final decree to be set aside indirectly without formal and direct attack.

*Janki Nath v. Promotha Nath* (11) was the first case under the new Code in which these doctrines were applied. They were applied to an appeal against an order of remand the appeal being filed after the disposal of the suit upon remand. They were applied notwithstanding the new provision in S. 105 (2) upon which the only observation made was that this clause:

"does not meet the present case but applies rather to the converse case."

The learned Judges failed to observe that this clause had made any difference at all to the reasoning of Maclean, C. J. in *Madhusudan's* case (7) or even that it had affected the doctrine as to "election of alternative remedies" laid down by Mookerjee, J. In the case of *Baikantha v. Salimullah* (1) under the Code of 1882 leaving aside cases in which the presentation of the appeal from the preliminary decree preceded the passing of the final decree. I come next to the case

*Khirodamoyi Dasi v. Adhar Chandra* (12). This case was governed entirely by the Code of 1908 but the principles of *Mackenzie's* case (10) were applied to it. It was laid down that whether or not an appeal has been preferred against the preliminary decree before the final decree has been passed, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree if he desires a remedy, and it was further held that in either case an appeal against the preliminary decree alone would be useless. In this respect, it will be seen, this decision goes beyond *Mackenzie's* case (10) and beyond *Madhusudan's* case (7). Of S. 97 of the new Code it was observed:

"That section does not, however, relieve the person who appeals from the preliminary decree from the necessity of appealing against the final decree; nor does it provide how, if the preliminary decree is contrary to the terms of the final decree, the final decree is to be interfered with if it has been allowed to stand without any appeal being preferred against it."

In the end, however, and inconsistently with their reasoning, the learned Judges appear to fall back upon the consideration that the appeal was presented after the final decree has been pronounced. The logic of this case would appear to be that nothing which can happen upon an appeal against a preliminary decree can affect the final decree, and in keeping with this view no suggestion is offered as to any principle according to which the final decree can be held to stand or fall according as an appeal against the preliminary decree was preferred before or after the making of the final decree.

The next case is the Madras case already referred to, *Laxmi v. Maru Debi* (8). The appeal in this case was against a preliminary order in execution and it was not filed until after the date of the final order. The decision contains a criticism of the Calcutta cases to which I have referred. It lays down that the final order merely carries out the former order and does not supersede it; that the final order could not affect or take away the right of appeal against the preliminary order; that the final order depends for its authority upon the preliminary order and that upon the quashing of the latter it would cease to have any force; that under S. 97 a party

(11) [1911] 15 C. W. N. 830=10 I. C. 514.

(12) [1912] 18 C. L. J. 321=21 I. C. 516.



whose grievance is against the preliminary order is bound to appeal against it and cannot dispute its correctness in any appeal from the final order; that in these circumstances he may have no grievance which he can raise against the final order and an appeal therefrom would be an empty formality. In *Bagaband Chandra v. Ishan Chandra* (13) the final decree was passed on 11th November though not drawn up or signed till 18th November. On 16th November an appeal was preferred against the preliminary decree. Fletcher, J., after pointing out that on 16th November the only decree against which the appellant could appeal was the preliminary decree, referred to a previous decision of his own in *Atul Chandra v. Kunja Behari* (14), saying:

"the right of appeal given by S. 97, Civil P. C., is one that is not taken away by the mere fact that the Judge has passed a final decree."

In *Atul's* case (14) the presentation of the appeal had preceded the passing of the final decree and the Court held that if the appeal succeeded, the final decree ought to be amended in accordance with the result of the appeal.

In *Kulada Prasad v. Ramananda* (15), the preliminary decree in a suit to enforce a mortgage had been followed by the final decree before the defendants filed an appeal against the preliminary decree. Mookerji, J. re-affirmed the principles upon which he had decided the case of *Mackenzie v. Narsingh Sahay* (10):

"If we were now to reverse the preliminary decree at the instance of the appellant, the final decree would still remain unaffected as no appeal has been made to challenge the propriety of that decree."

Referring to *Khirodamoyi's* case (12), he says, but not so far as I can see correctly, that it was ruled:

"that the final decree must be deemed to have been made on the assumption that if the preliminary decree should be modified or set aside in the appeal, the final decree also would be similarly modified or set aside."

In this case, however, the Court allowed the appellant to amend his memorandum of appeal so as to turn it into an appeal against both decrees. Again in *Nanibala v. Ichhamoyee* (16),

the same learned Judge re-affirmed the principles that the right of appeal from interlocutory orders ceases after the disposal of the suit, and that this rule is applicable to cases in which there is a preliminary decree and a final decree distinguishing certain cases in which the appeal against the preliminary decree had been lodged before the final decree was made, he says:

"It was ruled that the final decree must be deemed a contingent decree or in the words of Turner, L. J. in *Shama Purshad v. Hurro Purshad* (17), a subordinate and dependent decree liable to be superseded by the modification or reversal of the preliminary decree which was the subject matter of appeal before a superior tribunal when the final decree was made on the basis thereof in the primary Court."

In this case also recourse was had to the device of amending the memorandum of appeal so as to enlarge its scope and convert it into a combined appeal against both the preliminary and the final decree.

Where an appeal has been brought from the preliminary decree before the final decree has been passed, this Court has consistently held that such appeal is competent and that if the preliminary decree be set aside the final decree falls to the ground along with it. In these cases attempt has been made to induce the Court to affirm that the passing of a final decree takes away from the appellate Court its jurisdiction over the appeal already lodged against the preliminary decree; or else to hold that the final decree is valid and subsisting until set aside formally and directly by an appeal therefrom.

*Ugra Narain Singh v. Basanta* (18) like the case now before this Court, arose out of an application to enforce a final decree in execution. The suit was for an account.

"At the time when he preferred the appeal no final decree had been passed. The appellate Court therefore certainly had jurisdiction to hear the appeal and that power was not taken away by the final decree . . . . The final decree in the case which merely determined the amount for which the defendant was liable to the plaintiff was dependent upon the preliminary decree which held that the defendant was liable to render accounts and the validity of the proceedings which resulted in the final decree depended upon the preliminary decree itself: and that decree hav-

(13) [1918] 22 C. W. N. 891=46 I. C. 802.

(14) [1915] 22 C. L. J. 90=40 I. C. 321.

(15) A. I. R. 1921 Cal. 109=48 Cal. 1036.

(16) A. I. R. 1925 Cal. 218.

(17) [1865] 10 M. I. A. 203=3 W. R. 11=2; Suther. 103 (P.C.).

(18) [1913] 17 C. W. N. 868=19 I. C. 630.



ing been set aside on appeal, the final decree necessarily fell through. It has been contended that it was at any rate necessary to have the final decree formally set aside and that at all events the question could not be gone into in execution proceedings and that the executing Court has no power to deal with it. We think, however, that the final decree was superseded by the order of the appellate Court setting aside the preliminary decree upon which it depended. We are therefore of opinion that it is perfectly open to the executing Court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not and if such decree has been superseded and is no longer operative, the executing Court is entitled to refuse execution on that ground."

It will be noticed that in this reasoning the subordinate and dependent character of the final decree is rested not upon the fact of an appeal having been presented in the interim but upon the essential character of that decree and the nature of its relation to the preliminary decree. In *Nistarini v. Raimohun* (19) Mookerjee, J. rested it upon this:

"The party who obtained the final decree in his favour took it while the preliminary decree was under appeal. The final decree therefore must be deemed subject to the result of that appeal."

In *Kanhaya Lal v. Tribeni* (9) a decision of a Full Bench of the Allahabad High Court, the fact that the appeal against the preliminary decree had been filed before the passing of the final decree was not made the basis of the decision. The basis of the decision was the necessary dependence of the final decree upon the preliminary decree on which it was based. The Calcutta decisions were said to proceed on the basis that the final decree continued after the preliminary decree had been set aside, a view which was held to be erroneous.

In *Wahidunnessa v. Dip Narain* (20), Chamier, C. J. adhered to the Allahabad decision and Sharfuddin, J. affirmed that: "a preliminary decree has existence independent of the final decree and the final decree instead of extinguishing the preliminary decree gives effect to it."

It will be seen, therefore, that in this Court the decisions have followed two distinct lines according as the appeal from the preliminary decree was lodged before or after the final decree was passed. No difficulty has been felt in the former case. In the latter case it was not possible to say under the Code

of 1908 that the appeal from the preliminary decree was incompetent, but it was said that its competence depended upon the bringing of another appeal from the final decree itself. The first effective challenge to this doctrine was made in *Kasinath v. Himmat Ali* (21), B. B. Ghose, J. said:

"In my opinion, therefore, where a preliminary decree has an independent existence and a person aggrieved by it is bound to appeal from it, that right cannot be taken away by a final decree being passed either before or after the person appeals from the preliminary decree."

The order of reference in the present case repeats and amplifies this reasoning.

In my judgment it is altogether unreasonable to treat a preliminary decree under the Code of 1908 as a mere interlocutory order whose force is spent when the suit is disposed of. The definition given by S. 2 of the Code makes any decree preliminary:

"when further proceedings have to be taken before the suit can be completely disposed of."

This certainly is a lame definition and if it were taken strictly one might well ask how any decree could be partly preliminary and partly final. In mortgage or partition suits, in suits for partnership or other accounts, the preliminary decree is what in the Court of Chancery would have been described simply as "the decree;" the final decree corresponds to the "order on further consideration." The "further proceedings" are proceedings under preliminary decree and consist mainly of what Lord Hobhouse in *Syed Muzhar Hussain v. Bodha Bibi* (22) described as 'subordinate enquiries.' S. 97 has expressly excepted preliminary decree from the position assigned to interlocutory orders, precluding an appellant from impeaching them in the course of an attack upon the final decree. If there be any general doctrine of law to the effect that interlocutory orders cease to have any effect after the final disposal of the suit and that therefore they lose their appealable character upon the passing of the final decree, and I do not here affirm such doctrine, it is in my judgment reasonably clear that preliminary decrees, under the Code of 1908, which determine such questions as liability to account, existence of a mortgage, share in joint property, are altogether outside its scope.

(19) [1913] 18 C. L. J. 214=20 I. C. 576.

(20) [1916] 20 C. W. N. 1174=1 Pat. L. J. 406=35 I. C. 873=1 Pat. L. W. 13 (F. B.).

(21) A. I. R. 1929 Cal. 720.

(22) [1894] 17 All. 112=22 I. A. 1 (4) (P. C.).



In the second place I think it wrong to hold that the presentation of an appeal from the final decree is a circumstance which renders the final decree contingent upon the result of the appeal or creates in the final decree a character of dependence or subordination. In my judgment the final decree is, in its nature, dependent and subordinate because it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon. A final decree when passed is capable of immediate execution and the presentation of an appeal from the preliminary decree does not operate as a stay of execution. The Court which passes a final decree need not necessarily have before it the circumstance that an appeal from the preliminary decree has been presented. Whether such an appeal has been presented and whether or not the attention of the Court has been brought to the fact these matters in no way qualify the final decree when made.

Again, the doctrine that subordinate and dependent decrees come to nothing when the decree on which they are dependent is set aside must now be viewed in the light of the decision of the Judicial Committee in *Naganna Naidu v. Venkatappayya* (23). *Shama Prasad's* case (17), has for years been taken as extending this doctrine very widely but the decision of the majority of the Full Bench in *Jogesh Chandra Dutt v. Kali Churn Dutt* (24), has now been overruled. In a case such as the present, however, I see no reason for holding that the final decree is not a subordinate and dependent decree. It is as much subordinate and as much dependent as an order for the execution of a decree is subordinate and dependent on the decree which is being executed. The function of the final decree is merely to re-state and apply with precision what the preliminary decree has ordained. The decrees are in the same suit. The appellate Court, if it has power over the preliminary decree at all, power to reverse it or vary it, has power to affect the final decree. In a redemption suit, such as we are now concerned with, it has power to see whether there has been any mortgage and, if so, upon what basis the

plaintiff should be permitted to redeem. There is no intermediate position between the view that the mere existence of a final decree takes away all power from the appellate Court over the preliminary decree and the view that the appellate Court being competent to hear the appeal from the preliminary decree has necessarily the right to set aside the final decree and any other proceedings based upon the decree under appeal. With the solitary exception of *Khirodamoyi's* case (12), opinion in this Court has been unanimous to the effect that the existence of a final decree does not deprive the appellate Court of its power to hear an appeal previously presented against the preliminary decree.

It appears to me that in this matter we should take our stand upon the express provisions of the Code and refuse to read into the Code qualifications and conditions of which it contains no sign. I respectfully adopt the language of Chamier, J., in *Kanhaiya Lal's* case (9) at p. 536:

"The Code gives a right of appeal against a preliminary decree and further provides that where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. It seems to me that we are not at liberty to read into the Code any provision to the effect that the passing of the final decree shall be a bar either to the institution or the hearing of any appeal against the preliminary decree."

I would add that when a preliminary decree is set aside the final decree is superseded whether the appeal was brought before or after the passing of the final decree and that in my judgment an appellate Court when setting aside or varying a preliminary decree can, and indeed should, give direction for the setting aside or varying of the final decree if the existence of the final decree is brought to its notice as in all cases it ought to be. In the present case the preliminary decree affirming the existence of a mortgage has been set aside and the plaintiff's suit has been dismissed. But, be the question clear or difficult, I am of opinion that a Court of execution is entitled to enquire whether the final decree originally passed is still subsisting or has ceased to have effect. It does so when a decree has been reversed. It must do so when a decree has been superseded. No doubt had *Shama*

(23) A. I. R. 1923 P. C. 167=46 Mad. 895=50 I. A. 301 (P.C.).

(24) [1878] 3 Cal. 30=1 C. L. R. 5 (F.B.).



*Prasad's* case (17) stood unexplained there would have been some difficulty here and it is true that the present class of case was not considered by the Full Bench in *Gorachand Haldar v. Prafulla Kumar* (25). But on this point the reasoning of Chatterjee and Walmsley, JJ., in *Ugru Narain Singh v. Basantanarayan* (18), is in my opinion sound and should be followed.

I would answer in the negative both of the questions which have been referred to us. In my opinion the appeal should be dismissed with costs before the Division Bench and before us. Consolidated hearing fee before both Benches is fixed at ten gold mohurs.

**C. C. Ghose, J.**—I agree.

**Buckland, J.**—I agree.

**B. B. Ghose, J.**—I am entirely of the same opinion. As one of the referring Judges, I am glad that the cobwebs which disfigured the procedure of our Courts for a great many years have been swept away by the judgment of my Lord the Chief Justice just pronounced.

**Mukerji, J.**—I agree.

R.K.                      *Reference answered  
in negative.*

(25) A. I. R. 1925 Cal. 907=53 Cal. 166 (F.B.).

### \* A. I. R. 1929 Calcutta 697

B. B. GHOSE AND N. K. BOSE, JJ.

*Baldeo Das Bajoria and others*—Appellants.

v.

*Sorojini Dasi and others*—Respondents.

Appeal No. 338 of 1928, Decided on 29th May 1929, from original decree of 4th Sub-Judge, Alipur, D/- 31st March 1928.

\* (a) **Hindu Law — Partition — Mother's right to share arises only on partition being actually effected by sons and then with regard to property available to sons for partition—She is not even a necessary party to partition suit—She can only watch proceedings to guard her interest.**

Mother's right to claim share arises only on partition, no matter whether the partition is made amicably or as result of a decree by a suit. The bringing of a suit for partition by one of the sons does not confer any right on the mother to have a share. If the suit for partition is withdrawn, the mother cannot claim any share, nor can she insist that the suit must be carried on to a decree. If the partition suit is dismissed by the Court for some reason or other, then the mother could not get any share in the property. It is only

when the property is actually partitioned that the mother would get a share equal to that of the sons. She is not even a necessary party to suit having no interest in the property when the suit is brought. She can only come in to watch the proceedings and guard her interest when the partition is effected. Then too she will not be entitled to any share in property in which the sons had no interest and which could not be the subject of partition : 27 Cal. 77, *Foll.* [P 699 C 2]

\* (b) **Transfer of Property Act, S. 62—Joint family property mortgaged — Purchase of property by mortgagee under final decree—Partition suit pending to which mortgagee is party—Purchase is not affected by lis pendens.**

Where a joint family property is mortgaged and the mortgaged property is purchased by the mortgagor under a final decree on the mortgage, while the suit for partition in which that property is included is pending and the mortgagee is impleaded as a party to partition suit by reason of the mortgage, the purchase of that property cannot be annulled by invoking the principle of *lis pendens* : 27 Cal. 77, *Dist.* [P 699 C 2]

(c) **Hindu Law — Partition — Mortgaged property is partible till final decree for sale.**

Where joint family property is mortgaged even though a preliminary decree may have been obtained by the mortgagee with regard to the mortgaged property, interest of the mortgagors is not extinguished and the property can be made available for partition and included in the partition suit. For the interest is subsisting till final decree is made. [P 699 C 1]

*Sarat Chandra Rai Chaudhuri, A. N. Choudhuri, Narendra Nath Set and Dharendra Krishna Roy*—for Appellants.

*Rupendra Kumar Mitter and Bansari Lal Sircar*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by defendants 4 and 5 which arises out of a suit for partition. A preliminary decree has been made by the learned Subordinate Judge and the appeal is directed against that preliminary decree. The property which is the subject-matter of this appeal originally belonged to two brothers, Hari Narain and Hari Bansha. Hari Bansha died in the year 1900 leaving him surviving his widow and three sons. Hari Narain got his share partitioned in the year 1905. The three sons of Hari Bansha purchased the share of Hari Narain, which had been partitioned previously by a conveyance dated 31st May 1922. On that very day the three brothers mortgaged the entire interest in the house to a third person, with which we are not concerned in this litigation. On 12th October 1923 these three bro-



thers again mortgaged the property to defendant 5. On 1st September 1924 these three brothers again executed a second mortgage of this very property in favour of their mother. Defendant 5 brought a suit on his mortgage on 10th November 1924 and a preliminary decree was made on 22nd January 1925. In the meantime defendant 4 was appointed as Receiver by an order of the Court in accordance with the terms contained in the indenture of mortgage dated 12th October 1923. The Receiver remained in possession of the property on behalf of the mortgagors and the mortgagee. The present suit for partition was brought by one of the sons of Hari Bansha on 17th April 1925 and two items of properties were included in his suit. There is no dispute with regard to item 1 with which the present appellants have no concern and the whole dispute centres round item 2 which had been mortgaged to defendant 5. During the pendency of this suit for partition a final decree in the mortgage suit of defendant 5 was made on 19th March 1926 and the property was sold on 7th August 1926 and purchased by defendant 5, as the lower Court finds and as is contended for on behalf of the respondent. But it is stated that there were other purchasers who were trustees with regard to some charitable trust : but that is a matter with which we are not concerned and this was not discussed in the Court below. The Receiver was discharged by order of the Court and defendant 5 took possession of the disputed property as purchaser. In the partition suit the two brothers of the plaintiff were defendants 1 and 2 and his mother was defendant 3; defendant 4 was Receiver and defendant 5 was the mortgagee and subsequently became the purchaser.

The question which is in debate in this Court and which was the subject-matter of dispute in the Court below is whether the mother is entitled to a fourth share of the property including property No. 2, according to the provisions of the Hindu Law, on a partition being made among the sons. There is one small matter which has not been much debated that a half share of the property is not the ancestral property of the brothers and therefore if the widow of Hari Bansha is entitled to a share on a partition between her sons she would get a fourth

share of item 2. But the real controversy is whether she would get any share under the circumstances of this case. The learned Subordinate Judge has held that the plaintiff and defendants 1 and 2 have got no subsisting right to property No. 2, which has been described as the Strand Road premises, and their suit for partition with regard to that plot must fail. He has, however, made a decree to this effect that defendant 3, the mother, would get a fourth share of both the properties Nos. 1 and 2 and the plaintiff and defendants 1 to 3 would each get a fourth share of the property No. 1. As I have already stated that assuming that the learned Judge is right, the lady would be entitled to get an eighth share of the property No. 2. But it is contended on behalf of the appellants that under the circumstances of this case the lady would be entitled to get no share in property No. 2. Their case is that the principle of Hindu Law upon which the learned Subordinate Judge has relied is not applicable in this case and that his decision is, therefore, liable to be reversed. On behalf of the respondents reliance is placed upon the well known case of *Jogendra Chunder Ghose v. Fulkumari Dassi* (1). In that case Banerji, J., laid down the principle on which according to the Hindu Law the mother is entitled to get a share on a partition made among the sons born of her womb of the property inherited from the father. The learned Judge after quoting the text from *Dayabhaga* observes :

"With reference to the above passage from the *Dayabhaga*, it has been held, and it must now be taken as settled law, that the mother's right to claim a share arises only when her sons come to a partition, in other words that she cannot enforce her claim to a share so long her sons remain joint and do not ask for partition. But there is nothing said in this passage or in any other authoritative text of Hindu Law as to a mother's right to a share on partition being so absolutely non-existent before partition, that it may be defeated by any of her sons alienating his share before coming to a partition.

He then proceeds in this way :

"In my opinion the correct view to take of this right would be to hold that it is an inchoate right as long as no partition is come to amongst the sons and it becomes actually enforceable only when the sons come to a partition ; or in other words that the right, when it becomes enforceable by reason of a partition being come to among the sons, is

(1) [1900] 27 Cal. 77=4 C. W. N. 25



enforceable not only as against the sons, and as regards so much only of the joint property as at the date of partition is in the hands of the sons, but also as against any person deriving title from any of the sons and as regards the property to which they may have so derived title, subject to certain qualifications and limitations."

In that case during the pendency of the suit for partition by one of the sons another son sold his share in the joint property. It was held by the Court that by reason of the sale the interest obtained by the purchaser is subject to the rule of *lis pendens* and that he cannot stand on a higher footing than that of his vendor and when the partition is made, if his vendor was a party to the suit, the mother would get a share: that right cannot be defeated during the pendency of the suit by one of the sons transferring his interest in favour of a third party. This principle has been elaborated in a subsequent case *Amrita Lal Mitter v. Manicklal Mullick* (2) where Ameer Ali, J., sitting alone held that this principle is applicable where a stranger to the family purchases the interest of one of the sons and then seeks for partition of the joint family property. The question has again been discussed in the case of *Jogobondhu Pal v. Rajendra Nath Chatterjee* (3), by Mukerjee, J. But the principle has not been carried further than what was laid down by Banerji, J. In this case the appellants contend that he is entitled to the property by virtue of his purchase in the same state in which it was at the time of the mortgage or, in other words, that any subsequent alienation made by the mortgagor would not affect his interest. That proposition is uncontroverted. But if the mother could get any right in the present suit by reason of the partition, that would not be by the right created by the mortgagor but it would arise under the Hindu Law and I doubt whether the principle enunciated by the appellant would apply to such a case. In this case, in my opinion, the plaintiff had a right to bring the suit for partition at the time when he brought the suit. Although there had been a preliminary decree for partition the title of the plaintiff to his share of the property was not extinguished by that preliminary decree on mortgage but he had still a subsisting

interest in the share of the property by reason of succession to his father. The plaintiff's right to bring the suit was not affected. The mother's right to claim a share, however, arises, as Banerji, J. laid down, only on a partition no matter whether the partition is made amicably or as the result of a decree by a suit. The mere bringing of a suit for partition by one of the sons does not confer any right on the mother to have a share, according to the view expressed by Banerji, J. If the suit for partition is withdrawn the mother cannot claim any share, nor can she insist that the suit must be carried on to a decree. If the partition suit is dismissed by the Court for some reason or other, then the mother would not get any share in the property. It is only when the property is actually partitioned, the mother would get a share equal to that of her sons. She is not even a necessary party to the suit having no interest in the property when the suit is brought. She can only come in to watch the proceedings to safeguard her interest when the partition is effected.

Now, it is contended on behalf of the respondent that defendant 5 is bound by the rule of *lis pendens* as was applied in the case of *Jogendra Chunder Ghose v. Fulkumari Dassi* (1) cited above. The difficulty in this case is that that principle cannot be applied to this case. Here defendant 5 has acquired the interest of the plaintiff as well as the defendants who had interest in the property. It is a fundamental principle that a man cannot sue himself and the defendant standing in the shoes of the plaintiff with regard to this property cannot continue the suit for partition with regard to this very property. The plea therefore, must fall to the ground by reason of the purchase of defendant 5 and, as the learned Subordinate Judge says, the plaintiff and defendants 1 and 2 cannot ask for partition of property 2. That being so, the mother would not be entitled to any share of property No. 2 by reason of the fact that her sons had no interest in the property and this property could not be the subject of partition. Whether she would have a charge for her maintenance against the property in the hands of the purchaser is another matter. That question cannot arise in a suit for partition and if she has any

(2) [1900] 27 Cal. 551=4 C. W. N. 764.

(3) A. I. R. 1921 Cal. 351.



right, the question must be left open to be debated in a subsequent suit.

The result, therefore, is that the judgment and preliminary decree of the Subordinate Judge should be modified to this extent that the suit for partition with regard to property No. 2, i.e., the Strand Road premises, should stand dismissed and, therefore, any claim of defendant 3 will also stand dismissed, and the appeal is allowed to this extent. The appellant is entitled to his costs from the respondent who has appeared, hearing fee being assessed at three gold mohurs.

N. K. Bose, J.—I agree.

V.B/R.K.

Decree modified.

### A. I. R. 1929 Calcutta 700

RANKIN, C. J., AND C. C. GHOSE, J.

(Hazi) Tilloin Mahammad Umar Buksh—Plaintiff—Appellant.

v.

B. N. Ry. Co., Ltd.—Defendants—Respondents.

Appeal No. 641 of 1927, Decided on 26th February 1929, from appellate decree of 1st Addl. Dist. Judge, 24 Parganas, D/- 28th September 1926.

Railways Act (9 of 1890), S. 72—Risk-Note form H—Company is liable for "loss" of complete consignment or one or more complete packages and not for destruction or deterioration.

The words "except for the loss of a complete consignment or of one or more complete packages forming part of consignment" point to this that destruction or deterioration of or damage to goods is a thing which a Railway Company are not to be responsible even in case of wilful neglect. Only thing for which in certain events they are to be responsible is loss, that is to say, loss of all or any of consignments, and they are to be responsible for that only when there is a loss of complete consignment or one or more of complete packages. All arguments based upon the notion of loss as meaning monetary or pecuniary loss to the consignor have nothing to do with this word as used in the Risk-Note Form H: A. I. R. 1924 Cal. 725, Foll: 43 Mad. 617, Dist. [P 701 C 1]

B. C. Mitter, C. C. Biswas and Rabin-dra Nath Chowdhuri—for Appellant.

S. N. Bose, Amulya Chandra Chatterjee and Prokash Chandra Pakrashi—for Respondents.

Rankin, C. J.—This is an appeal from a judgment and decree of the learned First Additional District Judge of the 24 Parganas and the case has reference

to a consignment of oranges in a wagon from Nagpur to Howrah upon the terms of a certain Risk-Note in Form H. The goods were consigned on 4th April 1923 and they were to go by passenger train and the wagon commenced its journey on 5th April. Apparently the wagon was not in a fit condition for travel because after some forty miles it was found that its axle was too hot. Thereupon it became necessary to transfer the goods to another wagon and much complaint is made that this was not done with sufficient celerity. It is said that this operation was not completed until the 8th. The wagon into which the goods were put again became unfit for travel and at Bilaspur the goods had to be once more transhipped. These goods which had been put on rail on 4th April did not arrive at Howrah until 12th April. It would appear that they were fresh oranges but that upon their arrival at Howrah they were so decomposed or deteriorated that they were unfit for any purpose. They were in a rotten condition and when the plaintiff came to take delivery it was found that the goods were not worth taking delivery of. A certificate from the Sanitary Inspector was obtained and the best course was adopted in the interest of all the parties, namely, that the wagon load of rotten oranges was taken to a proper place and the oranges were destroyed. In these circumstances the plaintiff claimed damages and the learned Judge has found in favour of the plaintiff that the failure to tranship these oranges at Bhandara with reasonable quickness was not only negligence on the part of the Railway Company's servants but was wilful negligence. The language of the learned Judge is not too accurate but he says that:

"the conduct of the station staff at Bhandara appears to me to have been not only negligent but also reckless and careless."

However the learned Judge does mean to find that there was a case made out within the meaning of the Risk-Note and that the case made out was one of wilful neglect of the Railway Company's servants.

We have not heard the respondent in this appeal and I say nothing about the question whether this neglect is really wilful neglect or not. It appears to me that something might be said on either side. Assuming, however, that it is



wilful neglect, the question arises whether the neglect, such as it may be, of the Railway Company's servants, is a neglect for which the Railway Company is responsible. By this Risk-Note the consignor undertakes to hold the Railway Company:

"harmless and free from all responsibility for any loss, destruction or deterioration of or damages to all or any of such consignments from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway."

The first question which arises is what is the plaintiff's cause of action? He says that these oranges arrived at Howrah in a rotten condition and prima facie it seems to me that it is quite clear that he has the general terms of this clause against him. His claim is a claim which involves making the Railway Company responsible either for loss, destruction or deterioration of or damage to these oranges, and there is no way of putting the plaintiff's claim that does not bring it within the ambit of the general words of the clause. In these circumstances quite logically and reasonably the debate in this case has proceeded upon the question whether the plaintiff can say that his case comes within the exception which is in the following words:

"except for the loss of a complete consignment or of one or more complete packages forming part of a consignment."

That is the question to which the learned Judge has addressed himself and he has held that there has been no "loss" in the sense in which that word is used in this Risk-Note. I agree with the learned Judge on that point. It seems to me that the language of this particular clause points plainly to this that destruction or deterioration of or damage to the goods is a thing which the Railway Company are not to be responsible for at all. The only thing for which in certain events they are to be responsible is "loss" that is to say, loss of all or any of such consignments and they are to be responsible for that only when there is a loss of a complete consignment or one or more complete packages. All arguments based upon the notion of loss as meaning monetary to pecuniary loss to the consignee have to be put on one side, and I agree

with Page, J. in his view of the meaning of this word as stated in his judgment in *E. I. Ry. Co. v. Jogpat Singh* (1). I disagree with the view taken by the Madras High Court in the case *M. & S. M. Ry. Co. Ltd. v. Subba Rao* (2). Marine Insurance notions about what is total loss either actual total loss or constructive total loss have nothing to do with this word as used in this Risk-Note and we are not concerned with the many wide meanings that such a word is capable of having in common parlance. We are concerned with the definite meaning which appears upon this particular exception. We have to say whether this particular consignment has been lost within the sense of this Risk-Note remembering that it is perfectly clear that destruction or deterioration of or damage to these goods is a risk which the Railway Company does not take even in a case of wilful neglect.

In my judgment, the position here is that these goods deteriorated. They deteriorated because they were in transit for a longer time than they ought to have been required. They took a longer time than should have been required owing to the negligence of the Railway Company. Of that I have no doubt. For the moment I will assume that the length of time taken in the transfer, as the learned Judge notes, was owing to the wilful neglect of the Railway Company's servants. In these circumstances it seems to me that this is not a case of loss at all. These goods were never lost. What happened was that they deteriorated and became worth nothing. There was a pecuniary loss no doubt but the goods themselves were not lost. In that view it appears to me that it is necessary to consider carefully the evidence as to what happened at Howrah. I am not saying that if the goods were detained so long in the transit that they became rotten and could not be delivered if, for example, at some intermediate station they had to be taken out and thrown away, or even if they had to be thrown away after they arrived at Howrah and so could never have been delivered I am not saying whether in either or both of these cases the plaintiff might not have

(1) A. I. R. 1924 Cal. 725=51 Cal. 615.

(2) [1920] 43 Mad. 617=38 M. L. J. 360=11 M. L. W. 358=55 I. C. 754=(1920) M. W. N. 198.



said that there had been a loss of the goods. It is not necessary to pronounce upon that, because I am satisfied that in this case that is not what happened. In this case what happened was that the goods being useless and being of of such a character that the sensible thing to do was to destroy them, they were destroyed. I am not satisfied that it was impossible for the Railway Company to give delivery of the goods to the plaintiff. I am not satisfied that the plaintiff had no option, or that it was illegal for him to take delivery of these goods. What happened merely was that the goods being rotten they were in fact by consent destroyed which was the sensible thing to do. The Railway Sanitary Inspector gave a certificate first to afford the plaintiff proof of the condition of the goods and secondly because the railway staff would want some authority to destroy the goods.

When one looks at this Risk-Note one finds that it is a Risk-Note in a form that is applicable to the carriage of goods and animals. It is not a Risk-Note which has any special reference to perishable goods such as oranges, and the contention that is really raised upon this Risk-Note is this that if perishable goods are sent under Risk-Note H so that in consequence of delay in transit they become useless, then the protection which the railway company have stipulated for entirely vanishes. It is said that because they become entirely useless, it is no longer a question of deterioration or destruction, but a question of loss. In my judgment, so to construe this Risk-Note would be to give it a meaning which it was never intended to bear. It would give it a meaning with reference to perishable goods which would defeat the plain intention of the contract. "Loss" in this case is not used with reference to perishable goods in particular. The contract is dealing with ordinary goods and when it says "the loss of a complete consignment," it is not to be construed as though it were a part of the special intention of that phrase that it is to be applied to highly perishable goods.

Learned counsel Sir Benode Mitter has put before this Court various arguments and contentions and has cited opinions from certain other Courts to the effect that the Calcutta decisions as to the meaning of this word "loss" place too

narrow a construction on this Risk-Note. I can only say for myself that I am entirely of the opposite opinion: I think the Calcutta decisions place a meaning upon the words in this Risk-Note which it can be seen to bear by a careful study of the Risk-Note itself.

If a person entrusts goods to a railway for carriage to X and for delivery to himself or to his consignee and if the railway fails to give delivery his *prima facie* right is to sue the railway for his goods and for damages for their detention. Nothing in these Risk-Notes is intended to enable the railway to keep other peoples' goods nor are Railway Companies as a rule so unreasonable as to seek so to do. These Risk-Notes come into operation in the much more common case where the railway company cannot deliver the goods because it has not got them. Then a question arises of its

"responsibility for any loss of all or any of such consignments,"

to use the words of the risk-note before us. The words "loss, destruction or deterioration" are followed by the words "loss of a complete consignment" and the word "loss" means the same thing in both cases. The word "destruction" is not repeated and this of itself points firmly against any extension of the meaning to be given to the word "loss." The loss of goods, in the sense in which this Risk-Note is concerned with it, is a question of presence or absence and not of condition. However little it may matter to a trader whether his goods are destroyed, whether they are delivered to him in a useless condition, or whether he never gets delivery at all to a railway company carrying all sorts of goods and animals these eventualities represent very different risks. Moreover from this point of view "the loss of a complete package" is a different thing from the loss of some of the contents of a package. A consignee who proposed to insure his goods for the transit would soon find out these differences and a consignee who proposes to be his own insurer would be well advised to learn them.

The next point which arises has been dealt with by the learned Judge in a manner which is I think correct in its result. It was argued before the learned Judge that there was no alternative for the despatch of fresh oranges from Nag-



pur to Howrah and that the plaintiff could only despatch them on owner's risk terms. When we come to consider the logic of that argument and what it has to do with the question of this contract I can only say that while I paid attention to the argument of Sir Benode Mitter, I have failed to find that there is any ground for supposing that the existence of another method of consignment or of the non-existence of another method of consignment has any effect upon the validity of the particular contract before us. I do not understand why in the absence of proof that fresh fruits would have been accepted at railway risk, this consignment note is supposed to be without consideration, nor do I follow the argument which apparently impressed the learned Judge that the existence of an alternative rate was a condition precedent to the operation of that portion of the risk-note by which the company contracted themselves out of their general responsibility.

However, the learned Judge has found upon a construction of the documents laid before him that it is not shown that there was no alternative rate, and he has held that there was an alternative rate. The documents have been put before us. There is a document, first of all, of 1919 which purports to say that perishable articles are to be carried at the owner's risk. Then in 1920 came a series of arrangements, and I am satisfied, as the learned Judge was satisfied, that the notice of 1919 came to an end as regards the consignment of oranges from Nagpur to Howrah. There was a further document of 1921 and yet a further document of 1922 which have been laid before us. The 1921 document continued the 1919 arrangement only as regards certain named articles, sections or stations and as regards rates and fares "which are in force at present." For the present purpose, as we know, the arrangement of 1919 came to an end in 1920. Again in 1922 it appears that if a man must consign oranges from Nagpur to Howrah both in wagon-loads and by passenger train then the rate charged was a certain fixed rate. There is nothing whatever to show that there was no alternative course open. In my opinion, the learned Judge is right in his finding as to that and no cause of action arises to the plaintiff in this respect.

In my opinion, this appeal should be dismissed with costs.

C. C. Ghose, J.—I agree.

V.B./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 703

RANKIN, C. J., AND C. C. GHOSE, J.

*Sailendra Krishna Roy and others—Appellants.*

v.

*Rashmohan Shaha and others—Respondents.*

Insolvency Appeal No. 1 of 1929, Decided on 11th April 1929, against order of Pearson, J., D/- 5th December 1928.

Presidency Towns Insolvency Act, S. 36—Meaning of "a creditor who has proved his debt" explained.

The expression "a creditor who has proved his debt" means a creditor who has lodged the necessary proof of his debt and is entirely independent of the question either of acceptance or rejection of that proof by the Official Assignee: *A. I. R. 1923 Cal. 305, Diss. from.*  
[P 704 C 2]

*B. K. Ghose and N. C. Chatterjee—for Appellants.*

*S. M. Bose and J. N. Majumdar—for Respondents.*

**Rankin, C. J.**—This case arises out of an order made by my learned brother Pearson, J., refusing to interfere with an order made by the Registrar in Insolvency refusing to review an order made by him for the attendance of certain persons to be examined under S. 36, Presidency Towns Insolvency Act, 3 of 1909. The merits of the case and the necessity for holding the enquiry proposed seem plain enough; but the point which is relied upon on behalf of the appellant is a technical point. S. 36 begins in this way:

"The Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property; and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property."



On that it appears that this insolvency is a very old one the order of adjudication having been made on 9th August 1921. The creditor on whose application the order was made, in the form prescribed for affidavit and proof of debt had proved his debt about seven years ago. Various things happened. He was treated as a creditor while certain negotiations for composition were going on, he was a member of the committee of inspection and so on. It does not appear that R. 25, Sch. 2, Presidency Towns Insolvency Act, has been complied with by the Official Assignee and it further appears that so far as the insolvency rules of the Court go no time is limited within which the Official Assignee is obliged to comply with the provisions of that rule. The Official Assignee does not question the proof of debt, but the proof of debt itself is not formally and in writing admitted. In these circumstances it is said that the phrase "creditor who has proved his debt" in S. 36 does not include this creditor because it is said that until the claim is formally admitted the creditor is not a creditor who has proved his debt. That proposition is laid down in the decision of Greaves, J., reported in *Abdul Samad, In re* (1) and the learned Judge definitely holds that the phrase that :

"a creditor who has proved his debt means not merely a creditor who has lodged proof of his debt but a creditor whose proof has been admitted by the Official Assignee under the provisions contained in S. 25, Sch. 2, Insolvency Act."

I am of opinion that the decision of Greaves, J., is erroneous and ought not to be adhered to. The ordinary meaning in bankruptcy of "a creditor who has proved his debt" is a creditor who has done all that the Act requires the creditor to do and in Sch. 2, English Act, this is made perfectly clear because the R. 2, Sch. 2 says that :

"a debt may be proved by delivering or sending through the post in a prepaid letter to the Official Receiver or if a trustee has been appointed, to the trustee, on affidavit verifying the debt."

When the creditor has done that, he is said to be a creditor who has proved his debt. Whether the proof is admitted or not is a question entirely diffe-

rent from the question whether the creditor who has done his part can be said to have proved. It is true that the language in the Presidency Towns Insolvency Act has been altered and apparently it is a possible view that the draftsman was not content to copy the language which is found in the English Statute from which the Indian Statute is an abridged transcript, because it says that :

"a proof may be lodged by delivering an affidavit verifying the debt."

At the same time it has to be remembered that the phrase "creditor who has proved his debt" is to be regarded in the light of the context. We find for example S. 48 of the Act, says :

"with respect to the admission and rejection of proofs and other matters referred to in Sch. 2, the rules in that schedule shall be observed."

It is clear that proof is one thing and admission or rejection is another and I am not prepared to hold that it is a reasonable construction of the language to deny to the phrase "a creditor who has proved his debt" its ordinary English meaning. If the debt has been proved then in that case the question may arise at a meeting of creditors whether, by reason of the provisions of Sch. 1, the creditors' proof has been admitted or has not been admitted for the purpose of voting. But here we are asked to hold that a creditor has not proved his debt at all unless and until the Official Assignee under the rules has admitted the proof for the purpose of dividend. There is no question about this creditor's right. The creditor has complied with the formalities set forth and has given the required proof of debt. The point taken is not made out and in my opinion this appeal must be dismissed with costs.

C. C. Ghose, J.—I agree.

P.R./R.K.

Appeal dismissed.



\* A. I. R. 1929 Calcutta 705

RANKIN, C. J. AND MUKERJI, J.

*Ojamshee Purushottamdas and Co.*—  
Plaintiffs—Appellants.

v.

*Abdul Rahim Oosman and Co.*—De-  
fendants—Respondents.

Appeal No. 51 of 1927, Decided on  
21st March 1928.

\* (a) Deed—Construction—Words—Court  
is good judge of meaning of words and it is  
not duty of Court to affirm meaning or de-  
finition given in dictionaries.

When one is enquiring after the ordinary  
popular meaning of a term, the Court is as  
good a judge of that meaning as any learned  
authority. There is no reason to suppose that  
the Court is not put in better position for  
judging by consideration of the definitions  
which are to be got from dictionaries. But  
it is essential in this case to remember that  
the duty of the Court is to take a parti-  
cular case and decide whether or not that  
case comes within the term that is in ques-  
tion, and it is not any part of the duties of the  
Court to affirm a definition as one which can  
safely be relied upon to govern all other cases.

[P 708 C 1]

\* (b) Deed — Construction — Words—  
“Merchant” held to mean merchant in  
popularly accepted sense—“Assistant” held  
not “merchant.”

A contract of sale provided that any dispute  
between the buyers and sellers who were  
commercial people should be referred to the  
arbitration of a “merchant.” There was a  
dispute and it was referred to a person daily  
engaged in buying and selling the commodi-  
ties contracted for as an assistant of a firm.  
The assistant was an assistant of some senio-  
rity with more responsible duties than many  
other assistants and was head of the depart-  
ment with wide discretionary powers.

Held: that he was not a “merchant”  
within the terms of the contract: *Hopkins  
and Co. v. Foukelmann*, 2 K. B. 948; *Gill’s case*  
28 L. T. 589, Ref.

[P 707 C 2]

**Rankin, C. J.**—In this case the  
plaintiff firm brought a suit on 5th April  
1921 to have it declared that seven dif-  
ferent awards were not binding upon the  
plaintiff firm. It appears that by seven  
contracts all dated 10th November 1920  
the defendant firm sold to the plaintiff  
firm a quantity of 187½ tons of white  
Java sugar at Rs. 26 per maund to be  
shipped by S. S. “Rajput” on certain  
terms particularized in the contracts.  
The contracts contain an arbitration  
clause being Cl. 15 upon the terms of  
which, if any difference should arise re-  
garding the contract or any matter con-  
nected therewith, it was to be optional

to the sellers to require buyers to sub-  
mit the matter in difference to arbitra-  
tion in one or other of the two ways.  
The way which matters for the purposes  
of the present case is:

“the arbitration of two European merchants  
in Calcutta (one to be appointed by the sellers  
and one by the buyers).”

There is a provision that if the buyers  
should fail to appoint an arbitrator to  
join in such arbitration within three days  
after notice in writing by sellers so re-  
quiring them the arbitration shall at the  
option of the sellers proceed ex parte and  
the award by the arbitrator shall be  
binding upon the buyers.

Now the S. S. Rajput arrived with  
1,000 tons of this Java sugar consigned  
to the sellers. The arrival notice was  
given on 16th December 1920. At that  
time the market had gone against the  
buyers and the price had fallen. From  
16th December onwards the price con-  
tinued to sag. The buyers did not take  
delivery. Accordingly the arrival notice  
of 16th December 1920 was followed by  
a letter of 28th December requiring the  
plaintiffs to arrange at once to pay for  
and to take delivery of the goods. Again  
on 3rd January a similar demand was  
made. On 5th January there was a  
solicitor’s letter which informed the  
plaintiffs that unless they paid the de-  
fendants’ bills for the price of the goods  
including interest in exchange for the  
delivery order, the defendants would re-  
sell the goods on the following day  
namely on 6th. On the following day  
the goods were sold by the defendants  
against the plaintiffs and as the plain-  
tiffs professed by their letter of 7th  
January that they had been ready and  
willing to pay for and to take delivery of  
goods and disputed their liability to pay  
damages on the basis of resale as claimed  
by the defendants, Messrs. Pugh and Co.  
acting on behalf of the defendants wrote  
to the plaintiffs a letter on 10th Janu-  
ary 1921 which is as follows:

“Our clients wrote to you together with  
their bill for the above sum and demanded  
payment but you have so far failed and neg-  
lected to do so. Our clients now want to re-  
fer the matter to arbitration in terms of the  
contract. Our clients appoint Mr. A. Duggan  
of Messrs. Shaw Wallace and Co., to be their  
arbitrator. We have to call upon you to ap-  
point your arbitrator within three days fail-  
ing which our client will appoint the said  
Mr. Duggan as the sole arbitrator in terms of  
of the contract.”



To that letter a reply was sent by the plaintiffs' solicitors on 12th. It restated the plaintiffs' refusal to pay the sum claimed as damages and went on to say:

"As regards your client's proposal for arbitration our clients contend that there is no valid agreement for submission to arbitration and your clients cannot submit their alleged claim to arbitration. However, without prejudice to our clients' contention they will nominate an arbitrator in the course of this week."

On 13th January Messrs. Pugh and Co. continued the controversy and claimed that

"under Cl. 15 of the contract a valid and proper agreement between the parties has been made for reference of any dispute under the contract to arbitration. Should your clients fail to nominate their arbitrator duly our clients shall appoint their arbitrator as the sole arbitrator."

On 14th January Mr. Duggan who had been appointed by the defendants wrote to inform the plaintiffs' solicitors that he had been appointed arbitrator on behalf of the defendants and asked for the name of the plaintiff's arbitrator by Wednesday morning the 16th, failing which he intimated that he would proceed with the arbitration *ex parte*. On 17th January Mr. Duggan was written to by the plaintiffs' solicitors in the following terms:

"We have to point out to you that you are not eligible to become an arbitrator inasmuch as you are not a merchant. It is not therefore necessary on our clients' part to nominate an arbitrator at this stage. If in spite of this you proceed with the arbitration *ex parte* you will do so at your risk and our clients will not be bound by your acts. This letter is written of course without prejudice to our clients' contention that there has been no valid agreement for arbitration."

A similar contention was addressed on the same day to the defendants' solicitors. On 18th the defendants' solicitors intimated that the defendants had appointed Mr. Duggan as the sole arbitrator and requested him to proceed with the arbitration.

The question which I propose to deal with first is whether or not the plaintiffs' contention is correct that Mr. Duggan was not eligible under Cl. 15 of the contract to act as an arbitrator. The phrase to be construed is an extremely short one, namely, "the arbitration of two European merchants of Calcutta." It is clear to me that if Mr. Duggan is not in the ordinary meaning of the term, a European merchant of Calcutta, the

awards must be set aside. The objection was taken at the earliest moment and the plaintiffs took no part in the arbitration proceedings. They brought first of all an application under the Arbitration Act to set those proceedings aside, and on it being ruled that it was necessary to proceed by a suit, they brought this present suit taking their stand on this ground amongst certain others which I shall mention hereafter. There can be no doubt that Mr. Duggan is a European and there is no doubt that he is living in Calcutta and is in business in Calcutta. The question is whether he is a merchant within the meaning of that expression in these contracts. As regards that question we have the evidence of Mr. Duggan himself. He was called as a witness on behalf of the plaintiffs and the answers upon this point commenced with the question No. 20. These answers are given in examination-in-chief. I do not find that in cross-examination the witness is asked any question upon this particular matter or that in re-examination any addition is made to the evidence which he had given. The evidence with which we are concerned therefore is this:

Q. You said that you are connected with Shaw Wallace & Co. How are you employed there?

A. I am an assistant in the firm.

Q. What are you exactly?

A. I am in charge of the sugar department.

Court.—Are you the head of the department?

A. Of the sugar department only.

Court.—Do you buy and sell on behalf of your firm?

A. Yes.

Court.—Do you make contracts on behalf of the firm for sale of sugar?

A. I give out offers to the brokers and also send out the offers to Java or wherever we are buying from. I give out the offers personally to the brokers.

Court.—What happens when you buy sugar?

A. I instruct the brokers to buy.

Court.—When you sell?

A. Also to sell I instruct the brokers.

Court.—You give the price?

A. Yes.

Court.—They sell and you fix the price?



A. Yes.

Q. Are you a partner of that firm?

A. No.

*Court.*—When you buy and sell sugar is that subject to the general supervision of the partners

A. No, not an ordinary offer. Not on offers received or which I send out. If I wanted to buy anything on our own account I consult one of the partners. If I want to buy or sell sugar in the market, if we are short of sugar and I wanted to buy I would consult one of the partners. We have a limit, should I exceed the limit in any way I would consult the partners but firm offers which I receive I can sell any quantity I like without consulting anyone.

These are the facts upon which the question is to be decided whether or not Mr. Duggan is a merchant of Calcutta. The learned Judge has dealt with the matter in this way. After pointing out that Mr. Duggan is a gentleman of great experience in commercial matters and has in addition long experience of arbitration in cases of this kind, that he holds a responsible position and that he is in the habit of buying and selling goods acting on his own authority, the learned Judge observes as follows :

"In my opinion in a case of this kind and indeed in any commercial case the Court ought not to be too strict in the interpretation of words of mercantile usage, that is to say, I think the Court should not seek to go out of its way to do anything to upset the arrangements and the dispositions of the commercial community. Now in the present instance these buyers and sellers were commercial people. They provided in their contract that their disputes should be referred to a European merchant and I think that all that they meant was that the person to act as an arbitrator should be an European who had experience of business transactions of the kind with which these contracts were concerned. It is quite manifest that Mr. Duggan was and is a person of that kind, and although he is not actually in business on his own account, I think he can properly be described as a merchant without any undue straining of the English language, and I think it would be too pedantic to say that merely because he is not trading on his own account he does not come within the description of an European merchant as mentioned in this contract."

Now in my judgment it is very necessary to keep this question entirely clear from any consideration as to whether or not the decision of this question will be upsetting arrangements and disposition of the commercial community. I am

quite satisfied that Mr. Duggan has very frequently acted as an arbitrator. How often if it all, he has acted as an arbitrator under a clause framed precisely as the present clause, is a question upon which I have no information. I have no doubt that he is duly qualified to act as an arbitrator under many sale contracts and I have no doubt that he would be an admirable person for the parties to appoint when they have a free choice of their own as to the arbitrators. It is news to me that there are any arrangements or dispositions of the commercial community which involve the proposition that an assistant in a Calcutta business house is a merchant. But there is no question here of those words having any special meaning.

The question is as to the natural and ordinary meaning of an English word. In the case of *Gill v. Manchester Sheffield and Lincolnshire Railway Co.* (1) cited to us, it is called "ordinary popular meaning." That is the first thing. In the second place it is not a question whether there is any undue strain on the English language. I do not feel called upon to put any strain in either direction. The question is whether or not, drawing the line fairly as best one can, according to the popular usage of English words, Mr. Duggan comes on the one side of the line or on the other side. Approaching the question in that way I notice that Mr. Duggan when he is asked "how are you employed there," says "I am an assistant in the firm." He is of course, not an ordinary assistant because he appears to be the head of the sugar department. How many assistants are engaged in the sugar department I do not know but I should presume that there are several. He is an assistant of some seniority with more responsible duties than many other assistants. It is quite clear that the mere fact that he is an assistant to a firm of merchants would not make him a merchant in Calcutta. It is quite clear also that the mere fact that he is the head of a department would not make him a merchant in Calcutta.

It is contended, however, that upon the evidence that he is daily engaged in buying and selling sugar on behalf of his firm by giving out orders to brokers, this consideration makes him a merchant

(1) [1873] 28 L. T. 589.



within the true meaning of that term. It is said that he is none the less a merchant, that he is merely acting on behalf of other people all the time. It is said that he is none the less a merchant because his authority is limited and he has in certain exceptional matters to take authority from the partners. Stress being laid upon the circumstance that he is daily engaged in the matter of buying and selling Mr. Sircar presses upon us that we ought to hold that he is a merchant. It is also said that as a merchant's business may be conducted by a company, by means of managing agents, one ought not to regard it as an essential part of the connotation of the term "merchant" that the man in question should be in business for himself trading for his own profit as distinct from assisting other people to trade for their profit. "Merchant" is a term which has been defined in several dictionaries to which we have been referred. One definition has been cited to us from Webster's Dictionary. "Merchant" — Any one making a business of "buying and selling commodities." Another from the New Oxford Dictionary :

"Merchant—One whose occupation is the purchase and sale of marketable commodities for profit."

I agree with Mr. Sircar in the view which he cited to us from the observations of Lord Blackburn in *Gill's* case (1) that when one is enquiring after the ordinary popular meaning of a term the Court is as good a judge of that meaning as any learned authority. I am far from saying that the Court is not put in a better position for judging by a consideration of the definitions which are to be got from dictionaries. But it is essential in this case to remember that the duty of the Court is to take a particular case and decide whether or not that case comes within the term that is in question, and that it is not any necessary part of the duties of the Court to affirm a definition as one which can safely be relied upon to govern all other cases.

I examine this matter with a view to ask myself whether in the ordinary popular acceptation of the word, Mr. Duggan would be recognized as accurately describing himself if he said "I am a Calcutta merchant." I cannot doubt that without straining the word Mr. Duggan

does not come within the ordinary popular acceptation of the term. The learned Judge on this short question of the English language was in as good a position to form an opinion as I am and I find some consolation in the fact that there are expressions in his judgment which seem to show that in the interest of business arrangements he found room for Mr. Duggan within the definition of "merchant" by putting some little strain upon the ordinary popular acceptation of the term. Mr. Sircar on behalf of the defendant has very properly pointed out to us that the question is in this case, not whether Mr. Duggan is carrying on business as a merchant in Calcutta but whether, he can be described as a merchant—that term being given to express the general nature of his calling. A man certainly can be a merchant although for the moment he is out of business. A man who has a business of a merchant and turns it into a limited liability company of which he becomes the managing director could not be refused the designation "merchant" merely because for a few months he had ceased to be trading on his own account.

Again it is quite clear that in the case of a profession which has a definite qualification such as solicitor, a man might be described as a solicitor although he is not in practice for himself. I quite appreciate these points but still the question is whether Mr. Duggan is a merchant. In my judgment taking it as a concrete case, he comes under a different and well known category viz., that of "assistant" in a firm of merchants but he is not within the meaning of merchant in the contract with which we are concerned. In the arbitration clause it is not provided that the arbitrator must be a person with special knowledge of sugar. There is nothing to show that he has to be a sugar merchant. He is to be a European and he is to be of Calcutta. He has certainly according to any definition of "merchant" to be accustomed to buy and sell by himself or by others. But if the ordinary popular meaning of the word "merchant" connotes a certain status, there is nothing in this clause to show that the Court is entitled to disregard that part of the meaning of the expression. If all that is required is a certain acquaintance with or experience



in buying or selling or even in the buying or selling of sugar then persons would be qualified under Cl. 15 who might be persons occupying a very modest position in life and in the business world. If that were so it might go down to such persons as Head Clerks or people of even less position who might be entrusted by their masters or employers with buying or selling on their behalf. When the defendants insisted upon appointing Mr. Duggan and carrying the arbitration *ex parte*, they took a risk. Giving the best consideration I can to this matter I am of opinion that the true exposition of Cl. 15 is one under which Mr. Duggan is not such a person that the defendants could insist upon his arbitration in spite of the opposition of the plaintiffs. If Mr. Duggan is not qualified then these awards are not binding upon the plaintiffs. That appears, in my judgment, to be abundantly clear from the decision of Pickford, J., in the case of *Mughe in, Hopkins & Co. v. Foukelmann* (2) and also upon principle.

Now, there remain two points in this case and on both of them I am in entire agreement with the learned Judge. The first is the question whether there was something informal in the way in which Mr. Duggan was made the sole arbitrator by the defendants. That question depends upon a contention to the effect that the concluding words of Cl. 15 do not form a Code of their own, but that we have to read into them the requirements of the Arbitration Act. I mean the requirement of due notice and so on. In my judgment the clause must be construed as it stands and it is not shown that the defendants acted in any way in disconformity with their rights under the contract.

The third and last question is one which has occupied the greatest amount of the time and attention of the Court below and indeed of this Court. The contention was that Mr. Duggan's award had been improperly procured in the sense that the defendants had no goods to offer to the plaintiffs in December 1920, that they fraudulently professed to have them and that they effected a bogus re-sale of goods which they did not possess on 6th January 1921 and fraudulently put their case

before Mr. Duggan concealing from him all these material facts. This case was allowed to be raised by an amendment of the plaint in April 1925, some four years after the institution of the suit. It was allowed on the representation that the plaintiffs had been put upon enquiry by a letter of September 1924 whereby the defendants' solicitors wanted to withdraw from examination certain documents mentioned in their affidavit of documents. The leave to amend was granted in April 1925 and Mr. Sircar on behalf of the defendants maintains before us that in this appeal he is entitled to question that interlocutory order and that such leave ought not to have been granted. Speaking for myself, I should not interfere with an order of that character. The matter has been open to the plaintiffs and the whole case has been thrashed out upon the evidence. But the question upon which it is right that we should express an opinion is the question whether these awards can be set aside as being fraudulently procured by the plaintiffs. As I have said, on that question I am in entire agreement with the judgment of the learned Judge. It is only necessary to make one or two observations so as to show that this part of the case has been duly considered by this Court.

The plaintiffs' case is that 1000 tons of white Java sugar arrived for the defendants in due course. They are unable to show that from 16th December right down to 4th January the defendants had not ample supplies with which they could make delivery to the plaintiffs. It is quite clear that in the second half of December the defendants were pressing the plaintiffs to take delivery but the plaintiffs did not take the goods as the market had gone against the plaintiffs heavily. It is said, however, that if you go to 5th January (by which time it was abundantly clear that the plaintiffs had no intention of taking these goods) it can be seen that the defendants had parted with so much of the 1000 tons that they had no longer any desire or ability to make delivery. In my opinion that case breaks down altogether. It depends upon the process of taking delivery orders according to their dates and dealing with delivery orders after the manner of Claytons case in the basis that the moment a delivery



order had been issued the goods entirely ceased to be in the defendants' control. Even on that basis I do not say that the plaintiffs have made out their case. But I think it is a wrong basis. It is quite clear to me that if on 5th or 6th plaintiffs had paid for and taken delivery orders they could and would have got their sugar from the docks. It is not the case on the evidence that the moment a delivery order is signed any particular goods cease to be under the control of the defendants, nor is it any concern of the plaintiffs in what way any outstanding delivery orders given to other people would have been dealt with had the plaintiffs chosen to take delivery of the goods. On that point I entirely agree with the learned Judge. I think, therefore, that there was enough of this sugar to answer not only the plaintiffs contract but also the contract of Kala Chand whose goods were included in the same re-sale. That is the first question. In my judgment the defendants had the goods. Then it is said that when the re-sale was made on 6th January that was a bogus re-sale. In my opinion the evidence called by the plaintiffs themselves disproves that contention. There was re-sale in the ordinary manner. There were several bidders there and the price obtained was a reasonable rate.

The third thing that is said is that after all the goods were sold to Sattar and we find that Sattar parted with the goods back again on the same day at the same price; and that is a circumstance which shows that it was a bogus re-sale and the awards are liable to be upset because this circumstance was not fairly and fully laid before Mr. Duggan in this ex parte arbitration. The learned Judge has dealt with that contention in a manner which seems to me to be adequate and correct. I will take it that Sattar may be regarded as a mere nominee of the defendants for this purpose. Still every other person was given an opportunity to bid. A reasonable rate was obtained, and in the end Mr. Duggan awarded the rate of damages claimed because he was satisfied that it was based upon a reasonable market rate in accordance with his experience. In these circumstances, the plaintiffs' case on that part of the matter has been rightly dismissed by the learned Judge on the original side.

However this appeal must be allowed and there must be a declaration that the awards are not valid or binding upon the plaintiffs.

On the question of costs it is manifest that the defendants have in the end succeeded upon the chief matters which required the taking of evidence; and while the plaintiffs have succeeded ultimately in the suit we are of opinion that there should be no order as to costs either in this Court or in the Court below.

There will be an order for repayment of the sum of Rs. 26,220-7-3 with interest thereon at 6 per cent per annum from the date of the withdrawal of the money by the defendant firm till the date of payment.

**Mukerji, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 710

S. K. GHOSE AND PATTERSON, JJ.

*Rajani Mohan Saha and others—*  
Plaintiffs—Appellants.

v.

*Sambhu Nath Saha and others—*  
Defendants—Respondents.

Appeal No. 1935 of 1927, Decided on 5th July 1929, from appellate decree of Dist. Judge, Dacca, D/- 2nd July 1927.

(a) Registration Act, S. 49—Immovable property worth above Rs. 100 conveyed by unregistered document—Document can be admitted to prove nature and character of possession.

Unregistered document conveying immovable property worth above Rs. 100 can be admitted for the collateral purpose of proving the nature and character of the possession of the transferee provided the transferee is in possession and the document is genuine: *A. I. R. 1919 P. C. 44* and *A. I. R. 1921 Cal. 647, Rel. on.* [P 711 C 2]

(b) Transfer of Property Act, S. 44—Monthly tenancy—Partition—Partition can be effected or refused on ground of convenience only.

There is no fixed rule of law that a property held in temporary right cannot be partitioned; the only ground on which partition may be allowed or refused is convenience. [P 712 C 2]

The subject matter of a suit was a plot of land adjoining a homestead and there was no substantial structure on it. The holding was monthly one but, was old and in occupation of tenants for over 50 years. The tenants suing for partition had occupied it since their purchase for over 21 years without apparently any effort on the part of landlord to eject them. The landlords were numerous



and scattered and there was no practical likelihood of their writing to eject the tenants. The tenancy rights were possessed solely by the parties to the suit, and they themselves were cosharers-landlords. Parties had been in joint possession and partition between them would not bind the landlord.

*Held*: that the mere fact that technically the holding was a monthly tenancy should not debar the parties from their lawful right to partition: 24 Cal. 575 (F.B.), *Rel. on.*

[P 713 C 1, 2]

*Sarat Chandra Basak, Gopal Chandra Das and Bhuban Mohan Saha*—for Appellants.

*Brojolal Chakravarti and Rupendra Kumar Mitter*—for Respondents.

**S. K. Ghose, J.**—Plaintiffs sue for partition of a plot of land described as "Bairagi Bari" alleging that they have purchased four-fifths share of the tenancy right and defendants have purchased the remaining one-fifth share. Plaintiffs and defendants have small shares in the landlord's interest, the entire 16 annas of that interest being held by a large number of persons. The defence is that plaintiffs have no title except by virtue of the superior interest and that the property falls within the joint estate only up to a certain extent, the rest being in another estate. Plaintiffs won in the first Court, but they lost in the Court of appeal below. They now come in second appeal.

In this appeal the first point is whether plaintiffs have proved their tenancy right to the land in suit. Plaintiffs base their right upon three conveyances, namely: (1) Ex. 1 which is an unregistered deed bearing date 4th Sravan 1308 in respect of a one-fifth share of the tenancy right for a sum below Rs. 100. (2) Ex. 1 (c) an unregistered deed of conveyance dated 2nd Aswin 1308 in respect of a two-fifths share for a sum above Rs. 100, the documents being executed by two females on behalf of their minor sons. The latter confirmed the transaction in 1328 by two registered instruments, Ex. 1 (a) and Ex. 1 (b). (3) Ex. 1 (d) an unregistered deed of conveyance dated 7th Aughrayan, 1310, in respect of a one-fifth share of the tenancy for a sum above Rs. 100. Defendants get their title from a registered kabala Ex. 1 (e) dated 8th Baisak, 1310, in respect of a one-fifth share of the tenancy right. It is admitted that the original tenants were five brothers from whom plaintiffs and defendants derived their title by pur-

chase as above. The difficulty in the way of the plaintiffs is that all these three deeds of sale were unregistered. The learned District Judge took the view that, as regards the first acquisition in Sravan 1308, the transaction being for a consideration of less than Rs. 100, it did not require to be proved by registered instruments and that there had been proof of delivery of possession as required by S. 54, T. P. Act. He, therefore, accepted the plaintiffs' case that they came into the possession of a part of the disputed land in Sravan 1308. The learned District Judge further thought that the kabala Ex. 1 was relevant for the strictly collateral purpose of the proving in what capacity the entry of possession was made by the plaintiffs and he found that as regards this one-fifth share acquired in Sravan 1308 the plaintiffs had shown that they were tenants. But, as regards the other two kabalas, the learned District Judge thought that they could not be used at all in favour of the plaintiffs, and so he thought that they were in possession in their capacity as cosharers landlords.

In this view he came to the conclusion that the plaintiffs were not entitled to partition without joining the other cosharers landlords. The learned advocate for the appellants has contended that the learned District Judge was wrong in not considering that the kabalas Ex. 1 (c) and Ex. 1 (d) could also be admitted for the collateral purpose of proving the character of the possession of the plaintiffs as tenants. I think this contention is correct and it is supported by the decision of their Lordships of the Judicial Committee in the case of *Varada Pillai v. Jeevarathnammal* (1). That was a case of a gift and the fact that in that case there was no deed of gift at all makes to my mind no essential difference. The point is that in that case although the gift was held to be invalid, because it was not made by a registered deed as required by S. 123, T. P. Act, and the recitals in a partition could not be used as evidence of gift, it was held that those recitals might be referred to as explaining the nature and character of the possession of the donee. A similar view was taken in the case of *Jagannath Mararwari v. Sm. Chandui*

(1) A. I. R. 1919 P. O. 44=43 Mad. 244=46 I. A. 285 (P.C.).



*Bibi* (2). In that case also the fact that a deed of gift was not necessary according to law makes no difference, the point being that an unregistered deed of gift was held to be admissible in evidence for the purpose of proving the character of the possession of the donee. Now it has been found by the trial Court that the kabalas were genuine documents for consideration and that they were followed by delivery of possession to the plaintiffs. The learned District Judge has not reversed these findings, on the contrary he writes that :

"it is admitted that both the parties are in possession of the disputed land,"

As regards the first kabala, it has been found that it led to the possession of a one-fifth share by the plaintiffs as tenants. As regards the second kabala, although the title was not possibly perfected by the two deeds of release, Ex. 1 (a) and Ex. 1 (b) still those deeds were operative by way of admission of adverse possession on the part of the tenants vendors. Plaintiffs and defendants themselves are no doubt small cosharer landlords, and I do not overlook the fact that in the Courts below plaintiffs tried to make a case that they were actually paying rents to the other landlords but that the learned District Judge found that some of the rent receipts were forged. Still we have the fact that plaintiffs have been in possession of these properties ever since the execution of the kabalas from 1308 onwards, and in order to explain the character of the possession we have to look to those documents. They show that the possession was that of a tenant. The only point that has troubled me is this, that although plaintiff's title has been perfected by possession for more than 12 years as against the vendors, whether that could conclude the present defendants, they being also cosharer landlords. Hence apparently the learned District Judge was led to think that plaintiffs' possession as regards the three-fifths share must be held to be that of cosharer landlords. But I think this position is inconsistent with the view that as regards the one-fifth share plaintiffs were in the position of tenants. From the judgment of the trial Court I find that in that Court it was admitted that the original tenants were 5 Saha brothers

(2) A. I. R. 1921 Cal. 647.

and it appears that the father of defendants 1 and 2 purchased from Monmohan Saha, son of one of the Saha brothers. The defence of defendant 1—that he or defendant 2 has got no tenancy right—seems to me to be inconsistent with the origin of their possession by virtue of the aforesaid purchase. I, therefore, think that the learned trial Court took the correct view when it stated that :

"in the present case the plaintiffs and their predecessors first entered into possession as tenants."

This possession continued for more than twelve years and I find that plaintiffs have got their title in respect of the four-fifths share of the tenancy right in the land in suit.

The next point upon which the learned District Judge decided the suit against the plaintiffs is that the tenancy is a monthly tenancy under S. 106, T. P. Act, and that, therefore, it is not a fit subject for partition. The question is whether this view is correct. No doubt plaintiffs would be entitled to partition of their property under S. 44, T. P. Act, unless it could be shown that the holding was liable to some disability against partition. To my mind when once the rights are established the sole ground on which partition may be allowed or refused is the ground of convenience. This principle was laid down in the Full Bench case *Hemadri Nath Khan v. Ramani Kanta Roy* (3) and following this principle the case of *Bepin Behari Mitter v. Bhagwat Sahai* (4) held that partition should not be allowed when the interest in question was of a temporary and qualified character. On appeal their Lordships of the Judicial Committee in the case of *Bhagwat Sahai v. Bepin Behari Mitter* (5) reversed the finding that the interest in question in that case was of a temporary and qualified character, but they expressly refrained from adopting as a rule of law that a temporary interest could not be partitioned. In the case of *Lalit Kishore Mitra v. Girdhari Singh* (6) the subject of partition, which was allowed, was terminable, albeit it was a mining lease for a term of 999 years.

(3) [1897] 24 Cal. 575=1 C. W. N. 406 (F.B.).

(4) [1905] 9 C. W. N. 693.

(5) [1910] 37 Cal. 918=7 I. C. 549=37 I. A. 198 (P. C.).

(6) [1916] 20 C. W. N. 1306=1 Pat. L. J. 441=35 I. C. 861=2 Pat. L. W. 383.



In the case of *Rajendra Narayan Saha v. Satish Chandra Pal* (7) the subject-matter of partition, which was also allowed, was an ordinary occupancy holding. Thus I do not find that it has been laid down anywhere as a fixed rule of law that a property held in temporary right can not be partitioned and the only rule that I can find is the rule of convenience. In the present case stress has been laid on the finding that the subject-matter of the suit is a monthly tenancy under S. 106, T. P. Act, terminable on 15 days' notice. The learned advocate for the appellant in this Court has complained that this matter was agitated for the first time in the Court of appeal below. In reply to this I have been referred to issue 4 of the trial Court which runs as follows :

"Are the plaintiffs entitled to a partition of the tenancy right without bringing into hotchpot the superior proprietary right which they and defendants have to the land?"

This issue, however, did not raise the question quite in the same way, and judging from the fact that the learned Subordinate Judge disposed of it in a few lines, it is apparent that the parties did not attach particular importance to this question at the time of the trial. However, no doubt we have the finding that the subject matter of the suit is a monthly tenancy terminable on 15 days' notice. But looking at the actual circumstances, it seems to me that this is only technically so. The subject matter of the suit is a plot of land adjoining a homestead and it does not appear to have any substantial structure on it. The holding is very old and the finding is that it has been in occupation for over half a century. Plaintiffs certainly have been occupying it since their purchase more than 21 years ago without apparently any effort on the part of the landlords to eject them. The landlords are numerous and scattered and there is no practical likelihood of their writing to eject the tenants. The tenancy right is possessed solely by the present plaintiffs and the defendants, and they themselves are cosharers landlords. In these circumstances I cannot see how the prayer for partition can be refused on the ground of convenience. Plaintiffs and defendants have been in joint possession for a long time, and of course parti-

tion as between them would not bind the landlord. In the circumstances of this case I consider that the mere fact that technically the holding is a monthly tenancy should not debar the plaintiffs from their lawful right to partition. I think, therefore, that partition should be allowed.

The learned District Judge disposed of the appeal against the plaintiffs on these two points. In this Court the learned advocate for the defendant respondent has argued that on the findings arrived at by the learned District Judge, it cannot be said that the tenancy was transferable. It is pointed out that the learned District Judge has found that the tenancy has been in existence for about half a century. He says :

"Its occupation by the Bairagi goes back about half a century and its previous history is unknown."

It has been argued from this that the learned District Judge appears to have found that the property was in existence from before the passing of the Transfer of Property Act in 1882. I do not think, however, that this is the proper construction of what the learned District Judge has found. Apparently that was not in his mind and it would be a straining of the language used to hold that he must be taken to have found that the tenancy was in existence from before the passing of the Transfer of Property Act which was about 40 years before the suit. On the other hand it was never the defence that the tenancy had been in existence from before the passing of the Transfer of Property Act, but the defence was that the tenancy was governed by the Bengal Tenancy Act. My attention has been drawn to ground 14 of the grounds of appeal in this Court which runs as follows :

"For that the Court of appeal below is wrong in holding that the present tenancy is a tenancy from month to month whereas it should have held under the circumstances of the case that there is a presumption of permanency and that the tenancy was created before the Transfer of Property Act."

The learned advocate for the appellant, on his attention being drawn to this ground, stated that he gave it up and I do not consider that his clients are to be bound by what is after all an inconsistent ground in appeal. There is therefore no substance in the point taken by the respondents, and it must fail.



The result is that in this suit there will be a preliminary decree for partition subject, however, to the decision of the following issue, namely, issue 6, of the trial Court, which was to this effect :

"What are the correct boundaries and extent of the land liable to be partitioned? Are the settlement plots indications of the land correctly depicted and is the record incorrect?"

Upon this the learned Subordinate Judge came to this finding :

"It is accordingly held in this issue that the land in suit is the Cadastral Survey Settlement Dags Nos. 205 and 272 and that portion of 1054 which lies between them being bounded on the west and east by the lines joining the nearest corner points of the Dags Nos. 205 and 272."

The question was raised again before the learned District Judge and he remarked as follows :

"There was another point in the appeal about the limits of the alleged tenancy regarding which however in view of my decision on the main question I did not hear argument."

It is necessary that this point should now be heard and decided.

The appeal is accordingly allowed. The decree of the lower appellate Court is set aside and the case is remitted to that Court, in the first place, for a decision of the above point. When that point has been decided, there will be a preliminary decree for partition. Appellants will get their costs in all Courts. Future costs will abide the result.

**Patterson, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

## A. I. R. 1929 Calcutta 714

LORT-WILLIAMS, J.

*Bengal National Bank, Ltd.*—Plaintiff.

v.

*Jatindra Nath Mazumdar and others*—Defendants.

Suit No. 126 of 1925, Decided on 10th December 1928.

(a) Limitation Act, S. 19—Acknowledgment of liability to pay debt by a letter forwarding bills between creditors and bankers "as arranged" is valid acknowledgment.

Where defendants who carried on business in partnership opened an overdraft account with the plaintiff bank and it was arranged that each partner was eligible to sign cheques in the firm's name and the bank agreed to advance money to enable the defendants to purchase materials and on receipt of bills given on payment for goods supplied to

customers would collect the same on commission and deduct the same balance from the overdraft, a letter forwarding such bills with request to credit amount to sender's account is sufficient acknowledgment of the debt or payment of the principal. [P 715 C 2]

(b) Limitation Act, S. 21 (2)—Acknowledgment by one of the several partners in the absence of notice of dissolution by resigning partner is binding on resigning partner—Contract Act, Ss. 251 and 267.

Where a firm of partners opens an overdraft account and the bank agrees to collect bills and credit balance after deducting commission to the firm account, any acknowledgment by means of a letter forwarding bills as arranged sent by one of the partners, other having severed his connexion with the partnership, is sufficient acknowledgment in the absence of a notice of dissolution to the bank, and is binding on the other partner: *Tucker v. Tucker* 3 Ch. D. 429; *Watson v. Woodman* 20 Eq. 721, Dist. 26 Bom. 42, Ref. [P 715 C 1]

(c) Limitation Act, S. 21 (2)—To make other partners liable acknowledging partner must have authority to do so.

Section 21 (2) simply means that mere acknowledgment or payment by one or more partners is not of itself sufficient to make the other or others chargeable apart from the question of authority. [P 716 C 1]

(d) Limitation Act, S. 19—Current account between banker and customer—Each increase of overdraft is not separate loan: (*Obiter.*)

In the case of a current account between a banker and his customer it is not within the correct interpretation of the Act to regard each increase of the overdraft as a separate loan from the date of which the period of limitation must be computed: 33 Cal. 407, (*P. C.*), Doubtful. [P 716 C 2]

*F. S. R. Surita and O. R. Surita*—for Plaintiff.

*S. M. Bose and S. Roy*—for Defendants.

**Judgment.**—In this suit, the plaintiffs' claim against the defendants is for the balance of a current account. The defendants Amar Nath Banerjee and Hiralal Mukherjee do not contest the suit. It is admitted that the defendants carried on business in partnership under the firm name of Banerjee Mukherjee & Co., and opened an overdraft account with the plaintiff bank, which is now in liquidation and it was arranged that each partner should be eligible to sign cheques in the firm name, adding thereto his own initials, and that the bank would advance money to enable the defendants to purchase materials and on receipt of the bills given in payment for goods supplied by defendants to customers would collect these on commission and deduct the balance from the overdraft. The defendant Jatindra Nath, however,



says that this partnership was dissolved in 1921, and that the plaintiffs had notice thereof. That thereupon he ceased to have any interest in the business, which was carried on by the other two defendants alone, and that he commenced a separate business on his own account. He says also, and this seems to be true, that whatever sum was due to the bank at the time of dissolution has been repaid. He has produced a deed of dissolution dated 24th June 1921, and I have no reason to think that it is other than genuine. He has also produced a carbon copy of a letter dated 27th June 1921, giving notice of the dissolution, which he says that he handed personally to Bhupendra Nath Banerji, who was the managing director of the plaintiff bank, after giving him verbal notice at or about the date of dissolution.

He admits, however, that he did not obtain a receipt for this notice, nor did he receive any acknowledgment from the bank nor did he give any notice to firm's dealing with Banerjee Mukherjee & Co., nor did he advertise the fact of dissolution in the Exchange Gazette, nor in any of the Vernacular Gazettes nor in any English newspaper.

On the contrary Bhupendra has been called and has stated emphatically that he never had any notice of the dissolution either verbally or in writing until after the institution of the suit and he has produced the bank's Letter Receipt Book which confirms his statement.

As between the evidence of Jatindra and Bhupendra I accept that of the latter, and I find in fact that notice of the dissolution was not given to the plaintiffs—who are not therefore affected by it: S. 264, Contract Act. It is unnecessary for me to decide whether this omission to give notice was due to forgetfulness on the part of the defendants, or because they or Jatindra failed to realize what his legal position would be with regard to the firm's creditors, or because they or Amar Nath and Hiralal feared that knowledge of Jatindra's retirement might affect the firm's credit with the bank. The defendant Jatindra has raised the further points that the arrangement for overdraft was limited to Rs. 4,000, and that moneys were to be advanced only against approved securities. This Bhupendra has denied and I accept his evidence. In any case this limit was

very soon exceeded, and large sums advanced without any security, to the knowledge of Jatindra. However, the substantial point raised on his behalf is one of law, namely whether the claim is statute barred, and (assuming that the period of limitation otherwise would have expired) that depends upon whether having regard to S. 21 (2), Lim. Act, there had been any acknowledgment of liability in writing under S. 19 or any part payment of the principal of the debt by the debtor or his agent duly authorized in that behalf, and the fact of which payment appears in the handwriting of the person making it as required by S. 20. Now the facts upon which the plaintiffs rely are: (1) a letter dated 11th January 1922 from defendants to plaintiffs which reads as follows:

"Enclosed please find the undermentioned bill with complete voucher which is to be collected from Messrs. Andrew Yule & Co., Ltd. account the Port Engineering Works Ltd., and credited to our account on realization as arranged."

Bill No. 1578. The Port Engineering Works, Ltd. Rs. 2832-1-6. This Bill less commission was credited to defendants' account on 26th May 1922. (2) A letter dated 18th January 1922 in similar terms referring to Bills Nos. 1492, 1583, 1584, Bill No. 1583 being credited on 24th March 1922. This suit was instituted upon 14th January 1925.

I am of opinion that there has been a sufficient acknowledgment and/or payment by the defendants Amar Nath and Hira Lal to satisfy the provisions of the above sections, as against them. The part payments of the principal debt are evidenced by the handwriting of the person making them contained in the covering letters. The fact that the collection and receipt of the money and the letter containing the handwriting are not simultaneous in point of time is immaterial, as has been decided. Moreover the letters contain acknowledgments of liability, because they refer to the account and request that the bills may be credited "as arranged," that is to say deducted, from the amount of the overdraft according to the agreement between the parties and an acknowledgment of a current account implies an acknowledgment of a right to have accounts settled and implies a promise to pay should the balance turn out to be against the person making it. *Maniram Seth v. Seth Rup-*



*chand* (1). The question remains whether what they did is binding upon the defendant Jatindra Nath and it is a question of implied authority.

Ordinarily whatever their authority had been, it would cease upon dissolution. But S. 264, Contract Act, provides in effect, that so far as the plaintiffs are concerned, there had been no dissolution and the partnership still subsisted at the time when this suit was instituted. The real question therefore is, what implied authority has one partner to bind another partner by his acts.

Section 251, Contract Act, provides that each partner who does any act necessary for, or usually done in, carrying on the business binds his copartners, as if he were their agent duly appointed for that purpose. Section 21 (2) simply means that the mere acknowledgment or payment by one or more partners is not of itself sufficient to make the other or others chargeable, apart from the question of authority. Therefore what I have to decide is, whether, an acknowledgment or payment such as was made in this case and which has the effect of removing the bar of limitation, was authorized impliedly, by the defendant Jatindra Nath or not. That depends upon whether it was an act necessary for or usually done in carrying on the business. In my opinion, clearly it was such an act. The acknowledgment was contained in a letter, dated 18th January 1922 similar to many dozens of others written by defendants to plaintiffs, asking that certain bills should be collected and credited to the firm's account. It was written in the usual course, and was essential to the business, which could not have been carried on without the overdraft arrangement made with the plaintiffs. It was followed by a payment made on 24th March in accordance therewith upon collection of the bill. There was another payment upon which plaintiffs rely made on 20th May. These stand upon quite a different footing from the acknowledgments or payments with which we are familiar and to which the cases refer, and which are made specifically in recognition of the debt. For this reason none of the cases to which I have been referred is really applicable to the

facts of the present case. Moreover, in view of the clear provisions of Ss. 251 and 264, Contract Act, the law as declared in the English cases of *Tucker v. Tucker* (2) and *Watson v. Woodman* (3) seems of doubtful application to India. Of the Indian decisions, the law applicable to the facts of this case is correctly stated in *Dalsukhram v. Kalidas* (4) where the effect of S. 264 is recognized.

In my opinion which article of the Indian Limitation Act applies is immaterial in this case.

If Arts. 57 or 59 apply, then the date when the loan was made must in my opinion be taken to be the date when the last credit was entered, namely 26th May 1922 or the last debit which was in 1925, in which cases the periods of limitation had not expired when the suit was instituted. In the case of a current account between a banker and his customer, I do not think it would be practicable, or within a correct interpretation of the Act, to regard each increase of the overdraft as a separate loan, from the date of which the period of limitation must be computed, though this seems to have been the view expressed by Sir Alfred Wills in the case of *Maniram Seth v. Seth Ruxchand* (1) at p. 1057. However, if I am wrong on this point, there has been an acknowledgment and part-payments of those loans in the present case, which have extended each of the periods of limitation. In English law time runs from the date when the cause of action arises (Limitation Act 1623) and not from the date when the loan is made as in Arts. 57 and 59.

No cause of action arises as between banker and customer until demand has been made. *Joachimson v. Swiss Bank Corporation* (5). *Re British American Continental Bank: Credit General Liegeois' claim* (6) per P. O. Lawrence, J. at p. 593; Grant on Banking 7th edn. at p. 182. These are recent decisions, and their effect has been to upset views previously held by many lawyers. It has been declared, that it is an implied

(2) [1894] 3 Ch. D. 429=71 L. T. 453=12 R. 141.

(3) [1875] 20 Eq. 721=45 L. J. Ch. 57=24 W. R. 47.

(4) [1901] 26 Bom. 42=3 Bom. L. R. 484.

(5) [1921] 2 K. B. 110.

(6) [1922] 2 Ch. 589.

(1) [1906] 33 Cal. 1047=33 I. A. 165=4 C. L. J. 94 (P.C.).



term of the contract of loan made between a banker and his customer that demand shall be made before any cause of action can arise. The first decision was given in a case in which the customer sued the banker. In the second case the banker sued the customer on an overdraft, and though the actual decision turned on another point, P. O. Lawrence, J. applied the principles laid down in the former case. Moreover, in my opinion, the term ought to be mutually applied, if at all. The Indian legislature, however, seems to have given effect to the decision in the first case so far as it affects the question of limitation but not to that in the second. This has been done in a curious and rather clumsy way. There have been added to Art. 60, Lim. Act, which deals with money deposited payable on demand as distinguished from money lent, the words "including money of a customer in the hands of his banker so payable." The distinction between deposit and loan seems to be that the depositor stands in a fiduciary relationship to the depositor, thus by introducing this amendment in Art. 60 the legislature seems to have regarded the relationship between banker and customer as such, and not as that of borrower and lender, as is the position in English and has been hitherto in Indian law.

This may not have been intended and may lead to confusion and it would have been better to have dealt with the relationship of banker and customer in a separate article. However, it seems quite clear that it was not intended to extend the amendment to a banker suing his customer on an overdraft, and Art. 60, as drafted, has no application to the present case. The decisions given upon Art. 85 are difficult to apply to the facts of this case, and are not very easy to follow. Thus it has been held that there must be reciprocity of dealings, items on one side only are not enough though made up of debits and credits—an account under which one party has merely received and paid moneys on account of the other is not a mutual account properly so called. *Ram Pershad v. Harbans* (7). Similarly where the plaintiff a banker had made advances and received part-payments from time to time, the balance always being in plaintiff's favour. *Ram*

(7) [1907] 6 C. L. J. 168.

*Ram v. Ralli Ram* (8), *Bank of Multan Ltd. v. Kamta Prasad* (9).

But where plaintiff advanced money and defendant consigned goods to plaintiff for sale on commission, it was held that there were independent obligations on both sides, because there existed the relationship of creditor and debtor between plaintiff and defendant and that of principal and agent between defendant and plaintiff: *Numbermal v. Kotayya* (10), *Ratan Chand Jwala Das v. Asa Singh Bhoga Singh* (11).

The facts of the present case are somewhat similar as the plaintiffs charged commission on collection, and on the whole I think that Art. 85 applies and the close of the year 1922 is the appropriate date from which limitation begins to run. Apart from this question of commission, I do not think that Art. 85 would apply. If none of these articles apply, then the case must fall under Art. 120, which provides a period of six years from the time when the right to sue accrues.

The result of all these considerations is that in my opinion the suit is not barred against any of the defendants and there must be judgment against them and in favour of the plaintiffs for the sum claimed, with costs on scale 1 against Amar Nath Banerjee and Hira Lal Mukherjee, and on scale two against Jatindra Nath Mauzmdar.

V.B./R.K.

*Suit decreed.*

(8) [1916] 103 P. W. R. 1916=37 I. C. 300.

(9) [1917] 39 All. 33=35 I. C. 199=14 A. L. J. 949.

(10) [1913] 14 M. L. T. 498=21 I. C. 773.

(11) A. I. R. 1921 Lah. 369.

### \* A. I. R. 1929 Calcutta 717

CUMING AND GRAHAM, JJ.

*Badarannessa Chaudhurani* —Defendant—Appellant.

v.

*Ram Chandra Mala Das and others*—Plaintiffs and Defendants—Respondents.

Appeal No. 512 of 1927, Decided on 10th April 1929, from the appellate decree of Dist. Judge, Zillah, Tippierrah, D/- 4th October 1927.

(a) Court-fees Act (7 of 1870). S. 9 — Court-fees Act does not warrant requiring appellant to prove correctness and valuation of property and dismissing appeal for

Advocate High Court

Jammu & Kashmir

Srinagar.



non-prosecution on failure—S. 9 applies to appellate Courts and procedure laid down there cannot be departed from.

It is not in the power of the Court to call upon the appellant to produce evidence to substantiate the value which he has assessed upon the property in question. If the Court is of opinion that the value has been wrongly assessed, the Court can proceed under S. 9 but there is no provision whatever in the Court-fees Act under which the Court can call on a party to prove that the Court-fee is what the party alleges to be and on his failure to do so dismiss his appeal for non-prosecution. [P 719 C 1]

\*(b) Court-fees Act (7 of 1890)—Issuing chart setting out valuation of land in district by District Judge, superseding provisions of Act is entirely unwarranted.

Issue of a chart by the District Judge setting valuation of different classes of lands in the district, and sent round to all subordinate Courts is a serious interference with Court's judicial discretion and entirely unwarranted by the provisions of the Act. The propriety of such chart is questionable inasmuch as the Act provides that the Court may if it questions the valuation, issue a commission for such local investigation as is necessary. [P 718 C 2]

*Chandra Sekhar Sen*—for Appellant.

*Nagendra Chandra Chowdhury* — for Respondents.

**Cuming, J.**—The facts of the case out of which this appeal has arisen are briefly these. The plaintiffs in the suit brought a suit in which they claimed that a certain jote was held under them by the defendants and not by them under the pro forma defendants. In the trial Court the suit was valued at Rs. 200 and this valuation was accepted both by the trial Court and the parties. The appeal to the lower appellate Court was valued at the same amount. The office made a note on the memorandum of appeal as follows:

"This is a suit for establishment of the plaintiffs' taluka right over the disputed land and for declaration of getting rent from the 2nd party defendant. Ad valorem fee has been paid on valuation of Rs. 200 in both the Courts."

The learned District Judge then made a note asking the lower Court to explain how the valuation was arrived at and under what section the court-fees were assessed. The learned Judge says that S. 7 (c) would seem to apply and he asked both parties to produce a copy of the rayati khattian in question by 17th August 1926. It is difficult to understand why the lower appellate Court should have asked the trial Court or its explanation. The valuation had

been accepted by the lower Court and both the parties and presumably was correct. Be that as it may the trial Court replied as follows:

"The suit in question was instituted in the local Munsif's 6th Court on 13th August 1923 and was registered in that Court that, is, before the chart for the guidance of valuation of suit land was issued. This Court received the suit on transfer and as the defendant did not raise any objection as to the value of the suit no question on the point arose for my consideration."

The chart referred to in the explanation requires explanation. We are informed that the District Judge has sent round to the Subordinate Courts in the district a chart in which the valuation is set out of the various classes of land in the district. The propriety of the issue of a chart of this character is over questionable. S. 9, Court-fees Act, provides that the Court may if it questions valuation issue a commission for such local investigation as is necessary. But it makes no provision for a chart of this kind and for the District Court to issue a chart of this kind to the Subordinate Court seems to me to be a serious interference with those Courts' judicial discretion and entirely unwarranted by any provision of the Act. After the receipt of this explanation by the lower appellate Court the appellant prayed for ten days' time to produce the map and the khattian. There is a note by the lower appellate Court that there was no appearance on behalf of the plaintiff respondents. On 4th October the appellant prayed for further time to produce the map and the khattian. The learned Judge refused to grant further time stating that the appellant could have brought the map and khattian long ago and that he was not prosecuting the appeal properly and that the memo. of appeal was therefore rejected. Against this order the appellant has appealed to this Court.

The order passed by the learned Judge is clearly an illegal order and must be set aside. It has not been suggested to us by the parties that there is any section either in the Civil Procedure Code or in the Court-fees Act within which it can possibly fall. It certainly does not come under O. 41, R. 3 or O. 41, R. 17 or 18, Civil P. C. It has been suggested to us by the learned advocate for the respondents that it falls under S. 12, Court-fees Act.



It clearly does not. S. 12 only provides that whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the question of valuation of a suit has been wrongly decided to the detriment of the revenue it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided and the provisions of S. 10, para. (ii) shall apply. In this case the Court did not decide that the question relating to valuation for the purpose of assessing court-fees had been wrongly decided nor did it require the appellant to pay additional court-fees under the section. Clearly, therefore, the appeal was not dismissed on the ground that the appellant failed to pay additional court-fees when called on to do so by the appellate Court. It is difficult to see under what procedure or under what section of the Court-fees Act the appellant was called upon to produce evidence as to the value of his land. The only section which seems to deal with this point is S. 9, Court-fees Act. This section applies to the Court of first instance primarily but there is no reason to think why it should not apply also to a Court of appeal. S. 9 provides :

" If the Court sees reason to think that the annual nett profits or the market value of any such land house or garden as is mentioned in S. 7 paras. 5 and 6 have or has been wrongly estimated the Court may, for the purpose of computing the fee payable in any suit therein mentioned, issue a commission to any proper person, directing him to make such local or other investigation as may be necessary, and to report thereon to the Court. "

If therefore, the Court is of opinion that the value has been wrongly assessed the Court can proceed under that section and assess the value in the manner provided in that section. In these matters the Court must proceed strictly according to law and not in the arbitrary and illegal way this case reveals. It is not in the power of the Court to call upon the appellant to produce evidence to substantiate the value which he has assessed upon the property in question. But there is no provision whatever in the Court-fees Act under which the Court can call on a party to prove that the Court-fee is what he the party alleges it to be and on his failure to do so

to dismiss this appeal for non-prosecution.

The order of the District Judge is clearly wrong and is set aside and he will take up the appeal from the stage at which he passed his order.

There will be no order as to costs in this appeal.

**Graham, J.**—I agree that the appeal must be allowed on the ground that the order appealed against is without jurisdiction and is not in accordance with any section either of the Code of Civil Procedure or in the Court-fees Act. The proper procedure for the learned Judge to adopt was under sub-S. (2), S. 12, Court-fees Act. But that procedure has not been followed. I concur in the order which my learned brother has made.

V.B./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 719

B. B. GHOSE AND PANTON, JJ.

*Manmatha Nath Dutt and others—*  
Defendants—Appellants.

v.

*Matilal Mitra and others—*Plaintiffs—  
Respondents.

Appeals Nos. 174 and 175 of 1926, Decided on 10th December 1928, from original decrees of Sub-Judge, Khulna, D/- 13th November 1925.

(a) Civil P. C., O. 20, R. 12 — Right to mesne profits found in judgment—No direction in decree—Assessment of mesne profits in decree was allowed.

Where plaintiff's right to mesne profits is found in judgment but there is no direction in the decree and on plaintiff's application for the assessment of mesne profits the Court decreed the amount of mesne profits, the action of the Court in assessing the mesne profits, as if an order was distinctly made in the decree in terms of O. 20, R. 12, is right.

[P 720 C 2]

(b) Bengal Civil Courts Act (12 of 1887), S. 21 (2)—Value of land below Rs. 5,000—Value with decreed mesne profits exceeding Rs. 5,000—Appeal lies to High Court.

Appeal against decree for mesne profits in a suit for possession of land, where value of the land with mesne profits up to the date of the suit was below Rs. 5,000, but such value with mesne profits decreed exceeded Rs. 5,000, lies to the High Court : A. I. R. 1925 Cal. 1076, (F.B.), Dist. ; 34 Cal. 954 (F.B.), Ref.

[P 720 C 2]

(c) Transfer of Property Act, S. 6—Mere right to sue—Assignment of right to property, all interest and mesne profits claimed in suit is not mere right to sue.

Transfer of properties and all interests in suit including past and future mesne profits



by original plaintiff in a suit for possession of land to the plaintiff subsequently substituted is not a mere right to sue and is not prohibited under S. 6. [P 721 C 1]

(d) **Landlord and Tenant—Rent**—On dis-possession rent suspended—If mesne profits are granted for period of dispossession landlord is entitled to deduct rent.

Where a landlord dispossesses the tenant, there is no doubt a suspension of rent; but when a tenant gets mesne profits from the landlord for such dispossession landlord is entitled to deduct the amount of rent payable to him on account of the lands in question. [P 722 C 2]

(e) **Civil P. C., S. 35 — Commission for taking accounts**—Plaintiff succeeding is entitled to costs of commission.

When commissions for taking accounts and so forth are directed if the plaintiff succeeds to any extent, he is entitled to the costs of the commission. [P 723 C 1]

*Rupendra Coomar Mitra and Paresh Chandra Mitra*—for Appellants.

*Basak and Jitendra Kumar Sen Gupta*—for Respondents.

**B. B. Ghose, J.**—These two appeals are by the defendants against the final decree made by the Subordinate Judge of Khulna assessing the amount of mesne profits in two suits brought by the vendor of the present respondents. The suits were instituted in 1908 by one Nag for recovery of possession of certain lands and for mesne profits from Assar 1314 till the date of the suits and also subsequent mesne profits till the date of recovery of possession. The suits were originally brought in the Munsiff's Court: then they were refiled in the Court of the Subordinate Judge as the Munsif found that the value of the subject-matter of the suits was beyond his jurisdiction. During the pendency of the suits the original plaintiff executed a conveyance in favour of the present respondents on 10th December 1911 and the contesting respondents were substituted for the original plaintiff. They carried on the suits and obtained decrees in the trial Court. There were appeals to the District Judge and then second appeals to this Court in both of which the respondents were successful. Subsequently, the respondents applied for assessment of mesne profits. In November 1925 the amount of mesne profits assessed by the Subordinate Judge in the two suits was about Rs. 8,000. The same arguments were addressed in both the appeals and it will be sufficient to give reasons with regard to one of them.

A preliminary objection has been taken on behalf of the respondents as to the forum of the appeal. Their contention is that the appeals ought to have been preferred in the Court of the District Judge, the reason being that the original value of the lands in suit and the mesne profits claimed up to the date of the suit fall below Rs. 5,000 although the value of the lands added to the amount of mesne profits now decreed exceeds Rs. 5,000. Reliance is placed upon certain expressions in a judgment of myself in the Full Bench case of *Bidyadhar Bachar v. Manindra Nath Das* (1), and it is contended that the appeals should lie to the District Judge. The observations referred to were, however, made with reference to the jurisdiction of a Munsiff to make a decree in excess of his pecuniary jurisdiction for mesne profits pendente lite and no question was involved in that Full Bench case as to the forum of appeal from a decree of the Subordinate Judge under the present circumstances. The observations with regard to an appeal in that case referred to the provisions in the Bengal Civil Courts Act, S. 21 (2) about an appeal from the decision of a Munsif. The question as to the forum of appeal in a case such as this was decided in the previous Full Bench case of *Ijjatulla Bhuian v. Chandra Mohan Banerjee* (2). The appeal, therefore, to this Court is competent and the preliminary objection taken on behalf of the respondents must, accordingly, be overruled.

On the merits a large number of objections has been taken by the learned advocate for the appellants.

The first is that there is no direction in the decree made previously under O. 20, R. 12, Civil P. C., for the assessment of mesne profits and therefore no enquiry could be made by the Court at any subsequent stage of the hearing. What happened at the trial was that a distinct issue was raised in the trial Court as regards the right of the plaintiff to mesne profits. That issue was issue 14. In deciding that issue the Subordinate Judge made the following observations:

"The plaintiff is entitled to get mesne profits, the principal defendants being found to be in possession of the disputed properties

(1) A. I. R. 1925 Cal. 1076=53 Cal. 14 (F.B.).

(2) [1907] 34 Cal. 954=6 C. L. J. 255=11 C. W. N. 1133 (F.B.).



without any title. The amount of mesne profits will be determined hereafter."

These words, however, were not in the ordering portion of the judgment and in the decree no specific mention was made with regard to mesne profits. The ordering portion of the decree only states: "The suit is decreed on contest against the defendant who appeared" and then there was the provision for taking khas possession and so forth. This decree, as already stated, was affirmed by the District Judge on appeal and by the High Court in second appeal. It is clear that the decree was not drawn up in accordance with the judgment. At a subsequent stage of the proceedings the Subordinate Judge, who was a different official from the original Judge who made the decree, construed the decree as allowing mesne profits as claimed by the claimant in the plaint. To give effect to the contention of the appellants would only result in this, that the plaintiffs would have to apply to the Court to make the decree in accordance with the judgment. There is no limitation for such an application and, therefore, the objection raised on behalf of the appellants is not a substantial one. The Court below was right in assessing the mesne profits as if an order was distinctly made in the decree in terms of O. 20, R. 12, Civil P. C.

The second objection is based upon the fact of transfer of the interest of the original plaintiff to the present respondents. It is contended that by virtue of that transfer the substituted plaintiffs are not entitled to claim mesne profits for the period before the date of such transfer, that is to say, before 10th December 1911. The objection is based on the ground that the right to claim mesne profits was a mere right to sue and, therefore, the transfer of the right is within the mischief of S. 6 (e), T. P. Act, which forbids the transfer of a 'mere right to sue. The question, therefore, for decision with reference to this objection is whether the original plaintiffs transferred a mere right to sue in favour of the present respondents. Reliance has been placed by the learned advocate on behalf of the appellants to the case of *Jewan Ram v. Ratan Chand Kissen Chand* (3) in support of his contention. That case, however, seems to me to have no bearing on the present controversy.

(3) A. I. R. 1921 Cal. 795.

In that case it was held, upon a true construction of the terms of the assignment that there was not anything more than an assignment of a mere right to sue. Sir Lancelot Sanderson, C. J., stated that the assignment did not in terms purport even to assign the contract or the benefit thereof. Richardson, J., also held that what was assigned was not anything more than a mere right to sue, a right which is not incidental to property. In this case the question is whether what was assigned was a mere right to sue or property with an incidental remedy for its recovery and consequential benefit. An assignment of a mere right to sue does not convey any property, e. g., if any person out of possession of immovable property makes an assignment to the effect that the assignee would have a right to sue, without conveying any interest in the property, the assignee would not be entitled to maintain any suit for the recovery of the property. But it would be otherwise if the property itself is transferred. The first thing that strikes me with regard to this objection is that when the present plaintiffs were substituted in the place of the original plaintiff on the ground of the entire interest having been assigned, then no question was raised by the defendants that the assignees could not carry on the litigation with regard to any part of the claim, that is, the claim which had accrued due for past mesne profits. The entire suit was decreed in favour of the substituted plaintiffs in the trial Court as well as in the two Courts of Appeal.

But assuming such an objection could be raised now, I should say that the assignment by the original plaintiffs was not an assignment of a mere right to sue with regard to any part of the claim. Certain English cases have been cited before us but they cannot be used as direct authority on the question in this country, because the rule in England is more stringent than here, as certain transfers in England are not allowed as savouring of champerty or maintenance. Many conveyances which would not be allowed in England may be allowed in this country because there is no rule against champerty or maintenance in this country. But the decisions of English Courts may serve as a guide as regards the question as to whether an assignment is one merely of a right to sue or, as it is ter-



med in England in many cases as, a bare right of action, or a right in the property with incidental rights. On this question the observations of the Court of Appeal in the case of *Ellis v. Torrington* (4) which was cited before us on behalf of the respondents, are of considerable help. Lord Justice Scrutton at p. 412 observes as follows :

"So in this case when the respondent who had bought the free-hold, took, also an assignment of the right to recover damages for dilapidations against the first lessee, he was not buying in order merely to get a cause of action; he was buying property and a cause of action as incidental thereto."

In that case the plaintiff purchased a leasehold interest with the right to recover damages which accrued previously to the date of purchase for non-repair by the lessees under a covenant. I find that Seshagiri Ayyar, J., made certain observations with regard to that case in *Venkatarama Aiyar v. Ramasami Aiyar* (5). I entirely agree with those observations. The transfer in this case was of the properties and all the interest which the original plaintiff had in the suits. I am of opinion that in this case there was no transfer of a mere right to sue which is prohibited under S. 6 (e), T. P. Act. This argument of the appellant also fails.

The third point raised was with regard to an alleged purchase by a person named Sashi Bhusan Maulik of the properties in question in execution of a decree against the plaintiffs. It is said that Sashi Bhusan purchased the properties on 17th November 1916. The agreement is that the present plaintiffs were not entitled to recover any mesne profits subsequent to that date. Whether the purchase by Sashi Bhusan was real or not we need not discuss. Assuming that it was a good purchase, it does not appear that he ever took possession. On the other hand, it has been proved that the plaintiffs themselves took possession in execution in Chaitra 1326 (1920). Sashi Bhusan did not get himself substituted in place of the plaintiffs and whatever he purchased it was made pendente lite and he would be bound by the decree that is made in the suit. This objection of the appellant also fails and cannot stand.

The fourth objection urged was that the rent payable on account of the properties in suit should have been deducted in calculating the mesne profits. The Subordinate Judge has not allowed that on the ground that the defendants themselves being the landlords had dispossessed the tenants and they were, therefore, not entitled to get rent. That seems to me to be an erroneous view to take. If the landlord dispossesses the tenant, there would no doubt be a suspension of rent; but when the tenant gets mesne profits from the landlord for such dispossession, the landlord is entitled to deduct the amount of rent payable to him on account of the lands in question. The respondent does not seriously object to this proposition. Therefore the amount of mesne profits should be deducted to the extent of the amount of rent payable each year.

The next objection taken on behalf of the respondent is with regard to collection charges. The commissioner allowed ten per cent and the Subordinate Judge reduced it to five per cent. Having regard to the circumstances of the case, we are not inclined to increase the collection charges allowed by the Subordinate Judge.

The sixth point taken was that a predecessor-in-interest of the plaintiff let out certain lands to the tenants on paddy rent by taking kabuliats from them and in those kabuliats it was stipulated that if the tenants did not pay paddy rent, a certain sum of money should be payable.

The objection taken by the appellant is that the plaintiffs are not entitled to claim the market price of the paddy. But the evidence in this case appears to be that the defendants actually collected paddy from some of the tenants and therefore they are bound to pay the market rate.

The seventh and the last objection that was pressed was that the commissioner found that three jamas were not in existence; but the defendants have been made liable for the profits of the three jamas. What the commissioner said was that the plaintiffs could not point out these jamas. The plaintiffs were strangers to the properties. Those jamas appear in the papers of the defendants and therefore the commissioner took into account the profits of the jamas. There is nothing wrong in it. It ap-

(4) [1920] 1 K. B. 399=89 L. J. K. B. 369=86 T. L. R. 82=122 L. T. 361.

(5) A. I. R. 1921 Mad. 56=44 Mad. 539.



appears that defendants produced collection papers for only one year, that is, 1314 B. S., and the mesne profits have been assessed with reference to the papers of the defendants themselves. If they have not produced papers of subsequent years and if they have been charged with more than what could be reasonably received from the property, it was their own fault and therefore they cannot complain. This disposes of the questions raised by the appellant.

The plaintiffs-respondents, however, complain that they have not been allowed costs of the commission and the appellants say that that has not been allowed rightly because the plaintiffs claimed altogether a very excessive amount to the extent of Rs. 17,000 as mesne profits. It does not appear that on account of the inflated claim of the plaintiffs, the commissioner had to undertake any lengthy enquiry. It is the general rule that when commissions for taking accounts and so forth are directed if the plaintiff succeeds to any extent he is entitled to the costs of the commission and there is no reason why this rule should be departed from here. The plaintiffs are entitled to costs of the commission. They will also get the value of court-fees paid in the lower Court from the defendants. This disposes of the cross objection preferred by the plaintiffs. We make no order as to costs of the cross objection.

The result is that the decree of the Subordinate Judge is varied to this extent that the mesne profits is reduced by the amount of rent payable on account of the lands in question every year. Costs of the commission and amount of court-fees paid by the plaintiffs in the lower Courts should be added to the decretal amount.

Having regard to the fact that the defendants have been made liable for a large amount of mesne profits, although to a great extent due to their own fault and that they have succeeded in part with regard to their appeal, we make no order as to the costs of this appeal.

**Panton, J.**—I agree.

V.B./R.K.

*Decree varied.*

## A. I. R. 1929 Calcutta 723

MUKERJI, J.

*Panchanan Roy and another*—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 380 of 1929, Decided on 8th May 1929.

**Stamp Act, S. 64 (a)**—Scope.

Person in whose favour the document is executed is not hit by S. 64 (a). [P 724 C 1]

*Mrityunjoy Chattopadhyaya and Manindra Nath Banerji*—for Petitioners.

**Judgment.**—This rule has been issued to show cause why the convictions of and the sentences passed on the two petitioners Panchanan Roy and Kuran Chandra Das should not be set aside or why such other order should not be made as to this Court may seem fit and proper on grounds 1 to 6 of the petition. Panchanan has been convicted under S. 64 (a), Stamp Act, and Kuran under S. 64 (b) of the same Act. Panchanan has been sentenced to pay a fine of Rs. 100, in default simple imprisonment for one month and Kuran to pay a fine of Rs. 50 in default to undergo simple imprisonment for 15 days. The facts shortly are that there was a kabala in respect of a sale in which one Serajuddin was the vendor, Panchanan the purchaser and Kuran the scribe. The kabala stated that the consideration for the sale was Rs. 100. It was presented for registration and Serajuddin apparently made a statement before the Sub-Registrar to the effect that the consideration was really Rs. 161. On these facts prosecution was started as against all the three persons against Serajuddin and Panchanan for having committed an offence under S. 64 (a) and Kuran under S. 64 (b), Stamp Act. At the trial Serajuddin made a statement of a confessional nature admitting that the consideration was really Rs. 161 and not Rs. 100 which was mentioned in the document. Thereafter the said Serajuddin as well as the two petitioners who obtained this rule were convicted in respect of the offences for which they were tried.

At the outset it will be seen that the conviction of Panchanan under S. 64 (a), Stamp Act, is not justified by the allegations that have been made against him, far less by any evidence that has been adduced. S. 64 (a) is in these words :



"Any person who with intent to defraud the Government executes any instrument in which all the facts and circumstances required by S. 27 to be set forth in such instrument are not fully and truly set forth etc."

It may be conceded that S. 27 requires the sale price to be fully and truly set forth in the document, but then Panchanan did not execute the document but the document was executed in his favour. He is not hit by S. 64 (a). I have considered the question as to whether he may be brought in under S. 64 (b), for if the circumstances of the case would justify his conviction under S. 64 (b), his conviction may properly be altered to one under that section. On reading the evidence, however, I find that there is not one word in it to the effect that he personally took any part whatever in the transaction, and though it was a document executed in his favour it cannot upon the materials that are on the record for a moment be suggested that he was employed or concerned in or about the preparation of the document, far less that he neglected or omitted to set forth the value fully and truly. The result is that the conviction of Panchanan must be set aside and I order accordingly.

As regards Kuran Das, as I have already said he has been convicted under S. 64 (b). His conviction must rest upon the knowledge if any that he had as regards the real price of the property. Of that again there is no evidence whatsoever. On the other hand the prosecution witnesses themselves say that it was given out at the time when the document was being prepared that the value of the property was Rs. 100. Under these circumstances to convict him upon the statement of Serajuddin, even if for argument's sake it may be taken that Serajuddin meant to say anything which would go to indicate that Kuran had knowledge as regards the real price of the property, will not be supportable from any point of view. His conviction also cannot stand.

The rule is made absolute. The convictions of the two petitioners being set aside it is ordered that the fines if paid by them be refunded.

V.B./R.K.

*Rule made absolute.*

## A. I. R. 1929 Calcutta 724

PEARSON AND MALLIK, JJ.

*Amanat Ali*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 38 of 1929, Decided on 28th May 1929.

(a) Penal Code, S. 211—False charge against public servant—Jurisdiction.

A false charge against a public servant must be made to an officer who has power to investigate and send it for trial: 6 Cal. 620, Foll. [P 725 C 1]

(b) Criminal P. C., (as amended), S. 197—Sanction of Government for trial of Government servant is necessary only when offence alleged is done in pursuance of public office.

The expression "offence alleged to have been committed by him while acting or purporting to act in discharge of his official duties" implies something in nature of an official character attached to the act itself, that act being in fact done as an official act in pursuance of public office held by the public servant. Therefore, in order that S. 197 may be applicable to the complaint of the offence against a public servant it is essential that the criminal act constituting the offence should have been done as an official act or under the cloak of what purported to be an official act. It is not enough that his capacity of public servant put him in position to do the alleged act. [P 725 C 2]

(c) Criminal P. C., S. 476—Power to make complaint is not confined to Court taking cognizance but superior Court to whom it is transferred or who has withdrawn case to its file under S. 528 may make complaint.

The power to make a complaint under S. 476 is not limited to the Court taking cognizance of the original case. But it extends to superior officer to whom the case has been transferred or to the Magistrate who has withdrawn the case to his own file under S. 528. But generally the Court which has proceedings before him and which tries the case on merits is the proper Court to make complaint under S. 476: 6 C. W. N. 35 and 3 C. W. N. 39, Ref. [P 726 C 1, 2]

*Mrityunjoy Chattopodhya* and *Rajkumar Chakravarty*—for Petitioner.

*Khundkar*—for the Crown.

**Order.**—The facts which have given rise to the present rule were these. The petitioner Amanat Ali preferred a complaint under S. 406, I. P. C., before Mr. K. L. Banerji, a Magistrate, 1st Class, Noakhali, charging Moulvi Azizar Rahaman, Sub-Deputy Collector of Sandip, with having misappropriated a sum of Rs. 400 paid to him by the petitioner as selami for certain khas mahal lands. Mr. Banerji examined Amanat Ali and sent the matter to one Mr. Ahmed Ali for an enquiry and report. On the next



day the District Magistrate withdrew the complaint to his own file and directed Mr. Khan, Sub-Divisional Magistrate, Sadar, to enquire into the complaint and report. Mr. Khan held an enquiry and submitted a report to the District Magistrate declaring the complaint of Amanat Ali to be maliciously false. Thereupon the District Magistrate on a consideration of that report dismissed the complaint under S. 203, Criminal P. C., and under the provisions of S. 476 of the Code made a complaint against Amanat Ali under S. 211, I. P. C. Against this order of the District Magistrate the petitioner moved the Sessions Judge but without any success. Thereupon the petitioner came up to this Court and obtained the present rule.

The rule was issued on two grounds: namely, (1) that no Court being entitled to take cognizance of Amanat Ali's complaint against the Sub-Deputy Collector without sanction of the Local Government the complaint under S. 211, I. P. C., in respect thereof was not sustainable; (2) that the District Magistrate not having taken part in any judicial proceeding connected with the petitioner's complaint was not competent to make the complaint against the petitioner under the provisions of S. 476, Criminal P. C.

As regards the first ground it was urged that the charge under S. 211, I. P. C., was not sustainable, the contention being that S. 211 requires that a false charge must be made to an officer who has power to investigate and send it up for trial and that in the present case Mr. Banerji or any other Magistrate had no power to send up the matter for trial, S. 197, Criminal P. C., operating as a bar to it, inasmuch as admittedly no sanction had been obtained from the Local Government. So far as the proposition that a false charge must be made to an officer who has power to investigate and send it up for trial goes it is perfectly sound finding support as it does from the decision in the case of the *Empress v. Jamoona* (1). But the contention that S. 197 operates as a bar to taking cognizance in the present case does not appear to be sustainable. Under S. 197 a previous sanction of the Local Government is made necessary in a case where a public servant is accused

of an offence, alleged to have been committed by him "while acting or purporting to act in the discharge of his official duty." The present wording has been somewhat altered from that of the former Code, where the question was whether the person was "accused as such Judge or public servant of any offence." The trend of the cases was that the section extended only to acts which would have no special signification except as acts done in the capacity of public servant. Leaving aside authority, however, the proper method of approaching the matter is to take the language of section as it now stands, without reference to changes in the wording or comparison with corresponding sections in previous Statutes, and thus to see what the application of it would be in the present case, taking the language in its ordinary and natural meaning. The question is whether in the present case the offence is alleged to have been committed by the public servant, namely the Sub-Deputy Collector, while acting or purporting to act in the discharge of his official duty. That would seem to imply that something in the nature of an official character attached to the act itself, that act either being in fact done or purporting to be done as an official act in pursuance of the public office held by the public servant. In the case of a criminal breach of trust by a public servant, it would, therefore, be essential to shew, before S. 197 would be applicable that misappropriation had taken place as an official act or at least under the cloak of what purported to be an official act. In the present case Amanat Ali never alleged that the Sub-Deputy Collector had misappropriated the money while acting in the capacity of a public servant. All that he said on the point was that when he asked for settlement the Sub-Deputy Collector made no settlement of the land with him and when he asked for a refund of the money the Sub-Deputy Collector denied having received any.

It is true that to constitute an offence under S. 409, I. P. C., the accused should have been entrusted with the property in his capacity of a public servant and should have committed criminal breach of trust in respect of that property. He may, therefore, be guilty under that section although the crimi-

(1) [1881] Cal. 620=8 C. L. R. 215.



nal act itself was not done or did not purport to be done in the discharge of his official duty. But we do not think that any argument can be based on that as to what is intended by the language of S. 197 with which alone we are here concerned. The fact that the Sub-Deputy Collector is a public servant may have afforded him the opportunity for the commission of the offence and it may be a necessary part of the proof to show that the property was entrusted to him as a public servant. But the criminal act which constitutes the offence of criminal breach of trust must itself be something in the nature of an official act done or purporting to be done in the discharge of his official duty, before the provisions of S. 197 would become applicable. As was said by Coutts-Trotter, J., *In re Abdul Khadir Saheb* (2) (which was a case under the former Act):

"I think on the whole that even if it is a necessary averment to say that he was a public servant and not a mere matter of proof nevertheless the offence is of criminal breach of trust and that it is not an offence which is committed by him in his capacity of public servant as such, his capacity of public servant being only that which puts him, so to speak, in a position in which such an offence can be committed."

We are, therefore, of opinion that in the present case the facts do not attract the operation of S. 197 so as to make that section a bar to the proceedings which have taken place. If S. 197, Criminal P. C., is no bar and we have held that it is no bar to the proceeding there was nothing wrong in Mr. Banerji's taking cognizance of the offence.

In support of the second ground it was contended that the District Magistrate was not competent to make a complaint under S. 476 as he had not taken cognizance of the case. But there is nothing in law to show that a complaint under S. 476 can be made only by the officer taking cognizance and by no one else. On the other hand, the words "in relation to a proceeding in a Court" which are to be found in S. 476 as well as in S. 195, sub-Cl. (1)(b), Criminal P. C., would indicate that the power to make a complaint under S. 476 is not confined only to the officer who takes cognizance of the case. In the present case it was the District Magistrate who transferred the case to his own file and

sent the case for an enquiry and report to another Magistrate and it was the District Magistrate who on a consideration of the report of that enquiry dismissed the complaint under S. 203, Criminal P. C. In these circumstances, the District Magistrate had certainly a proceeding before him and it cannot be gainsaid that the false charge as made in the petition of complaint was a false charge in relation to that proceeding. That the District Magistrate was really more competent than Mr. Banerji to make a complaint under S. 476 would appear from the decision of this Court in the case of *Jeeban Brista Shaw v. Benoy Kristo Shaw* (3) and in the case of *Putiram Ruidas v. Mahomed Kasem* (4) where it has been held that the Court which tries the case on its merits and not the Court before which proceedings are instituted and even process issued is the proper Court to grant sanction for prosecution.

Then there is another aspect of the matter from which the second ground taken before us would appear to be noticeable. The District Magistrate withdrew the case to his own file under S. 528, Criminal P. C., and by his order he put himself exactly in the same position in which Mr. Banerji was. Mr. Banerji when he ordered the preliminary enquiry could certainly offer a consideration of the report of that enquiry, if he thought fit to proceed under S. 476. If Mr. Banerji could proceed under S. 476 there was no reason why the District Magistrate who by his order of transfer under S. 528 put himself in the same position as Mr. Banerji should be held debarred from proceeding under the same section. Both the points taken before us fail and the rule is accordingly discharged.

V.B./R.K.

Rule discharged.

(3) [1902] 6 C. W. N. 35.

(4) [1899] 3 C. W. N. 33.

**\* \* A. I. R. 1929 Calcutta 726**

CUMING AND S. K. GHOSE, JJ.

*Khiro Mondal*—Accused—Appellant.  
v.

*Emperor*—Opposite Party.

Criminal Appeal No. 969 of 1928, Decided on 12th June 1929, from order of Dist. Judge, Rajshahi.

(2) [1916] 1 M. W. N. 384=33 I. G. 648=17 Cr. L. J. 168.



**\* \* Criminal Trial—Jury—It is for Judge to determine whether confession is voluntary and for jury to determine its truth—Direction to jury to consider the question of voluntary nature of confession is misdirection.**

In a trial by Judge and jury it is for the Judge to determine whether the confession is voluntary and for the jury to determine whether it is true or false. It is not open to the Judge to ask the jury to determine whether it is voluntary or not even though that is a question of fact. [P 727 C 2]

In a trial for an offence under S. 395, Penal Code, only evidence against the accused was his own confession which was subsequently retracted. In his direction to the jury the Judge observed: "I have admitted the confession in evidence and have provisionally answered the question if it was voluntarily made. It is for you to determine whether the confession is true or not. You will have to consider circumstances in which it was made. You will also have to consider the suggestions and allegations made against the accused. You must remember that when an accused alleges that he made a confession under inducement and threat from persons in authority the onus is upon him to prove the allegations. It is not of course possible to prove such allegations even if they were true."

*Held*: that the conclusion from the direction was that they were called upon to determine whether the confession was voluntarily made or not and so the Judge was guilty of serious error of law. [P 728 C 1]

*Held further*: that the Judge had committed a serious error in directing the jury that the burden of proving threat or inducement was on him and it was impossible to prove such allegation. [P 728 C 1]

*Held*: that since the confession was the only evidence against the accused, the directions have been serious misdirections which were fatal for trial. [P 728 C 2]

*Mrityunjay Chattopadhyaya*—for Appellant.

*Khundkar and Nirmal Chandra Chakravarti*—for the Crown

**Cuming, J.**—This is an appeal by one Khiro against the order of the learned District Judge of Rajshahi convicting the appellant under S. 395, I. P. C., and sentencing him to three years' rigorous imprisonment. The appellant was tried jointly with another man Sabur Sheikh. Sabur Sheikh was acquitted. The dacoity with which we are concerned took place in the house of one Prosanna Chandra Mandal on 27th July 1927. The usual investigation followed but no clue was obtained.

Then later in connexion with the investigation of another dacoity the present accused Khiro made some statements to the police as the result of which he was taken before a Deputy Magistrate

where he made a statement which forms the basis of the present case. Khiro and Sabur were committed to the Sessions with the result already noted. It will be seen and it is admitted that the only evidence against the present appellant is his own confession which was subsequently retracted.

The appellant has contended that for certain reasons the Judge should have held that the confession was not voluntary and so inadmissible in evidence and that being so the Judge should have told the jury that there being no evidence against the accused they should return a verdict of not guilty. Further that certain formalities not having been complied with the confession for that reason was inadmissible. The admissibility of evidence is a question for the Judge.

Section 24, Evidence Act, provides that a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, etc., in other words whether the confession is a voluntary one.

It is for the Judge to determine whether the confession is voluntary and for the jury to determine whether it is true or false.

I do not think it is open to the Judge to ask the jury to determine whether it is voluntary or not even though that is a question of fact for the result would be that the jury would have had put before them evidence which was inadmissible in evidence and the difficulty of removing the effect of the inadmissible evidence from the jury's mind is obvious.

In dealing with this point the learned Judge charged the jury as follows: "So far as the accused Khiro is concerned the only evidence against him, is his retracted confession (the confession Ex. 4 read).

Khiro has alleged that the confession was not voluntarily made and he was tutored to make the statements. Confession which is not voluntary is not admissible in evidence. With regard to the confession two main points have to be considered:

- (1) Whether it was voluntarily made.
- (2) Whether it is true.

The Sub-Divisional Magistrate who recorded the confession has deposed to the effect that he gave warning to the



confessing accused before recording the confession. He was satisfied that it was voluntarily made. I have therefore admitted the confession and provisionally answered the first question. It is for you to determine whether the confession is true or not. You will have to consider the circumstance in which it was made.

You will also have to consider the suggestion and allegation made by the accused. You must remember that when an accused alleges he made a confession under inducement and threat from persons in authority, the onus is on him to prove the allegation. It is not of course possible to prove such allegations even if they were true."

The first difficulty is to determine what is the meaning of the word "provisionally." As far as I can see the learned Judge has not himself determined whether the confession was voluntary or not. He says the Magistrate has found it so and so he admits it "provisionally."

Reading the whole of the paragraph beginning with :

"I have therefore admitted the confession in evidence and have provisionally answered the first question. It is for you to determine whether the confession is true or not. You will have to consider the circumstances in which it was made. You will also have to consider the suggestions and allegations made by the accused. You must remember that when an accused alleges that he made a confession under inducement and threat from persons in authority the onus is upon him to prove the allegations. It is not of course possible to prove such allegations even if they were true,"

the conclusion to which I have come is that the learned Judge left it to the jury to determine whether it was or was not voluntarily made and in other words was it admissible. This is the only way in which I can attach any meaning to the expression "provisionally." If that is so the Judge has been guilty of a serious error of law for it was for him and not for the jury to determine its admissibility. The Judge has committed a further error in directing the jury. He has told them that the accused must prove any threat or inducement but that it is impossible to prove such allegation even if true.

In other words, that the law places on the accused a burden which it is impossible for him to discharge. In other words that an accused person can never prove that a confession is not voluntary.

The proposition requires only to be stated to be rejected.

It is not necessary for me in dealing with this point to decide whether the onus of proving that a confession is voluntary is on the accused or the prosecution. The point is not free from controversy.

Supposing, however, for the sake of argument that the burden was on the accused it was a clear misdirection to tell the jury that the accused could not possibly discharge this onus. It might no doubt be difficult, in some case very difficult but it is not always impossible and to tell the jury so is a grave misdirection. It has been suggested that in this case the accused never attempted to substantiate the allegation by evidence. Perhaps he did not but it would be still open to him to show that the circumstance under which it was made would justify the inference that it was obtained by threat or inducement.

It is to be remembered that the expression used in S. 24, Evidence Act, is not 'proved' but "if it appears" which is not a strong expression as proved. Bearing in mind that this confession is the sole evidence against the accused I must hold that there has been such serious misdirection in dealing with it as would be fatal to the trial.

If the Judge had determined that it was not voluntary his duty was to tell the jury that there was no evidence against the accused and direct a verdict of not guilty.

We must therefore set aside the verdict of the jury and the order of the Judge. Whether the appellant should be retried we leave to the decision of the Local Authorities.

**S. K. Ghose, J.**—I agree.

**By the Court.**—Pending the decision of the Local Authorities as to whether the appellant will be retried or not he will continue on bail.

V.B./R.K. *Order set aside.*

**A. I. R. 1929 Calcutta 728**

**RANKIN, C. J., AND BUCKLAND, J.**

*Abedali Fakir and others* — Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 504 of 1928, Decided on 11th December 1928, against order of Addl. Sess. Judge, Mymensingh, D/- 27th April 1928.



**Criminal P. C., Ss. 276, 279** — To make up for the deficiency in number of jurors to be empanelled, requisition of persons from outside Court is improper.

There is no provision for requisition of jurors from outside the Court. Selection of jurors will have to be made from jurors attending in obedience to summons and chosen in the manner provided by S. 276 or if there is no such other juror present then any other person present in the Court, whose name is on the list of the jurors or whom the Court considers a proper person may be selected.

[P 729 C 1]

*Suhrawardy* and *A. S. M. Akram* — for Appellants.

*D. N. Bhattacharjee*—for the Crown.

**Rankin, C. J.**—In this case eight accused persons were convicted by the Additional Sessions Judge of Mymensingh and a jury of seven on charges under S. 302 read with S. 34, I. P. C. The jury were not unanimous, four of them being in favour of a conviction and three in favour of an acquittal.

On this appeal Mr. Suhrawardy takes the point that according to the order of the learned Judge himself the jury was empanelled in a manner which is contrary to law and which is entirely outside the scope of Ss. 276 and 279, Criminal P. C. The learned Judge has recorded :

"The names of all the 14 jurors who were summoned for the case were called by lot one after another. Nine of them were found present of whom three being challenged by the pleader for the defence, were discharged. Six being unchallenged were elected to sit at the trial. Another person whose name was on the juror's special list was therefore requisitioned from the local school to sit as a juror and being unchallenged was accepted as the 7th juror. They then elected their foreman and were duly sworn."

If the learned Judge would look again at Ss. 276 and 279 he will find that there is no provision for requisition of jurors from a local school or from anywhere else. He will find that selection will have to be made from jurors attending in obedience to summons and chosen in the manner provided by S. 276 or if there is no such other juror present then any other person present in the Court, whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury may be selected. I think the learned Judge was wrong in acting in contravention of the provisions of the section and in inventing a procedure which is entirely unauthorized. It is quite true that the person whose services were obtained must at some stage have complied with the condition of be-

ing present and it is a point to consider whether or not the requirement of being present in Court finds its place in the section with any intention to limit the arbitrary power to choose a juror entrusted to the learned Judge or whether it merely recognizes the fact that in the ordinary way a person not present will be of no immediate assistance as a juror. This matter has been more than once considered. I understand from Mr. Bhattacharjee that there are four unreported cases of this Court on this point and two of them have been placed before us. They all hold this procedure to be bad.

In these circumstances, it appears to me that we have no option but to enforce the principle that the jurors are to be empanelled as required by the sections.

The appeal must be allowed. The convictions and sentences are set aside and a retrial is ordered.

We make no order as to bail.

**Buckland, J.**—I agree.

P.R./R.K.

*Appeal allowed.*

## A. I. R. 1929 Calcutta 729

PEARSON AND PATTERSON, JJ.

*Gobra Badia* and *others*—Accused—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 348 of 1929, Decided on 2nd July 1929.

(a) **Criminal P. C., S. 109**—Failure of accused to give satisfactory evidence about themselves does not bring case under S. 109.

Where the accused persons give correct names and addresses when questioned by the police, the mere fact that they did not give satisfactory account of what they were doing at the time of arrest cannot justify action under S. 109 : *A. I. R. 1925 Cal. 616, Ref.*

[P 730 C 1, 2]

(b) **Criminal P. C., S. 109 (a)**—S. 109 (a) applies to continuous acts of concealment.

Section 109 (a) refers to the case of a continuous act and not the case of an isolated effort of concealment : *22 C. W. N. 163, Rel. on.*

[P 730 C 2]

*N. K. Basu* and *Tarapada Banerjee* for *D. N. Bhattacharjee*—for Petitioners.

**Judgment.**—The accused were convicted and sentenced on certain proceedings under S. 109, Criminal P. C., taken against them. The Sessions Judge sustained the conviction against the petitioners, and the present Rule has been issued on the ground that the provisions



of S. 109 would have no application to the facts as found in this case; that there was no concealment as contemplated by the section, because they gave true information to the police as to their names and addresses when questioned; and that it could not be said they had failed to give a satisfactory account of themselves, merely because they did not give a satisfactory account of what they were doing at the time of their arrest.

The finding of the Sessions Judge is that the accused:

"failed to give a satisfactory account of themselves and were attempting to conceal their presence within the jurisdiction of the Magistrate and that they were taking such precautions with a view to commit an offence."

It appears from the facts found that P.W. No. 7, then an acting Inspector of Police, met the Sub-Inspector of Police of Kaliganj, and informed the latter that he had heard there was likelihood of further dacoities in his neighbourhood. This witness also said that one Kalimuddin (P.W. 8) gave him information that he had been approached by one of the accused to join in a dacoity but had refused. Kalimuddin corroborated that. Then it appears that after that, on 18th May, while enquiring into a dacoity case near by, the Sub-Inspector of Kaliganj found the present accused all proceeding together towards a place called Aditmeari along the railway line. The Sub-Inspector therefore questioned them, and the evidence is that the accused or some of them, gave an account of where they were going, and for what reason, which was in some particulars at any rate demonstrated to be false, whereupon the story was changed. They were then all asked their names and what village they came from, to which it appears they replied with correct information. Three others of the accused gave a confused and shifting explanation of where they were going, and others gave replies of an extremely improbable and suspicious nature. One of the accused had a bottle of kerosine oil, a piece of bamboo and some rags, and the explanation regarding these was said to be shifty, and in certain respects demonstrated to be false by the evidence.

On the face of the above it is difficult to maintain that the accused were attempting to conceal their presence within the meaning of S. 109. They were residents within the jurisdiction and gave not false but true information as to their names

and addresses. Then, although the District Magistrate points out that there are certain other considerations as to the contradictions in their statements, the decisions of this Court follow the principle that S. 109 (a) refers to the case of a continuous act and not the case of an isolated effort at concealment: see *Rashu Kabiraj v. Emperor* (1); *Piru v. Emperor* (2). The question of the accused's liability on this ground must be decided in their favour. As to the other ground, their having failed to give a satisfactory account of themselves, the facts found are undoubtedly more against the accused, but it is difficult to say that the facts are stronger than in the above case of *Rashu v. Emperor* (1), where a man who was a Kabiraj and a dealer was found in association with two others at midnight and with house-breaking implements in their possession: on being discovered he fled and when arrested remained silent and the explanation he subsequently gave to the Magistrate was false. It was held that he was not within S. 109. On these grounds therefore the Rule is made absolute.

V.B./R.K.

*Rule made absolute.*

(1) [1917] 22 C. W. N. 163=41 I. C. 649=27 C. L. J. 382.

(2) A. I. R. 1925 Cal. 616.

### A. I. R. 1929 Calcutta 730

MUKERJI, J.

S. A. Hamid—Accused—Petitioner.

v.  
Sudhir Mohan Ghose—Complainant  
—Opposite Party.

Criminal Revn. No. 1146 of 1928,  
Decided on 5th February 1929, against  
order of Sub-Divisional Mag., Sadar,  
D/- 30th June 1928.

(a) Railways Act, Ss. 113 and 122—Mere bonafide belief that a person is trespasser or that he is travelling without ticket is not sufficient to justify arrest—More than that must be proved.

To justify an arrest without a warrant much more than trespass or travelling without ticket would be necessary. In the case of trespass it must be shown that there was reason to believe that the person to be arrested would abscond or that his name and address were unknown and he refused to give his name and address or that there was reason to believe that the name or address given to him was incorrect. In the case of travelling without ticket it must further be shown that there was refusal to pay the sum charged.

[P 731 C 2, P 732 C 1]



**(b) Penal Code, S. 342—Scope.**

Submission by the complainant to arrest does not detract from the accused's acts or diminish its legal effect. The compelling of a person to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action is an imprisonment on the part of him who exercises that exterior will. 2 M. H. C. 896, *Rel. on.* [P 732 C 1]

**(c) Penal Code, S. 342—Mens Rea.**

Mens Rea does not enter into offence under S. 342 at all. [P 732 C 1]

*B. C. Chatterjee and Suresh Ch. Taluqdar*—for Petitioner.

*N. K. Bose, Asitaranjan Ghose and Hemendra Nath Bose*—for Opposite Party.

**Order.**—The petitioner is the District Traffic Superintendent on the Eastern Bengal Railway at Dacca. He has been convicted under S. 342, I. P. C. and sentenced to pay a fine of Rs 15.

The finding of fact on which his conviction is based is that the complainant Sudhir Mohan Ghose and a companion of his, two school boys, were caught by the petitioner near the overbridge on the platform of the My-mensingh Railway Station and then taken to the exit gate and made over to ticket collector there. What followed after this is of no use so far as the questions before me are concerned. What preceded the event is relevant from the point of view of both the parties and the finding on that question, therefore, has also to be examined. The defence case was that the petitioner noticed the complainant amongst 5 or 6 persons proceeding towards the exit gate, and when he challenged the complainant he understood the latter to say in reply that he had no ticket, and as a train had just been in he asked the ticket collector to treat the complainant as one who had travelled without a ticket; that he noticed another boy with a bicycle and told the ticket collector to check his ticket also. The complainant's case was that the petitioner met him and his companion near the overbridge, having come up from behind, that the petitioner asked them for their tickets, and notwithstanding that the complainant replied that they would be travelling by the train which had just come in and were going to purchase their tickets the petitioner seized their hands and dragged them to the ticket collector and asked him to realize the fare from the star-

ting terminus Naraingunj up to My-mensingh.

Of these rival versions it is the complainant's story substantially which the learned Magistrate was prepared to accept. He accepted the evidence to the effect that the complainant and his companion entered the platform from the western extremity and entry into the platform from that side was prohibited. He, however, dealt with the case on either footing and held that even on the assumption that they came by the train and the petitioner arrested them after questioning the complainant whether they had tickets or not and after hearing what the complainant told him, the legal consequence was the same.

Against the conviction several grounds have been urged and it would be convenient to deal with them one by one.

The first ground is to the effect that the petitioner may have been mistaken in fact. In my opinion it is possible that he did make such a mistake and that he bona fide believed that the complainant and his companion were either trespassers or that they had alighted from the train and were attempting to evade the checking. This is the most favourable view that may be taken of the petitioner's acts and it will be reasonable and fair to deal with the case on that footing.

It is next said that S. 79, I. P. C. protects the petitioner. But mistake on his part will not protect the petitioner unless he is able to establish that the facts that he assumed would justify him in catching the hands of the complainant and his companion and thus taking them from near the overbridge to the exit gate. S. 122, Railways Act, would make the entry punishable if it was unlawful (Cl. 1) and a refusal to leave the premises on being requested to do so after an unlawful entry would aggravate the trespass (Cl. 2). S. 113 would justify the charging of the requisite fare in the case of travelling without a pass or ticket or with insufficient pass or ticket or beyond the authorized distance. To justify an arrest, however, without a warrant, much more than trespass or travelling without ticket would be necessary. In the case of trespass, it will have to be shown that there was reason to believe that the person to be arrested would abscond



or that his name and address were unknown and he refused to give his name and address or that there was reason to believe that the name or address given by him was incorrect. In the case of travelling without ticket it will further have to be shown that there was refusal to pay the sum charged. None of these elements has been established in the present case.

Then it is said that it has been found that there was no protest by the complainant and that no force had to be used. This only means that there was submission to the arrest and that does not detract from the petitioner's act or diminishes its legal effect. The complainant and his companion were made to go in a particular direction up to a certain point namely up to the exit gate. That the compelling of a person to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action is an imprisonment on the part of him who exercises that exterior will is a proposition that cannot be disputed: *Parankusan v. Stuart* (1).

The other two arguments that have been advanced are that the offence, if any, was too trivial and that good faith protects the petitioner. I regret I am unable to take such a view of the petitioner's act as would justify the application of S. 95, I. P. C.; and as for good faith, mens rea does not enter into this offence at all.

The rule is discharged.

V.B./R.K.

*Rule discharged.*

(1) 2 M. H. C. 396.

### \* A. I. R. 1929 Calcutta 732

RANKIN, C. J. AND MUKERJI, J.

*Elie Goldberg* — Defendant — Appellant.

v.

*Sarojini Dasi*—Plaintiff—Respondent.

Appeal No. 68 of 1928, Decided on 17th August 1928, from an order of Lord-Williams, J.

\* Civil P. C., O. 38, R. 1—Amount of security required when warrant issued under O. 38, R.1, is amount mentioned in warrant.

Where a warrant has been taken out under O. 38, R. 1, the amount of security that the defendant is required to furnish is the amount mentioned in the warrant. [P 733 C 2]

*A. K. Roy* and *N. C. Chatterji*—for Appellant.

*S. M. Bose* and *B. K. Ghosh*—for Respondent.

**Rankin, C. J.**—In this case it appears that one Elie Goldberg was the defendant with two others in a suit brought by the mortgagee upon a covenant in an English mortgage for Rs. 15,000 plus interest. It appears that a certain colliery property was the mortgaged subject and the claimant sued for a personal judgment for Rs. 29,508.8.0. The suit was filed a few days ago, namely, on 13th August 1928. On 14th August, the plaintiff applied for the arrest of the defendant, Elie Goldberg, under O. 38, R. 1, on the ground that he was about to leave the jurisdiction, with intent to delay the plaintiff or to avoid the process of the Court and to obstruct and defeat the execution of any decree that might be passed against him.

Now the plaintiff got an order ex parte in the form of a warrant directed to the Sheriff and commanding him :

"to demand and receive from Elie Goldberg a sum of Rs. 10,000 as sufficient to satisfy the plaintiff's claim in this suit and, unless the said sum of Rs. 10,000 is forthwith delivered to him by or on behalf of the said defendant Elie Goldberg, to take the said defendant, Elie Goldberg, into custody and to bring him before this Court, in order that he may show cause why he should not furnish security to the extent of Rs. 10,000 for his personal appearance before this Court whenever called upon to do so until the said suit shall be fully and finally disposed of and until satisfaction of any decree that may be passed against him in this suit."

Now it will be observed that the first portion of that warrant is merely to say that if, when the Sheriff arrests the man, the man hands over Rs. 10,000 that is to be deemed to be payment of the claim and the Sheriff is not to arrest the defendant Elie Goldberg, and that is what is intended by R. 1, O. 38. In this case, when the Sheriff arrested the man, he did not pay Rs. 10,000 and the Sheriff did not get Rs. 10,000. Consequently the Sheriff arrested him. The second part of this warrant, which is a notice to Elie Goldberg, says in effect that the Sheriff is to take him in custody and bring him before the Court in order that he may show cause why he should not furnish security to the extent of Rs. 10,000 for his personal appearance. I leave aside the other words, which merely indicate that the appearance is to be ap-



pearance at any stage of the suit up to the full satisfaction of the claim in execution.

In these circumstances, the matter came before the learned Judge on the original side and he has made an order in terms, it is quite true, of O. 38, to the effect that he is to deposit with the Registrar money or property sufficient to answer the claim (which is not for Rs. 10,000 but for Rs. 29,508-8-0) or to give security for his appearance at any time in accordance with O. 38, R. 2. O. 38, R. 2 says that the defendant is to furnish security for his appearance and that :

"every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit."

The result is that the effect of the order of the learned Judge is that the man must either deposit Rs. 29,508-8-0 or he is to get a surety who will be responsible that if the man makes default in appearance he will pay the whole amount of the claim. Now that is, it is quite true, what O. 38 authorizes the learned Judge to do. But it is not what by this warrant the defendant was given notice of as the relief that was to be sought against him. I am of opinion that, in these circumstances, it is more correct to hold the plaintiff to the terms of the notice in the warrant which has been issued by the Court. While in no way expressing surprise at the terms of the order of the learned Judge which followed the statute, I am of opinion that in this case the form of the warrant taken out by the plaintiff makes it more proper that the sum should be limited to Rs. 10,000. When one looks at O. 38, R. 2 and form 2, Appx. F, one does not find it contemplated that the defendant, on failing to make deposit, is to give security for appearance in a particular sum to be fixed by the Judge, but that, if this security takes the form of a bond by a surety, it is to be the whole amount of the decree. If the defendant can give security himself, he will give it for the claim by deposit of money or property. Otherwise he will get some one to go bail for his appearance. That is I think the scheme of O. 38. The only thing which is required by form 2 is that the surety engages with the Court that the man shall appear and, if, the man does not

appear, the surety promises to be answerable for any judgment that may be made in the suit. I do not think the form given by the statute is at all the same thing as the order which in this case sought against the defendants according to the warrant.

I would, therefore direct that Elie Goldberg shall be at liberty to give security to the satisfaction of the Registrar on the original side in terms of form No. 2, Appx. F, but limited to the amount of Rs. 10,000, and that until he gives that security he must remain in jail. There will be no order as to costs.

**Mukerji, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 733

B. B. GHOSE AND S. K. GHOSE, JJ.

*Monmohini Dassi* — Petitioner — Appellant.

v.

*Taramoni*—Objectrix—Respondent.

Appeals Nos. 3 and 42 of 1929, Decided on 23rd July 1929. from original decrees of Dist. Judge, Dacca, D/- 2nd January 1929.

(a) Succession Act (39 of 1925), S. 299—No appeal from order for security from petitioner for probate.

No appeal lies against an order asking for security from the petitioner for probate as it is not a final order. [P 734 C 1]

(b) Succession Act (39 of 1925), S. 291 (ii) (6)—Direction in will that executors should obtain probate without security—Judge should not distrust executor and demand security.

Where in the will the testator mentions that the executors should obtain probate of the will without security, it is not the function of the Judge to distrust the executor and ask for security quite contrary to testator's desire : 7 Cal. 84 and 1 C. L. J. 180, Dist. [P 734 C 1]

(c) Succession Act (39 of 1925), S. 291 (ii) (b)—Executor sole legatee—Security should be of nominal sum (*Obiter*).

Where the executor is the sole legatee, if the District Judge thinks it necessary to take any bond, the security fixed must be a nominal sum. [P 734 C 1]

(d) Court-fees Act S. 19 (1)—Probate duty cannot be exacted before valuation.

An executor cannot be compelled to pay probate duty until the Collector has finished his work with regard to valuation of the property. [P 734 C 2]

*Sarat Chandra Bose, Naresh Chandra Sen Gupta, Sitaram Banerji, Suresh Chandra Das and Sarya Kumar Aich*—for Appellant.

*Sachindra Kumar Roy* — for Respondent.



**B B. Ghose, J.** — Appeal No. 3 of 1929 is directed against an order made by the learned District Judge asking for security from the petitioner for probate to the extent of Rs. 10,000. An objection is taken to the competency of the appeal on the ground that it is not a final order. I think that the preliminary objection is substantial and that no appeal lies against that order. It is, accordingly, dismissed.

Appeal No. 42 is against the final order made by the Judge striking off the application for probate. This amounts to a dismissal of the application. The case was struck off on two grounds that the probate duty was not paid and that the security was not furnished within one month as allowed by the learned Judge. The probate duty, we are told, could not be paid, because the Collector had not finished his work with regard to the valuation of the estate. So long as the Collector did not send his report as regards the valuation of the property, the executor was not in a position to ascertain the exact amount that he had to pay, and, therefore, he had not paid the probate duty. With regard to the question of security, it is urged on behalf of the appellant that the learned Judge was wrong in ordering security from an executor named under the will, especially as under para. 9 of the will the testator said that the executors would be able to obtain probate of the will without security. Ordinarily I should have thought that it is not the function of the Judge to distrust an executor and ask for security from a person whom the testator trusted to the extent as the testator in this case has done. No doubt under S. 291 (ii) (b) the District Judge has a discretion to ask for security from an executor. The learned advocate for the respondent relies on the case of *Juggodishari Debi, In re* (1) and *Mahamaya Debi v. Gangamoyi Debi* (2) in support of his contention that the District Judge in his discretion could ask for such security. In neither of those cases it appears that there was any provision in the will that the executor could obtain probate without any security. But it would appear from the cases that where the executor is the sole legatee, if the District Judge thinks it necessary to take any bond, the

security fixed must be a nominal sum. In the present case, the learned Judge has asked for security on the ground that there are certain trusts created by the will. The trust is (1) in favour of some idols and (2) for some charities. With regard to the idols, the appellant executrix is now the shebait and as such, she need not furnish any security for the debuttar property. With regard to the charities, it may be that the Court may in its discretion ask for security assuming that in spite of the desire of the testator the Court may ask for such security. The trust for charities is to the extent of Rs. 3,000 and we think that it would be quite sufficient if the executrix executes an administration-bond with a surety for Rs. 1,000.

The order of the learned Judge striking off the application is set aside and we direct that probate be issued to the appellant executrix on her paying the requisite duty after the report of the valuation is made by the Collector after which a reasonable time should be granted to her and on her executing an administration-bond with a surety for Rs. 1,000.

There will be no order as to costs in either of the appeals.

No order is necessary on the application filed on 20th December 1928.

**S. K. Ghose, J.**—I agree.

V.B./R.K.

Order accordingly.

### A. I. R. 1929 Calcutta 734

RANKIN, C. J., AND MUKERJI, J.

*Sambhu Nath Bandopadhyaya*—Defendant—Appellant.

v.

*Gopi Lal Seal*—Plaintiff—Respondent.

Appln. in Appeal of 1928, Decided on 5th September 1928, from the decree, D/- 16th May 1928, in Original Civil Suit No. 1869 of 1926.

Limitation Act, Art. 151—Decree of High Court on original side—Period required for drawing up decree, on plaintiff's application made within four days, cannot be charged to defendant-appellant.

The right to file a requisition for drawing up a decree in the High Court on the original side is primarily plaintiff's and where he has filed the requisition within four days, the period required by the plaintiff for drawing up the decree should be excluded in favour of the defendant in computing the period of limitation for his appeal against the decree, when he has been otherwise diligent: *A. I. R. 1929 P. C. 103, Ref.* [P 735 C 2]

(1) [1881] 7 Cal. 84.

(2) [1905] 1 C. L. J. 180.



*N. N. Bose*—for Appellant.

*N. C. Chatterji* for *B. K. Ghosh*—for Respondent.

**Rankin, C. J.**—This is an application that a memorandum of appeal be accepted and registered, the memorandum having been rejected by the office as being out of time. It appears that the decree was pronounced on 16th May 1928 in favour of the plaintiff. Now, on the next day, the plaintiff filed a requisition for drawing up the decree, so that the appellant-defendant never became entitled or obliged to exercise the right of putting in another requisition for drawing up the decree. The right accrues to him only if the plaintiff for four days omits to file the requisition for drawing up the decree. The requisition for drawing up the decree having been filed on 17th May the drawing up of the decree proceeded in the ordinary course, with this exception that although the draft decree was issued on 22nd May 1928, the appellant did not return it approved until 5th June 1928. On 5th June, the defendant, for the first time, filed a requisition for obtaining an office copy of the decree. As to that, I may point out that the appellant's solicitor took a great risk, because, on the decisions of this Court, it would seem that time does not cease to count against him until he files a requisition for an office copy. The time prior to that was occupied in getting the decree drawn up. At the same time, it is perfectly true that until there is a decree there cannot be a copy of it and from 17th May until 5th June the time might very well be counted in the defendant's favour, had he only filed his requisition sooner. Assuming, for the sake of argument, that from 16th May till 5th June exhausts the whole 20 days, to which the defendant was entitled, it remains to consider whether there is any other time that must be charged against him. As a matter of fact, the memorandum of appeal was filed on the very day the office copy of the decree was ready for delivery. The only way, therefore, in which the defendant can be out of time would be in respect of the period between 19th June, when the decree was sent to be ledgered and 9th July, when the decree was filed by the plaintiff. The plaintiff certainly did take unnecessary time, but the question is whether that can be charged

against the defendant, whether he is not entitled to say that, as the requisition for drawing up the decree was filed by the plaintiff, the defendant was not called upon to interfere in the process of the drawing up of the decree. It cannot be doubted that, if the defendant had insisted upon the decree being filed, it might have been filed sooner than it was. At the same time, I see no negligence on the part of the defendant. Indeed, I am satisfied that the defendant was keeping watch and making enquiry at the office diligently. I have some doubt whether by making any casual enquiry at the office he would be able to ascertain what the cause of the delay was. I am, therefore, of opinion that no part of the time occupied by the plaintiff in getting the decree drawn up can be charged to the defendant for the present purpose. The last occasion on which this matter came under review was the case of *Jijibhoy N. Surty v. T. S. Chettyar* (1) and Lord Phillimore, in giving the judgment of the Board, said:

"But for that time which is taken up by his opponent in drawing up the decree, or by the officials of the Court in preparing and issuing the two documents he"

that is the appellant "is not responsible."

I do not mean to doubt for one moment the settled practice and the principle of this Court that a person cannot by merely filing a requisition for an office copy and failing to take steps to get the decree drawn up, become entitled to exclude the time that has been wasted. But in this case, I am of opinion that the defendant is not out of time and, if he is out of time, it is not on account of his negligence, and the time should be extended if necessary.

In these circumstances I think that the memorandum of appeal should be accepted and registered.

Costs of this application will be costs in the appeal.

**Mukerji, J.**—I agree.

V.B./R.K.

*Application allowed.*

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(1) A. I. R. 1928 P. C. 103=6 Rang. 302=55  
I. A. 161 (P.C.).



## \* A. I. R. 1929 Calcutta 736

MITTER, J.

*Bhairab Chandra Sinha*—Petitioner.  
v.*Kalidhan Roy Choudhury* and others  
—Opposite Parties.Civil Revn. Nos. 679 and 680 of 1928,  
Decided on 5th September 1928, against  
judgments of 3rd Sub-Judge, Tippera.\* (a) Civil P. C., S. 115—High Court can  
interfere with findings of fact if they are  
not properly arrived at.Under S. 115, Civil P. C., the High Court  
has power to interfere with findings of facts  
when they are not properly arrived at; that  
is when they are not arrived at on a scrutiny  
of all relevant evidence and after considera-  
tion of proper presumptions arising out of the  
particular incidents. The High Court can  
then interfere on the ground of material ir-  
regularity. [P 737 C 1](b) Notice—To deduce subscriber's know-  
ledge of notice in a newspaper, his attention  
must have been directed to it.In order that a notification in a newspaper  
may amount to actual notice to a subscriber  
of the said newspaper, it must be shown that  
his attention was drawn to the said notifica-  
tion. [P 737 O 2]*Brojolal Chakravarty* and *Nagendra  
Kumar Dutt*—for Petitioner.*Akhil Chandra Dutt*—for Opposite  
Parties.

**Order.**—The petitioner in these two  
rules applied to set aside two sales of  
certain properties under O. 21, R. 90,  
Civil P. C. In one of the rules the pro-  
perty in question was sold in execution  
of a decree for arrears of rent, obtained  
by decree-holder opposite party for  
Rs. 73 and odd. The value of this pro-  
perty was found by the Munsif to be  
Rs. 1,600. The decree-holder was the auc-  
tion purchaser. The property in ques-  
tion in the other rule was sold for Rs. 32  
and odd and the value of the said pro-  
perty was found by the Munsif to be  
Rs. 386 and odd. The purchaser in this  
case also was the decree-holder in a suit  
for arrears of rent. The petitioner al-  
leged non-service of sale proclamation  
and suppression of all processes in con-  
nexion with the same and fraud and  
material irregularity in conducting and  
publishing the sales. The petitioner ap-  
plied within 30 days from the date on  
which he first came to know of the sales.  
The Munsif held that there was no evi-  
dence worth the name on the side of the

decree-holder to show that the writ of  
attachment and sale proclamation were  
served on the auction sold lands in these  
cases. He pointed out that Abdul Kader,  
Nobin Sing and Jabbar Ali who are said  
to have pointed out the lands sold at the  
time of the service of the writ of attach-  
ment and sale proclamation have not  
been examined. The Munsif further  
found that it has not been established in  
the case that the advertisement of the  
sales in question in the "Tripura Hitai-  
shi" was seen by the petitioner. He  
found that the applications were pres-  
ented within 30 days of the dates when  
the petitioner came to know of the sales  
and he held that the petitioner has suf-  
fered substantial injury as the result of  
the material irregularity and fraud in  
publishing and conducting the sales. The  
Munsif set aside the sales.

The decree-holder auction purchaser  
preferred two appeals against the order  
setting aside the sales to the Court of the  
Subordinate Judge and the learned Sub-  
ordinate Judge held that the appli-  
cations were barred by limitation and  
that there was no fraud and irregularity  
in publishing and conducting the  
sale as the processes were properly ser-  
ved. He held, however, that the prices  
fetched by the sale were certainly inade-  
quate but as there were no fraud or ir-  
regularity the sale could not be set aside.  
The Subordinate Judge accordingly con-  
firmed the sales.

These two rules were obtained for the  
revision of the appellate order of the  
Subordinate Judge in both the appli-  
cations for setting aside the sales. It is  
contended for the petitioner that the  
Subordinate Judge has exercised his juris-  
diction with material irregularity in  
holding that the processes were properly  
served although the most important  
witnesses on whose identification Adhar,  
the identifier, was said to have served  
the sale proclamation and writ of attach-  
ment have not been examined. It is  
argued that the identifier's deposition  
shows that he did not know the property  
sold himself and that he had to take the  
help of a man of the locality for the  
identification of the properties in ques-  
tion. It seems singular that the Sub-  
ordinate Judge would in the absence of  
the most material witnesses who identi-  
fied the lands should hold that there had  
been a proper service. The Subordinate



Judge failed to realize that when properties were sold for a grossly inadequate price and an application is made to set aside the sales, it is the duty of the final Court of fact to scrutinize with great care the evidence of service and to require the best evidence of such service. The evidence of service of the sale and attachment processes on which the Subordinate Judge relied is the evidence of a person who did not know the land on which he was effecting the service and such evidence is indeed absolutely valueless, in the absence of the evidence of persons on whose identification the identifier acted. To base a judgment on such evidence is a material irregularity in the exercise of the Court's Appellate Jurisdiction and vitiates his judgment on the important question of fact as to whether the services were properly effected. It has been strenuously contended by Mr. Akhil Chandra Dutt that I have no jurisdiction under S. 115, Civil P. C., to interfere with findings of fact. That would indeed be so if the finding of fact had been properly arrived at i.e., arrived at on a scrutiny of all relevant evidence and after consideration of the presumption to be drawn against the decree-holder from the non-examination of persons who are the most immaterial witnesses to prove the identification of the lands on which the law requires the service of processes to be effected.

The learned Judge of the appellate Court misdirected himself on the question of fact in not drawing unfavourable inferences against the regularity of the sales from the decree-holder withholding from the witness-box the witnesses who alone could have identified the land. The lower appellate Court misdirected himself in not considering the circumstances that the inadequacy of price fetched by sales in these two cases was so great as to shock the conscience and such inadequacy was itself valuable evidence of fraud in publishing and conducting the sales. There is another misdirection in point of law on the question of the knowledge of the petitioner of the dates of the sales. The learned Subordinate Judge assumes that merely because the petitioner was subscriber of the "Tripura Hitaishi" he must have read the sale notification. The law requires, however, that in order that a notification in a newspaper may amount

to actual notice to a subscriber of the said newspaper, it must be shown that his attention was drawn to the said notification. The finding on the question of limitation is vitiated by the Courts imputing notice to the petitioner by reason of his being the subscriber of the newspaper "Tripura Hitaishi." I think that justice required that before the sale could be confirmed the decree-holder auction purchaser should have produced all material witnesses of service of the sale and attachment processes and the Munsif was right in setting aside the sales in the absence of such evidence. The order of the lower appellate Court must in the circumstances be set aside and that of the Munsif restored. The result is that the sales are set aside.

The rules are made absolute with costs one gold mohur in each case which the decree-holder auction purchaser must pay to the petitioner.

P.R./R.K.

*Rules made absolute.*

### A. I. R. 1929 Calcutta 737

GRAHAM AND LORT-WILLIAMS, JJ.

*Meajan Howladar and others — Accused.*

v.

*Emperor*

Jury Ref. No. 32 of 1929, Decided on 8th August 1929, made by Sess. Judge, Bakarganj.

**Criminal P. C., S. 307—Reference under S. 307 is not justified unless verdict of jury is manifestly wrong and definitely contrary to weight of evidence.**

It is not contemplated that a Sessions Judge, who does not happen to agree with the verdict of a jury, should necessarily make a reference to the High Court, especially where pure questions of fact are involved, which are matters for the decision of the jury and the jury alone. It is no justification for a reference that the Sessions Judge came to a different conclusion, on the evidence tendered, from that of the jury unless there is something to show that the verdict of the jury was manifestly wrong and definitely contrary to the weight of the evidence. Whether a particular witness is to be believed or not is a question for the jury. [P 738 C 1]

*Radhika Ranjan Guha and Sitangsu Bhusan Bose—for Accused.*

*Debendra Narain Bhattacharjee—for the Crown.*



**Graham, J.**—This is a reference by the learned Sessions Judge of Bakarganj under S. 307, Criminal P. C., against the verdict of the jury in a case in which four persons were charged with offences under Ss. 467 and 471, I. P. C. One of these persons Milanjan Bibi was acquitted by the Judge in agreement with the unanimous verdict of the jury. The verdict of the jury as regards the remaining three accused was by a majority of 3 : 2 that they were not guilty of the offences charged. The learned Sessions Judge finding himself unable to agree with the verdict has referred the case to this Court. In para. 3 of his letter of reference he says that he is of opinion that the verdict both as regards the fact of forgery and the verdict as regards Raham Ali are not, as he expresses it, in accordance with the evidence. I should like to point out at the outset that this appears to indicate some misconception of his duty on the part of the learned Sessions Judge. It is not contemplated that a Sessions Judge, who does not happen to agree with the verdict of a jury, should necessarily make a reference to this Court, especially where pure questions of fact are involved, which are matters for the decision of the jury and the jury alone. The ground upon which this reference really seems to rest is that the learned Sessions Judge came to a conclusion on the evidence which was different from that arrived at by the jury. But that as I have already said cannot furnish any justification for a reference under S. 307 unless there is something to show that the verdict of the jury was manifestly wrong and definitely contrary to the weight of the evidence.

The learned Sessions Judge in his letter while inviting us to discard the evidence of certain witnesses on the ground that they cannot be relied upon has expressed the opinion that the case has been satisfactorily proved by the evidence of three witnesses. In para. 5 of his letter he says that :

"In my opinion the evidence of these three witnesses is sufficient to prove satisfactorily that the deed in question in this case is a forgery."

Now the three witnesses in question are P. W. 8, who is a stamp vendor named Munshi Mobarak Ali, P. W. 2 Taher Ali Howladar and P. W. 1, a handwriting expert named Henry Bennett.

It is necessary to examine briefly the evidence of these witnesses in order to see how far they substantiate the view which has been taken by the learned Judge. The stamp vendor merely proved that he sold a piece of stamp paper to one Ismail Meah on behalf of the deceased Aminuddin Howladar on 10th Magh 1334 B. S. (24th January 1928). This in itself has little or no evidentiary value. Then as to witness 2 for the prosecution the statement of this witness is that he saw accused 2 at the Registration office writing a document and that he was asked to be an attesting witness which he refused. No doubt this witness claims to identify the document but it does not seem very probable that he would be able to do so on such a cursory view of it, or that he would be able to identify it with any certainty. The learned Sessions Judge moreover in his charge while dealing with this witness has himself criticized his evidence. He says that there are minor discrepancies as to date and time between the evidence of this witness and the evidence of P. W. 3. He also refers to the fact that the complaint does not contain any allegation that witness 2 for the prosecution saw the deed written. In any view of the matter the question whether this witness was to be believed or not was a question for the jury. The witness was before them and they had an opportunity to see his demeanour and no doubt formed their own opinion as to his truthfulness.

As regards witness 3, the handwriting expert, so far as he is concerned the value of his evidence is entirely dependent upon accepting it as proved that the sale-deed Ex. 1 is a genuine document. The evidence of this witness proceeds upon the footing that if the first document is genuine then the second document the deed of gift is undoubtedly false and a forgery. But it so happens that the proof of the first document, the sale-deed, is dependent upon the evidence of P. W. 3 Osimaddi, and Osimaddi is one of the batch of witnesses whom the learned Judge has himself considered to be unreliable. The proof of the sale-deed is dependent on the evidence of Osimaddi, and it is a suspicious circumstance in connexion with that document that the attesting witnesses have not been produced and that no attempt has been



made to prove the payment of consideration.

Having regard to the nature therefore of this evidence and to all the facts and circumstances we find ourselves unable to accept this reference and we think that the jury were justified in finding by a majority that the guilt of the accused had not been established and in bringing in a verdict of not guilty.

We accordingly reject this reference and acquit the accused. The accused will be set at liberty, and if they are on bail they will be discharged from their bail bonds.

**Lort-Williams, J.**—I agree.

K.N./R.K.

*Reference rejected.*

### A. I. R. 1929 Calcutta 739

C. C. GHOSE, J.

*on difference between*

SUHRAWARDY AND GRAHAM, JJ.

*Bhut Nath Ghose* — Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1249 of 1928, Decided on 3rd May 1929, from an order of Addl. Sess. Judge, Midnapore, D/- 29th September 1928.

(a) Criminal P. C., S. 112—(*Per Suhrawardy and C. C. Ghose, JJ.*)—Notice under S. 110—"Substance of information" means clause under which person is charged or class to which offender belongs. (*Graham, J. contra.*)

The words "substance of information" mean such or so much of information as would enable the party to know under what clause of S. 110 he is charged or to what particular class of offenders he belongs. [P 740 C 1]

(b) Criminal P. C., S. 112—Detailed information cannot be insisted upon unless omission is prejudicial to the accused.

Repetition of the words of the section should as far as possible be avoided and although there may be cases where it is possible to convey the substance of the information briefly, ordinarily details cannot be insisted upon, and omission to give more information where possible does not vitiate the entire proceedings without proof of prejudice to the accused: 35 Cal. 243; 17 C. W. N. 238, *Foll.*; 43 Mad. 450 and A. I. R. 1926 All. 759, *Diss. from.* [P 740 C 2]

(c) Criminal P. C., Ss. 106 to 126—Accused should be allowed to reserve cross-examination unless sufficient information

about Crown evidence is disclosed. (*Per Suhrawardy, J.*)

When an accused is proceeded against, appears and prays for information about the evidence which the Crown proposes to adduce against him, it should be supplied or so much of it as practicable. This may be done in two ways. He may be given sufficient information of the evidence to be called or he may be allowed to reserve cross-examination till he has full information about the case against him. Denial of either is to prejudice him materially notwithstanding S. 253. [P 741 C 1, 2]

*Satkaripati Roy and Bireswar Chatterjee*—for Petitioner.

**Suhrawardy, J.**—This is an open rule for revising the order of the Sub-Divisional officer of Ghatal under S. 110 (a) read with S. 118, Criminal P. C. confirmed by the Additional Sessions Judge of Midnapore. Two points which have been stressed before us and require consideration are, first, that the proceeding drawn up under S. 112, Criminal P. C. is illegal and secondly that the learned Judge has misread the evidence of some of the prosecution witnesses when he says that they deposed to the fact of having direct knowledge of the petitioner committing theft.

As regards the first point it is urged that the notice under S. 112, Criminal P. C., was vague inasmuch as it did not set forth the substance of the information received against the petitioner. S. 112 says that the Magistrate shall make an order in writing setting forth the substance of the information. The proceeding drawn up by the Magistrate a copy of which was served on the petitioner was in these words:

"Whereas it appears from the report dated 28th February 1928, submitted by Sub Inspector of Police Station, Chandragona that Bhut-nath Ghose, son of etc., within the local limits of my jurisdiction is by habit a thief, a robber and house-breaker and is so desperate and dangerous as to render his being at large without security hazardous to the community etc."

It may be incidentally noted that the petitioner was found not guilty of the charge of being a desperate and dangerous character; he has been bound down only under S. 110 (a) for being by habit a thief, robber and house-breaker. It is argued that the notice served upon the petitioner merely repeated the words of the section and did not give the substance of the information upon which the Magistrate acted as required by S. 112. It is contended on the authority



of *Ranga Reddi v. Emperor* (1) and *Emperor v. Nihal* (2) that the notice was insufficient and vague as it merely quoted the words of the section and did not mention the particulars of the information received by the Magistrate. With great respect to the learned Judges who decided those cases I am unable to agree with the interpretation there put on the words "substance of the information" in S. 112. The learned Judges require that the notice should contain such details of information as to enable the accused to know in what cases he has been suspected and the names of the witnesses to prove the charges against him. This, to my mind is not "substance of the information" but details of information which may in some cases be not only very inconvenient but almost impracticable to put in the notice. A person may be suspected in a hundred cases and there may be five hundred witnesses to prove such suspicion and general repute. It is not reasonable to suppose that the law intended that all this information should be conveyed in the notice. If the notice states that the accused has been suspected in a hundred cases and there are five hundred witnesses to support the charge against him, it will not be of any practical help to him. There may be cases in which the substance of the information should be briefly conveyed to him if feasible as, probably, under S. 107 but ordinarily it cannot be insisted that any detailed information, however shortly it may be conveyed, should be supplied by the notice. In my opinion, the words "substance of the information" mean such or so much of the information as would enable the party to know under what clause of S. 110 he is charged or to what particular class of offenders he is said to belong. For instance, in this particular case he is said to be by habit a robber, house-breaker and thief but not a forger. Under Cl. (d), S. 110, he may be by habit an abettor of the commission of the offences of kidnapping, abduction, etc. The notice should specify as to which offence or offences mentioned in the clause he is said to be by habit an abettor. I concede that where possible

the repetition of the words of the section should be avoided but, it may not be possible in every case. We have authorities of this Court in support of this view. In *Chintaman Singh v. Emperor* (3) the notice was in similar words as in the section. It was held that the notice was good though it did not contain more information than that the accused was of a dangerous and desperate character. Similar objection was taken in *Rajendra Narain Singh v. Emperor* (4). It is observed at p. 261 "the Magistrate is further not bound to reveal the source of his information"; it is sufficient if he states the substance thereof and the Crown is not bound at the initial stage even to name the witnesses. This section is intended to meet such a case as arose in *Queen Empress v. Ishwar Chandra Sur* (5) where the notice did not mention under what clause of which section the accused was called upon to defend himself under Chap. 8. Even if it be held that it was necessary to give more information in the notice the omission at the most is an irregularity under S. 537 and should not vitiate the entire proceedings without proof of prejudice to the accused. I do not agree with the learned Judges of the Madras High Court that it is an illegality.

Though I hold that the law is satisfied if the notice contains the gist of the information and not a reference to cases and witnesses, proceedings under Chap. 8 should not be carried on in such a way as to hamper the offender in his defence and place him in a worse position than if he were accused of a substantive offence. Before he defends himself himself by cross-examining the witnesses for the prosecution and examining his own he must know definitely the case that he has been called upon to meet. When the accused appears and prays for information about the evidence which the Crown proposes to adduce against him it should be supplied or so much of it as is practicable. This may be done in two ways. He may be given sufficient information of the evidence to be called or he may be allowed to reserve cross-examination till he has full information

(1) [1920] 43 Mad 450=38 M. L. J. 97=11 M. L. W. 331=55 I. C. 722=(1920) M. W. N. 398.

(2) A. I. R. 1926 All. 759=49 All. 5.

(3) [1908] 35 Cal. 243=7 C. L. J. 177=12 C. W. N. 299.

(4) [1913] 17 C. W. N. 238=18 I. C. 149=16 C. L. J. 467.

(5) [1885] 11 Cal. 13.



about the case against him. Now in this case, as the petitioner alleges in his petition, he asked from the prosecution information about the witnesses intended to be examined but it was refused. He then asked for permission to reserve cross-examination of witnesses as he had the right to do but that too was refused. As soon as a witness was placed in the box and examined he was asked to cross-examine him without knowing the whole case for the Crown and without having time to collect materials for the cross-examination of the witness and giving proper instruction to his lawyer. One need hardly refer to the inconvenience and practical inutility of instructing the cross-examining pleader from the dock. As the procedure to be followed in the case was to be that prescribed for trial of warrant cases, it was improper to call upon the petitioner to cross-examine the witnesses then and there who were immediately discharged. The trying Magistrate submits in his explanation that the petitioner could have applied for recalling the witnesses under S. 256, Criminal P. C., and not having done so he cannot now complain of prejudice.

I am not impressed by this argument for the petitioner's prayer for reserving cross-examination having been refused he had no hope that his prayer for recalling witnesses would have been granted. Besides, as has been held by the Additional Sessions Judge, it seems to be the opinion of the Courts below that S. 256 is not applicable to proceedings under S. 110 for reasons not discussed but apparently as no charge is to be framed. In view of the procedure adopted by the trial Magistrate I cannot say that the petitioner was not prejudiced in his defence. When a right is conferred by law on a party, it may be presumed that it is for his benefit; if such right is denied him it may also be presumed that he has been deprived of that benefit. It is not such a clear case in which I can honestly say that the evidence for the prosecution is so overwhelming that it will be futile to order a retrial. The defence examined 28 witnesses one of whom was the local zemindar, pleader and Chairman of the Midnapore District Board. Of all the witnesses examined for or against, he is the most respectable and his evidence supports the defence case. Though the

learned Judge has attempted to explain away his evidence by observing that he does not ordinarily live in the village but the fact is that he is the local zemindar and often visits the village which is within a few miles of the town of Midnapore. It is hard to suppose that if the petitioner bears the character and the repute which he is said to do, the witness would have been ignorant of it. I do not mean to suggest that on the evidence as it stands on the record the petitioner is entitled to an acquittal but I hold that the petitioner has made out a case that he has been prejudiced by the procedure adopted and that it is a proper case for our interference. I would therefore make the Rule absolute, set aside the order complained against him and direct that the petitioner be retried according to law.

As to the second ground I do not think there is much substance in it. By saying that some of the witnesses have direct knowledge of the petitioner's committing theft the learned Judge means to distinguish those witnesses from others who have given evidence of general repute. Though the word knowledge is not happily used, the witnesses have spoken to facts which led them to believe that the petitioner is a thief.

**Graham, J.**—I have the misfortune to differ from my learned brother, the conclusion at which I have arrived being that the Rule should be discharged.

The main point urged before us is that the proceeding drawn up under S. 112, Criminal P. C., is defective and contrary to law inasmuch as it does not embody the necessary materials required by that section. The section enacts that when a Magistrate acting under S. 110, Criminal P. C., deems it necessary to require any person to show cause, he shall make an order in writing setting forth :

(1) the substance of the information received ; (2) the amount of the bond to be executed ; (3) the term for which it is to be enforced ; and (4) the number, character, and class of the surety required.

The order in question contains all these matters. It has been argued that it is not a compliance with the sections to merely set forth the substance of the police report in terms of the language of S. 110 that the accused is by habit a thief, robber, and house-breaker, and that something more is required viz., parti-



culars of the charge giving details of the cases in connexion with which the accused was charged or suspected on the previous occasions. In my opinion this contention is not well founded. The question is what is meant by "substance of the information." As I understand the words it means substance as distinguished from details or particulars, and I do not think that it was ever contemplated that the proceeding should set out details in the manner of a charge drawn up at a trial. The distinction between an inquiry of this nature and a trial should be borne in mind. I do not remember in my experience to have seen a proceeding in which particulars were set forth in the manner demanded by the petitioners.

The learned advocate for the petitioners has referred to *Rajbansi v. Emperor* (6) and *Ranga Reddi v. Emperor* (1) in support of his contention, but with all respect for the learned Judges who were responsible for them I am not prepared to follow those decisions. The learned advocate was unable to show any authority of this Court in favour of his proposition; on the other hand I find that there is a case reported in *Chintamon v. Emperor* (3) which supports the view I have taken.

It was next urged that the learned Additional Sessions Judge misread the evidence of P. W's. 1, 5, 6, 7, 11, 13, 16, 18, 20, 21, 22, 23, 24, 35, 44, 46, 48, 61, 63, 71, 74 and 75 inasmuch as they did not state that they had direct knowledge of the petitioner Bhut Nath committing theft as stated in his judgment. The evidence of these witnesses has been referred to, and it is clear that, so far as some of these witnesses are concerned, the remark made by the learned Judge is incorrect. But the order ought not on that account to be set aside, if it is clear that the materials on record are sufficient to justify the order for security. As to that it appears to me that there is ample evidence. Some of these witnesses have given direct evidence of theft against the petitioner, and there is apart from that a considerable body of evidence of repute. On the merits the main question was whether the petitioner was the bad character he was represented by the prosecution to be, or whether it was a case of a village conspiracy to drive away an inno-

cent person, who had made himself unpopular and obnoxious to the people of the village. The question of fact was one for the Magistrate to decide, and in my judgment there is sufficient evidence to support his decision. I would therefore discharge the Rule.

**C. C. Ghose, J.**—I have had an opportunity of examining the entire record and of perusing the two judgments of the learned Judges who have differed in this matter. I am in agreement with Subhawardy, J., in the view expressed by him and for the reasons given by him, I am of opinion that the ends of justice require that the order complained of should be set aside and the case sent back for retrial on the lines indicated by Subhawardy, J.

V.B./R.K.

*Retrial ordered.*

### A. I. R. 1929 Calcutta 742

CUMING AND LORT-WILLIAMS, JJ.

*Nagendra Nath*—Accused—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 46 of 1929, Decided on 16th July 1929, from decision of Addl. Sess. Judge, Khulna.

(a) Criminal P. C., S. 423—Trial by jury—Appeal—Appellate Court must consider adequacy of charge.

It is imperative that in every case of trial by jury and specially in murder cases, the High Court in appeal should be satisfied that the Judge's charge to the jury was adequate.

[P 746 C 2]

(b) Criminal P. C., S. 297—To avoid misdirection or non-direction Judge must give substantial help and guidance to jury by properly shifting and weighing evidence and by marshalling facts under distinct and separate heads.

To avoid any misdirection or non-direction of jury it is absolutely essential in proper cases that every particle of evidence should be carefully scrutinized and compared and contrasted and substantial help and guidance should be given to the jury to avoid any miscarriage of justice. It is not sufficient merely to recount and repeat chronologically the evidence as it had been given in Court by the various witnesses. It is necessary to sift and weigh and value the evidence. The final weighing is of course for the jury but the Judge ought to see that all essential facts go into the scales of justice and on the proper side of the balance. Further facts must be marshalled by the Judge under separate heads and in distinct compartments as they affect each separate incident in the story. Otherwise the evidence is to the jury simply a confused mass of discrepant, disconnected and contradictory details. [P 745 C 2; P 746 C 1]



(c) Criminal P. C., S. 297—So long as Judge makes it clear that jury are at liberty to regard or disregard his opinion it is not necessary that Judge should studiously avoid his opinion if any.

A charge to the jury which succeeds in avoiding any expression of opinion must generally amount to a most colourless and unhelpful direction and a Judge ought to tell the jury his opinion if any so long as he makes it clear they are at liberty to regard or disregard it as they please. [P 746 C 2]

*Probodh Chandra Chatterjee and Surendra Nath Basu*—for Appellant.

*Bir Bhusan Dutt*—for the Crown.

**Lort-Williams, J.**—The appellant was tried at Khulna by Mr. Simpson, the Additional Sessions Judge and a jury of seven convicted by their unanimous verdict of murdering Sita Nath Das on 15th June 1928, and on their plea for mercy sentenced to transportation for life.

There is no doubt that Sita Nath Das was murdered; the question is whether the appellant murdered him.

Sita Nath and one Manindra Nath were neighbouring shop-keepers at Kapilmuni. The appellant was Manindra's servant.

On the night of 15th June at about 9 p.m., Sitanath went to the shop of Kalibor Pramanik and there drank intoxicating liquor in the company of Manindra, Bansiram Pramanik, Mono Karmokar and Bhagoban Nath.

Sita Nath was going to Calcutta the next morning and had left his son-in-law Mono Mohan Das and his nephew Surendra Nath Das aged about 14 in his shop counting money which he needed to take with him.

He was not anxious to stay drinking, but Bansiram over-persuaded him and they all went on to the house of a prostitute named Susila where further drinking took place. At length Sita Nath escaped and set out for his shop. While on his way, some one coming out from underneath the thatch of a shop attacked him with a dagger, and after a short struggle in which Sita's left elbow and right wrist were injured, stabbed him in the abdomen, so severely that his entrails were exposed.

He shouted for help. In his dying declaration he says that he called for Upendra, Mojahar Gazi and others, held his hands to his wounded abdomen, and went to his shop. This was only a short distance away. Moni Mohun Das says

that he heard Sita Nath shouting out that Nagen was killing him. Surendra Nath Das says that he heard Sita shout out "Moni, Suren come at once, Nagen is killing me." They understood him to mean the appellant. They ran out, Surendra with a hurricane lantern was first and says that he saw Nagendra running, and called after him and saw him enter Manindra's shop. It was a dark night and there was no moon. Surendra in cross-examination said that he told these facts to Mojahar, the Union Board Clerk, but he admits that he told the doctor only that his uncle had been stabbed without mentioning any name. Surendra also says that immediately prior to hearing Sita Nath's shouts he had heard Nagendra reading aloud his part in a theatrical performance, he being a member of theatrical troupe. Mani and Surendra say that they found Sitanath standing and holding his abdomen. He did not speak and they brought him to his shop, and having laid him on a taktaposh gave the alarm. Mojaharali Gazi, the clerk of the Kapilmuni Union Board came with others. He asked Sitanath what had happened and he said that it was the doing of Manindra. He could not say any more. Surendra and Mani confirm this. The doctor was sent for and when he came, he asked Sita Nath how he had got into that condition. Sita Nath then said that he had been drinking with Manindra, Bhagaban, Bashiram and Mona Kumar and on his return had been stabbed at Manindra's shop. The doctor then asked him who had stabbed him, and he indicated that he was in too great pain to say any more. After attending to him and giving him a stimulating draught the doctor and Mojahar left, the others including a number of neighbours remained.

Then it is said that Sitanath for the first time named Nagendra as his assailant. Mojahar says this was 10 or 15 minutes after the doctor left before he, Mojahar, returned. Moni says that this was after the doctor had gone, but seems to suggest that it was in the presence of Mojahar. Surendra does not make it clear when first the appellant's name was mentioned, but in cross-examination he said that the doctor was not present, and he suggests that Mojahar was. Mojahar says that on his return Sitanath said that Nagendra had struck



him with a dagger; whether this was the first time the name had been mentioned is not clear, but it is evident from Mojahar's and the doctor's evidence that the doctor was not present and Mojahar in his cross-examination says that he was recalled by Moni who told him that the wounded man named his assailant. He also says that the compounder told him that Sita had said to him (the compounder) that Naga had stabbed him, and immediately afterwards Sita himself mentioned Naga's name in the hearing of Mojahar. But Moni and Surendra in cross-examination said that Sitanath was unable to speak and therefore Mojahar asked him to write in the Union Board book. Mojahar says that he wrote the four names Manindra Bhagaban, Bashiram and Moni Kamar, and the words "Naga had stabbed me with a dagger" and signed it in the presence of a number of witnesses who also signed their names. But Moni in cross-examination said that all that Sita Nath could write at first was the four names and that it was 45 minutes later, after being stimulated with medicine and upon further pressure by Mojahar to name his assailants that he first mentioned Naga and wrote about him in the book and signed it. Surendra in cross-examination also agreed with this story. The doctor's evidence is that having returned to his quarter Bonomali came and said that Sitanath was naming the person who stabbed him. He went, and Sita Nath told him that Naga stabbed him and Mojahar showed him the entries which had been made by Sita in the Union Board book. Mojahar's evidence is that Sita Nath said that Naga who lived with Manindra had stabbed him.

During all this commotion no one saw the appellant. But according to Mojahar, Manindra came to Sita's shop and stayed some time. The same night the Choukidar, the President and Dafadar were called and the Dafadar remained on guard over the house of Manindra, the south door of which was locked. But after he had called Nagendra twice the latter opened the door and sat at the door with the Dafadar. The next morning at dawn Mani went to lodge the first information report at the thana which was 8 miles away.

In this report Mani said that Manindra Nath and his servant had been quarrell-

ing with Sita Nath, that Nagendra in collusion with Manindra had tried to kill him and that Sita Nath stated that Nagendra gave him hurt. No one else has suggested that any enmity existed between Nagendra and Sita Nath. Later in the morning the Dafadar arrested Nagendra, and found a dagger behind Manindra's shop just below an opening in the split bamboo wall. No human blood was found upon it. At about 10 O'clock Sita Nath was on the point of death and very weak, and his dying declaration was recorded by Mojahar, in the presence of others. Sita Nath was able to speak in whispers. The doctor asked questions and Mojahar wrote down what Sita Nath said; then it was read over to him and he signed it. The Naib and the doctor both asked him how he recognized the person who stabbed him when the night was dark. This declaration contains a full and detailed story of the events leading up to Sita Nath's death. He states quite definitely that Nagendra stabbed him and that he had no difficulty in recognising him as the place was open. He also suggests that the motive was enmity between Manindra and himself over his foster daughter Noni, whom Manindra was keeping as his mistress. The story told by Nanibala and confirmed to some extent by Mani is very confused. She said that Sita Nath had been very kind to her and had brought her up as his foster daughter in his mistress Mono's house. He had her married to one Suklal Das. The latter was sent to jail and Mani returned to Sita Nath. Manindra enticed her away and concealed her. She lived with Manindra for some five months. Sita protested and this led to proceedings in Court. Then she went to live in one of Sita Nath's houses in the prostitute's quarter but she was not in the keeping of Sita Nath. Later Manindra, Bashiram and Satya again enticed her away and concealed her. A month or so before Sita Nath's death, Manindra entered her house. She refused to accede to his importunities and a scuffle ensued. Sita Nath took her to Khulna to file a complaint but Manindra met them on the way and the matter was compromised. A few days later Manindra went to her house again and said that if she did not obey him he would kill both her and Sita Nath.



Aswini Kumar Dey says that the night before his death Sita Nath was drinking at his shop with Manindra Bejoy, Mona Kamar, Kali Dasi, Nanibala and another prostitute. Moni says that Sita Nath was in the habit of borrowing money from Manindra and that he did so only a few days before his death. Sushila is another prostitute. She says that Sita Nath and Manindra were on good terms and often drank together at her house and wandered about in company. That Nanibala was in Manindra's keeping at the time of Sita Nath's murder but with his permission she also says that Satya Charan Das enticed Nani away from Manindra and kept her in Sushila's house. That in consequence Suklal prosecuted Satya and herself and Nani was taken away and returned to Manindra. The President speaks of another prosecution in which Suklal was complainant and Manindra, Rames Sikdar and Sitanath were defendants. This was just before Sita Nath's death. Kalibar mentions a quarrel between Sita Nath and Suklal over Nanibala. He says that he saw Suklal in the village 7 or 8 days before Sita Nath's death. Champa another prostitute who has become a Sadhu was brought from Calcutta by Sita Nath and lived as his mistress for a time. She came to her shop on the night of his death at 7 O'clock and again at 11 O'clock; according to her evidence Sita Nath said that as a result of Manindra, Bashiram, Mona Kamar and Bhoja had been the cause of his wound and that Nagendra actually struck him. He did not say definitely that the other four had any hand in the stabbing. Sita Nath had no ill-feeling with any one except with Manindra in connexion with Nanibala. He mentioned 20 or 25 times that Nagendra had stabbed him. No one suggested Nagendra's name to him. Krishnadhane Seal the compounder said in cross-examination that at first Sita Nath said that he was not able to say who had stabbed him, that it was in answer to his question that Sita Nath said that Nagendra was of the shop of Manindra and that he mentioned Nagendra's name some 20 minutes before he mentioned the names of the four others. Banshiram says that both he and Sita Nath were in an abnormal condition that night as a result of drink and could not walk steadily.

Abinash, Sub-Inspector of Police, says that Mojahar told him that Sita Nath cried out "I am being murdered Moja-har come" and later said that he was not in a position to say who had stabbed him. Also that the doctor told him that when he questioned Sita Nath as to who had stabbed him he said that he could not fix him well. That is the evidence. Manindra and Nagendra were brought before the Magistrate. Manindra was discharged and Nagendra was committed to the Sessions on a charge of murder—his defence was a simple denial and he refused to explain anything.

Seventeen grounds of appeal were filed on his behalf, of which the majority have been abandoned during the discussion. The truth being that the learned advocate who has argued them has been at a loss to indicate any specific instance of misdirection. Having carefully read the evidence and the charge of the learned Judge I am not surprised.

According to the strict letter of the Code of Criminal Procedure and the decisions grafted upon it, the charge is eminently correct. The learned Judge has done all those things which he ought to have done and left undone all those things which he ought not to have done.

Nevertheless I have no doubt that the result amounts to both misdirection and non-direction. The mere recital of the evidence when properly marshalled, is sufficient to show that this was a case in which it was absolutely essential that every particle of the evidence should have been carefully scrutinised and compared or contrasted and that substantial help and guidance should have been given to the jury to avoid any possibility of a miscarriage of justice. Something more is required than the strict letter of the law. The perfect Code is but a dull and lifeless treatise without the enlivening and enlightening spirit with which it must be quickened by those imperfect human agents whose duty it is to practise and expound it. It is not sufficient as the learned Judge has done, merely to recount and repeat chronologically the evidence as it has been given in Court by the various witnesses. It is necessary to sift, and weigh and value the evidence. The final weighing is of course for the jury, but the Judge ought to see that all essential facts go into the scales of justice, and on the proper side of the



balance. Further, facts must be marshalled by the Judge under separate heads and in distinct compartments, as they affect each separate incident in the story. Otherwise the evidence is to the jury simply a confused mass of discrepant, disconnected and contradictory details.

There must be some light and shade in every charge. Such matters for example as the darkness of the night, the drunken condition of Sita Nath, the uncertainty about the naming of his assailant, the inadequacy of any sufficient motive, the curious behaviour of Nagendra if guilty of murder, should have been brought into especial prominence and the jury's attention drawn and directed to the crucial points in the case, and not obfuscated, to use the learned Judge's own expression by a cloud of unnecessary detail, an exalted verbiage.

It is worse than a waste of time to spread fine language and lofty homilies before a jury, because not only do they fail to understand, but it confuses them. Nor will long and abstruse dissertations upon law enlighten them. This should be stated in the shortest and simplest terms and without reference to the numbers of acts and sections of which they have never heard.

The effect of a medical man's evidence about a simple fracture on the mind of a layman is comparable to a learned discussion of the law on the mind of a jury.

That the crime amounted to murder was obvious and unquestioned and the law might have been disposed of in a very few words. The important issue in the case to and upon which the whole attention of the jury should have been directed and concentrated was the identity of the murderer. Yet page after page has been devoted to explaining the law about murder and culpable homicide and the distinctions and difficulties which surround those sections of the Indian Penal Code and about the exact meaning of the word "intention" which is described in the words :

"we linger in the shadowy light and feed on the silent images which no eye but our own can gaze upon . . . . These are the objective effects of the subjective processes, certain circumstances and certain lines of conduct."

Such language is out of place and useless for its purpose. Nor was it necessary to implore the jury to concentrate their attention and address their minds to the

solution of the puzzling enigma whether Sita Nath was dead or not and what he died of. It was obvious that nothing could have been more dead than this unfortunate man. Quite a large assembly of witnesses had seen him die, others had taken his dying declaration and medical witnesses had spoken both as to his mode of death, and his condition post-mortem.

To advise a jury about the necessity of spending their virgin efforts in a critical analysis of the obvious was to bring the law into ridicule and disrepute and to divert their attention from matters which are essential.

The learned Judge's abjuration to disregard and his anxious care to avoid suggesting even the faintest suspicion of his own opinion about the facts to the jury was entirely misconceived. A Judge (if he has got an opinion at all) ought to tell a jury what it is, so long as he makes it clear that they are at liberty to regard or disregard it as they please. A charge which succeeds in avoiding any expression of opinion must generally amount to a most colourless and unhelpful direction.

Under the curious system which prevails in this country the responsible and somewhat horrible power of life and death is given to Judges in the Mofussil who are often comparatively young and generally without any practical experience of the profession of the law.

The responsibility, therefore, which devolves upon this Court is far greater than that upon other Courts of criminal appeal.

It is imperative that we should be satisfied in every case and especially in murder cases that the Judge's charge was adequate. We are of opinion in this case that it was inadequate. Therefore the conviction must be set aside and the case remitted for retrial.

**Cuming, J.**—I agree that the appeal should be allowed and the case should be retried.

V.B./R.K.

*Appeal allowed.*



**A. I. R. 1929 Calcutta 747****BUCKLAND, J.***on difference between***MUKERJI AND GRAHAM, JJ.***Superintendent and Remembrancer of  
Legal Affairs, Bengal—Petitioner.*

v.

*Jnanendra Nath Ghose and another—  
Accused—Opposite Parties.*Criminal Revn. No. 800 of 1928, De-  
cided on 8th February 1929, against  
sentence passed by the Addl. Sess. Judge,  
24-Parganas, on 5th June 1928.(a) Criminal P. C., S. 439—(*Per Graham  
and Buckland, JJ.*)—Person convicted on  
plea of guilty cannot show cause against con-  
viction when enhancement of punishment is  
sought. (*Mukerji, J., contra.*)In a case where a person was convicted on  
a plea of guilty and where punishment was  
sought to be enhanced :*Held : (per Mukerji, J.)*—The plea of  
“guilty” is a plea to the charge and does  
not necessarily amount to a confession of all  
the facts alleged. The Court is not bound  
to, but it may, convict the accused on his  
plea : vide, S. 271 (2) Criminal P. C. The  
plea operates as a bar in certain cases, to  
the preferring of an appeal except as to the  
extent and legality of the sentence : vide  
S. 412, Criminal P. C. A plea of guilty will  
perhaps also stand in the accused’s way in  
the matter of a revision which he may seek  
for. But when called upon to show cause  
why his sentence should not be enhanced, the  
accused has the right to show cause against  
his conviction : S. 439 (6), Criminal P. C.,  
does not make any exception as re-  
gards the case of a person who has been  
convicted on his own plea. Uncross-ex-  
amined testimony of the prosecution witnes-  
ses given in the Court of the Committing  
Magistrate can hardly be taken to suffice for  
the purpose of enhancing punishment.

[P 748 C 1, 2]

*Per Graham, J.*—The only circumstance in  
which it would be open to an accused to go  
behind the plea and reopen the matter of his  
conviction would be where he could show  
that there was some mistake in recording the  
plea, and that he did not in fact plead  
“guilty.” In view of S. 412 it cannot be  
held that an accused who has pleaded guilty  
is entitled under sub-S. (6), S. 439 to “show  
cause against his conviction.” Those words  
are applicable only where the accused has  
been convicted on the evidence, and in that  
case and that case only he is entitled to show  
that the conviction is wrong either upon the  
facts or through some error of law.

[P 749 C 2]

*Per Buckland, J.*—The accused cannot go  
behind his plea of “guilty” as a confession  
of the facts charged, nor is he entitled to  
withdraw his plea. [P 751 C 1](b) Criminal P. C., S. 439—Enhancement  
of punishment—Meaning explained.Enhancement of punishment means that  
the sentence originally passed is to be vaca-ted and a new and a proper sentence is to be  
passed. It cannot be that a second sentence  
in addition to the original one is to be passed,  
because for one offence the law can punish  
the accused but once. [P 748 C 2](c) Words and Phrases—Conviction mean-  
ing of—Criminal P. C., S. 439 (6).Conviction may mean the verdict of the  
jury or the sentence of the Court. What the  
term as used in S. 439 (6) means in a parti-  
cular case, depends on the particular facts of  
the case. [P 750 C 2]*Anil Chandra Chowdhury and Sachin-  
dra Nath Banerjee—for the Crown.**Satindra Nath Mukerjee—for Op-  
posite Parties.***Mukerji, J.**—Accused 1 Jnanendra  
Nath Ghosh alias Jnan Ghosh was con-  
victed under S. 493, I. P. C., and sen-  
tenced to be detained till the rising of  
of the Court and to pay a fine of Rs. 500  
or in default to undergo rigorous impri-  
sonment for six months and ac-  
cused 2 was convicted under Ss. 493/  
109, I. P. C., and sentenced to pay a fine  
of Rs. 50 or in default to undergo rigor-  
ous imprisonment for three months.  
They were convicted and sentenced as  
aforesaid by an Additional Sessions Judge  
of the 24-Parganas on 5th June 1928.  
The Superintendent and Remembrancer  
of Legal Affairs then moved this Court  
for enhancement of the sentences passed  
upon the said two accused persons and  
originally the rule was issued as against  
both of them to show cause why their  
sentences should not be enhanced. Sub-  
sequently it was mentioned to the Court  
that accused 2 could not be found  
and upon that the rule as against ac-  
cused 1 only was allowed to be proceeded  
with. It has now been heard by us in  
so far as it concerns that accused person.I do not consider it necessary to set  
out the facts alleged on behalf of the  
prosecution upon which the charges on  
which the accused persons were commit-  
ted to the Court of Sessions were framed.  
It is sufficient to say that the sentences  
passed on the accused persons are on the  
face of them far too lenient. At the  
same time I find it impossible to enhance  
the sentences upon the materials such  
as they are on the record. To explain  
what I mean I shall have to set out a  
few facts.The order-sheet of the Court of the  
Judge shows that on the charges against  
the two accused being read out and ex-  
plained to them they pleaded “guilty”  
and they were convicted on their own



plea. As reason for the sentence that he passed the Judge has recorded :

"In consideration of the inability of the prosecution to produce the girl who according to the Public Prosecutor is the only important witness in the case and the circumstances of the case, I deal with them leniently."

One thing is clear beyond doubt and that is his that without the girl's evidence the case could not go on, but beyond that I am not at all clear as to what actually took place. It may be that though the girl was not available, the prosecution were ready to go on with the trial by adducing the deposition of the girl taken before the Committing Magistrate as evidence at the trial after proving the facts necessary to be established in order to bring the case under S. 33, Evidence Act, or it may be that the prosecution were not in a position to proceed with the trial at all, because the girl was absent. On this point there is no affidavit on either side, and I am not at all sure that it is not one of those cases in which the accused pleads guilty to the charge in the hope of being leniently dealt with, the Public Prosecutor not pressing for severe sentences. All this, however, is only of minor importance.

Now, as far as I could understand the arguments adduced on behalf of the Crown, they are to the effect that the plea of "guilty" should be taken to conclude the accused altogether so that taking the facts alleged against the accused by the prosecution we should consider what is the proper sentence to be passed. This, in my opinion, is a wholly mistaken view of the situation. The plea of "guilty" is a plea to the charge and does not necessarily amount to a confession of all the facts alleged. The Court is not bound to, but it may, convict the accused on his plea: vide S. 271 (2), Criminal P. C. The plea operates as a bar, in certain cases, to the preferring of an appeal except as to the extent and legality of the sentence: vide S. 412, Criminal P. C. By analogy with and also as a necessary consequence of the bar as regards appeals, a plea of guilty will perhaps also stand in the accused's way in the matter of a revision which he may seek for. But when called upon to show cause why his sentence should not be enhanced, the accused has the right to show cause

against his conviction: S 439 (6), Criminal P. C. This subsection does not make any exception as regards the case of a person who has been convicted on his own plea. I do not find anything in the words of this subsection which would warrant an interpretation that the accused while showing cause against his conviction is to be held down to his plea of "guilty." The same result would follow if we consider the true nature of a proceeding for enhancement of sentence. In such a proceeding the Crown takes up the position that the sentence originally passed is to be vacated and a new and proper sentence is to be passed: it can not be that a second sentence in addition to the original one is to be passed; because for one offence the law can punish the accused but once. When the Court in such a proceeding is considering what is the proper sentence to be passed the accused is in the position of a person who has pleaded guilty and convicted, but not yet sentenced. Under the English law at such a stage the accused is entitled to withdraw his plea of "guilty" and enter a plea of "not guilty" though he cannot do so after sentence: *R. v. Selbe* (1), *R. v. Clouter* (2); *R. v. Plummer* (3). The technicalities of plea under the English procedure may not apply in all their details to the system here, but this is a broad principle which, so long as there is nothing in our Code militating against it, is in my judgment applicable to this country as well. Accused 1 in the present case in showing cause through his advocate says that his conviction is not right which means that his client is not guilty.

Nextly, as has been repeatedly said in numerous decisions in Indian Courts, enhancement of sentence is a very serious thing and so in considering the question whether a sentence should be enhanced or not the Court must know all the facts and circumstances of the case. Uncross-examined testimony of the prosecution witnesses given in the Court of the Committing Magistrate can hardly be taken to suffice for the purpose. Such evidence was not the evidence at the trial, and indeed the learned advocate for ac-

(1) 9 C. & P. 346.

(2) 8 Cox. C. C. 237.

(3) [1902] 2 K. B. 339=71 L. J. K. B. 805=18 T. L. R. 659=20 Cox. C. C. 269=66 J. P. 647=51 W. R. 137=36 L. T. 936.



oused 1 has asked us to treat the depositions as evidence.

For all these reasons I am of opinion that the proper order to pass is to make the rule absolute in the following way, namely, to set aside the conviction of accused 1 and to direct that notwithstanding his plea he should be regularly tried, and if convicted properly sentenced.

**Graham, J.**—In this case a rule was issued upon the accused (now opposite party) to show cause why the sentence passed upon him should not be enhanced.

The facts are shortly these: The opposite party Jnan Ghose, and a Nepali woman named Padam Kumari were tried before the Additional Sessions Judge of the 24-Parganas and a jury on charges against the former under S. 493, I. P. C., and against the latter under Ss. 493/109, I. P. C. Padam Kumari is, it is said, in Nepal and notice could not be served on her.

The case for the prosecution was that the accused Padam Kumari had brought from Nepal a girl named Chitra Kumari aged about 14 years on the representation that she would obtain for her a wealthy and suitable husband; that after keeping the girl with her for some time in Calcutta she introduced the accused Jnan Ghose as a wealthy suitor, and that thereafter these two persons took the girl to a house at Salkea where a sham marriage ceremony was gone through, that in fact there was no real ceremony of marriage, and that certain things were done, e. g., taking a photograph, exchange of garlands, and signing by the parties, so as to deceive the girl into the belief that marriage had been performed. Thereafter sexual intercourse is alleged to have taken place between Jnan Ghose and the girl Chitra.

At the Sessions trial both the accused pleaded guilty to the charges and the Additional Sessions Judge accordingly convicted them thereon and sentenced the accused Jnan Ghose to be detained till the rising of the Court and to pay a fine of Rs. 500 or in default to six months' rigorous imprisonment, while the accused Padam Kumari was sentenced to be detained till the rising of the Court and to pay a fine of Rs. 50 or in default to rigorous imprisonment for three months. Thereafter the petitioner

the Superintendent and Remembrancer of Legal Affairs, applied for and obtained this rule.

The question is whether any case has been made out for interference. There can be no doubt in my opinion that the sentences inflicted (we are concerned, however, now with the case of Jnan Ghose only) are wholly inadequate for an offence of this description. There are one or two matters, however, which require consideration. The first of these is as to the effect of sub-S. 6, S. 439, I. P. C., where there is a plea of guilty. That subsection reads as follows:

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-S. (2) of showing cause why his sentence should not be enhanced, shall in showing cause, be entitled to show cause against his conviction."

In my opinion this proviso, for it is in the nature of a proviso, can have no application where there is a plea of guilty, since that, as it seems to me, concludes the matter, and it is not possible to go behind such a plea. The only circumstance in which it would, I think, be open to an accused to go behind the plea and reopen the matter of his conviction would be where he would show that there was some mistake in recording the plea, and that he did not in fact plead guilty. No allegation of the kind is made here. That being so we must, I think, proceed on the basis that it was properly recorded, and means what it says, viz., that the accused acknowledged his guilt.

In this connexion reference may be made to S. 412 of the Code which lays down that where an accused person has pleaded guilty and has been convicted by a Court of Sessions, or any Presidency Magistrate or Magistrate of 1st Class on such plea, there shall be no appeal except as to the extent or legality of the sentence. In view of this section it cannot I think be held that an accused who has pleaded guilty is entitled under sub-S. 6, S. 439 to "show cause against his conviction." Those words are, as it seems to me, applicable only where the accused has been convicted on the evidence, and in that case and that case only he is entitled to 'show that the conviction is wrong either upon the facts, or through some error of law.



In the circumstances of the present case the petitioner having pleaded guilty the only question which in my judgment arises is whether the sentence is adequate or not. Speaking for myself I should not be disposed to interfere if the sentence inflicted could be considered to be in any way appropriate. It appears to me, however, to be altogether inadequate. In my opinion therefore the rule should be made absolute and I would set aside the sentence and direct that in lieu thereof the accused Jhan Ghose should suffer rigorous imprisonment for three years while maintaining the sentence of fine. (On difference between Mukerji and Graham, JJ., the case was put up before Buckland, J., who delivered the following judgment.)

**Buckland, J.**—This is a rule calling upon the two accused to show cause why the sentences passed upon them should not be enhanced. Janendra Nath Ghose has been convicted by the Additional Sessions Judge of the 24 Parganas upon his plea of guilty and sentenced under S. 493, I. P. C. to be detained till the rising of the Court and to pay a fine of Rs. 500 or in default to undergo rigorous imprisonment for six months. The rule has not been proceeded with against the other accused as she could not be found. Owing to a difference of opinion between my learned brothers Mukerji and Graham, JJ., the case has been laid before me under S. 439, Criminal P. C.

The case for the prosecution was that a girl of about 14 years of age named Chitra Kumari was brought from Nepal by the accused Padam Kumari on the representation that she would obtain a suitable husband for her. After keeping the girl for sometime Padam Kumari introduced Janendra Nath Ghose. By a ceremony of mock marriage which was gone through at Salkea the girl was led to believe that she was married to Janendra Nath Ghose and sexual intercourse is said to have followed.

Section 439 (6), Criminal P. C. provides that any convicted person to whom an opportunity has been given of showing cause why his sentence should not be enhanced shall, in showing cause be entitled also to show cause against his conviction. The accused has appeared through his advocate both before my learned brothers and at the hearing before myself for the purpose of so showing cause,

and it is claimed that by virtue of the right which the section gives him he may withdraw his plea of guilty notwithstanding that on an appeal by himself he would, by reason of S. 412, only be permitted to question the extent or legality of the sentence.

It does not suffice, in my opinion, in order to ascertain what are the rights under S. 439 (6) of a convicted person who has pleaded guilty, to refer to S. 412 and to contend that by virtue of the section he has rights which are denied him by the earlier section. A more correct way to arrive at a solution of the question is to determine the meaning of the word "conviction" in its application to the circumstances of the case.

It has been said that at common law in strictness a conviction consists of verdict, judgment, and sentence: Archbold's Criminal Pleadings 27, Edn. 237) The word is undoubtedly *verbum aequivocum*. It is sometimes used as meaning the verdict of a jury and at other times in its more strictly legal sense for the sentence of the Court: *Burgess v. Boetfeur* (4). Thus, though a prisoner may be said to have been convicted by the jury, a more correct legal phraseology requires this to be expressed by saying that he has been convicted by the Court upon the verdict of the jury. Also he may be convicted by the Court upon his own plea of guilty.

The Criminal Procedure Code uses the word in both senses. For instance in S. 307 (3) it refers to an "offence of which the jury could have convicted him upon the charge framed and placed before it," while S. 271 (2) provides that if the accused pleads guilty the plea shall be recorded and he may be convicted thereon. It is unnecessary to multiply instances of which many can be found in the statute.

In order to know the sense in which the word is used in S. 439 (6) in its application to any particular case it is necessary to enquire what has happened. In this case the accused was convicted under S. 271 (2) on his own plea of guilty and that being so the conviction against which he may show cause is the conviction by the Court, that is to say, the judgment of the Court which sentenced him. Against that conviction he may

(4) 7 M. & G. 481=8 Scott (N.R.) 194=8 Jur. 621=13 L. J. M. C. 122.



show cause, I apprehend by, for instance, contending that there was some defect in the proceedings or that the acts to which he confessed by his plea of guilty do not amount to an offence or the offence of which he has been convicted: *Reg v. Brown* (5). That, however, is not the case here and I make no attempt to say what might be allowed in other circumstances. I am however clear that he cannot go behind his plea of guilty as a confession of the facts charged. Nor is he entitled to withdraw his plea. As I have endeavoured to show, the meaning of the word "conviction" in the section in its relation to this case limits the accused to impugning the judgment of the Court. Indeed, the withdrawal of a plea of guilty is a totally different matter. Actually there is no provision in the Criminal Procedure Code which allows that to be done though I have no doubt that the Court would permit it in a proper case. The English authorities moreover agree that the leave of the Court is required and that such leave cannot be given after sentence, that is judgment has been pronounced. *Reg v. Clouter and Health* (6), *Reg v. Seth* (7) and *Reg v. Phunoner* (8).

In this case the accused has been sentenced and the sole question to be considered is the propriety of the judgment of the Court which sentenced him. From the accused's standpoint that may involve consideration of the question whether the Court was entitled in law to pass such sentence upon him, but no such point has been taken on his behalf. From the standpoint of the Crown the question is whether the sentence is sufficient.

My learned brothers, though they have had the misfortune to differ, are at one in their view of the sentence passed, which they describe as far too lenient and as altogether inadequate. This view I share. The learned Sessions Judge has said that in consideration of, in addition to the circumstances of the case, the inability of the prosecution to produce the girl, who, according to the Public Prosecutor, was the only important witness in the case, he dealt leniently with the accused. I am unable to understand that this can affect the quantum of sen-

tence though a plea of guilty will generally influence the Court.

The rule will be made absolute: the sentence will be set aside and I order that Jnanendra Nath Ghose alias Jnan Ghose, do undergo 18 months' rigorous imprisonment and pay a fine of Rs 500 and in default of payment that he shall undergo rigorous imprisonment for a further term of six months.

P.R./R.K

*Rule made absolute.*

### A. I. R. 1929 Calcutta 751

SUHRAWARDY AND GRAHAM, JJ.

*Kedarnath Sikdar and others*—Petitioners.

v.

*Bijoy Mandal and others*—Opposite Parties.

Criminal Revn. No. 1204 of 1928, Decided on 15th March 1929, against order of District Mag., Jessore, D/- 10th November 1928.

(a) Criminal P. C., S. 144 (4)—District Magistrate cannot order a Sub-Divisional Magistrate to draw proceedings under S. 145 though he can set aside order made under S. 144—Proper course is to make a reference under Criminal P. C. S. 438

The Sub-Divisional Magistrate on a police report draw up proceedings under S. 144. The District Magistrate set them aside holding they were wrongly drawn up and directed the Sub-Divisional Magistrate to draw up proceedings under S. 145.

*Held:* that though under S. 144 (4) he was entitled to set aside an order of the Sub-Divisional Magistrate there was no provision in law whereby he could direct the Sub-Divisional Magistrate to draw up proceedings under any other section. The proper course for District Magistrate in such case was to make a reference to the High Court under S. 438: 24 Cal. 391, *Foll.* [P 752 C 2]

(b) Criminal P. C., S. 145 — Sub-Divisional Magistrate drawing up proceedings under S. 145 as directed by the District Magistrate, but having sufficient ground for it, is not acting without jurisdiction.

Where a District Magistrate setting aside the proceedings of a Sub-Divisional Magistrate under S. 144 (4), directed him to draw up proceedings under S. 145 and he so drew them up.

*Held:* that he was not acting without jurisdiction where he had sufficient material whereon to base his order under S. 145: 24 Cal. 391, *Dist.* [P 752 C 1]

*Mritunjoy Chatterjee, Biraj Mohan Ray and Khetra Mohan Sarkar*—for Petitioners.

*Radhabinode Pal and Hemanta Kumar Biswas*—for Opposite Parties.

(5) [1889] 24 Q. B. D. 351.

(6) [1859] 8 Cox. C. C. 237.

(7) [1840] 9 C. & P. 346.

(8) [1922] 2 K. B. 339.



**Suhrawardy, J.**—This Rule is directed against an order of the District Magistrate of Jessore dated 10th November 1928 setting aside an order passed by the Sub-Divisional Officer under S. 144, Criminal P. C. and directing him to draw up proceedings under S. 145, Criminal P. C. This Rule was issued upon the ground that the learned District Magistrate was wholly in error in directing the learned Sub-Divisional Magistrate to draw up proceedings under S. 145. In my opinion, the ground upon which this Rule was issued, so far as it goes, is correct. Under S. 144 (4), Criminal P. C. the District Magistrate is entitled to set aside the order made by a subordinate Magistrate. But there is no provision in the law that he can order a subordinate Magistrate to draw up proceedings under any other section. The revisional powers exercised by the Courts below are much restricted and do not extend to the wide powers given to this Court under S. 439 which have been made co-extensive with the powers of an appellate Court under S. 423, Criminal P. C. The proper course for the District Magistrate when he was of opinion that proceedings under S. 144 had been wrongly drawn up and that the right course would be to take action under S. 145 was to make a reference to this Court under S. 438.

In support of the ground on which this Rule has been issued reliance has been placed on the case of *Kailash Chandra Pal v. Kunja Behary Poddar* (1). That case supports the view that I have ventured to take that a District Magistrate has no authority to remand a case to a subordinate Magistrate to take action under S. 145, Criminal P. C. But there is a distinguishing feature in this case which puts the petitioners out of Court. In that case the Sub-Divisional Officer drew up proceedings under S. 144 against a certain party on the result of previous cases between the parties which came up to the High Court and in which it was held that one of the parties was in possession. The District Magistrate was moved and he held that proceedings under S. 144, Criminal P. C. were not rightly drawn up and directed the Sub-Divisional Officer to institute proceedings under S. 145, Criminal P. C.

Thereupon the Sub-Divisional Officer drew up proceedings under S. 145. Against that order of the Subordinate Magistrate a Rule was obtained from this Court. The learned Judges held that the District Magistrate had no authority to direct the Sub-Divisional Magistrate to institute proceedings under S. 145; and as the proceeding drawn up by the Subordinate Magistrate was not based upon police report or other information showing likelihood of a breach of the peace but was based on the order of the District Magistrate, they set aside the order of the District Magistrate as also the proceeding before the Sub-Divisional Officer.

In the present case there was a police report upon which the Magistrate instituted proceedings under S. 144. That order was set aside by the District Magistrate. The Sub-Divisional Magistrate thereupon drew up proceedings under S. 145, Criminal P. C. in which he said that he was satisfied from the police report that there was a likelihood of a breach of the peace. So in the case before us the Sub-Divisional Magistrate considered the materials before him under S. 145 and it cannot be said that they were instituted without jurisdiction. The learned advocate for the petitioner argues that as the order passed by the District Magistrate directing the Sub-Divisional Magistrate to institute proceedings under S. 145 was wrong, the entire proceedings including the proceedings under S. 145 instituted by the Sub-Divisional Magistrate should be set aside. This I am not prepared to do, for the present Rule is obtained not against the order of the Sub-Divisional Magistrate drawing up proceedings under S. 145 but against the order of the District Magistrate remanding the case to the Sub-Divisional Magistrate, though I do not admit that we have no jurisdiction to set aside that proceeding as a consequential order to the order of the District Magistrate. Secondly, when the Sub-Divisional Magistrate drew up proceedings under S. 145, he had sufficient material before him on which he relied. Though no doubt he was led to this course because of the directions given by the District Magistrate, but he did not act without jurisdiction or illegally in instituting proceedings under



S. 145 when it was pointed out to him by his superior Court that his view relating to the possession of one of the parties was wrong. Thirdly, considering the state of the feeling between the parties it would not be right to drop the proceedings and leave the parties to fight. I would accordingly discharge this Rule.

**Graham, J.**—I agree. There was no doubt an irregularity in not giving notice to the opposite party (the present petitioner) before the order of 10th November 1928 was passed; but with all the materials before us it seems to be clear that the Magistrate based his order under S. 145 upon the police report and that he had jurisdiction to make that order. The case of *Kailash Chandra Pal v. Kunjo Behary Poddar* (1) to which reference has been made is distinguishable from the facts of the present case because there was apparently no police report and the order drawing up the proceedings was based entirely upon the direction of the District Magistrate.

P.R./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 753

#### Special Bench.

RANKIN, C. J., AND C. C. GHOSE AND  
BUCKLAND, JJ.

*In re, Martin & Co.*

Reference under S. 66 (2), Income Tax Act, Decided on 25th June 1929.

Income Tax Act (11 of 1922), S. 66 (2) and (4)—Findings essential for decision of case not appearing in statement of case—Case was remitted for further findings.

Where a case referred to High Court under S. 66 (2) had ultimately to be decided on the findings which did not appear in the statement of the case as made by the Commissioner, High Court sent back the case for further findings as required. [P 754 C 2]

*Radhabinode Pal*—for Commissioner, Income-Tax.

**Rankin, C. J.**—In order to dispose of the questions referred to us, it is necessary that we should refer the case back to the Commissioner to make certain additions thereto or alterations therein as provided by Cl. (4), S. 66, Income Tax Act of 1922. The observations which I propose to make now are entirely directed to making clear, so far as I can, the points upon which further findings are required at the hands of the Commissioner.

It appears that there is a firm called Messrs. Martin and Company which is governed by certain articles of partnership in writing. There seem to be three such documents. These documents have not been made part of the case stated. They ought to be made part of the case stated. It is not exactly clear to me whether as a result of these three documents that firm is shown to have had 7 partners or only 5. The documents will make that matter clear. In 1927, certain persons bought a business which was being carried on under the name and style of Burn and Company. From the documents which have been made part of the case, it would rather appear that the persons who bought that business were five in number, and it would further appear that these five persons became partners for a day at least with the original proprietors of the firm of Burn and Company. The terms upon which, the original proprietors having gone, the new proprietors were carrying on the business are defined in the documents dated 1st February 1929 by a reference to the documents which govern the firm of Messrs. Martin and Company. The words "so far as applicable to this present partnership" appear in the document of 1st February 1927. That is a matter which has not been discussed by the Commissioner in the case stated at all. That matter ought to be dealt with. He ought to give any facts in his judgment bearing upon the question as to the weight to be given to that reference in Cl. (3) of the agreement of 1st February 1927.

Again, in the document of 28th September 1927, which is an agreement to which the five purchasers to whom I have referred are parties, I find that in Cl. (4) two other people are suddenly described as partners. It seems to be necessary that it should be ascertained how that comes about. At the end of that clause, there is a statement to the effect that these two gentlemen being the senior assistants are entitled in pursuance of the partnership deed of Messrs. Martin and Company to participate in the net profit of Burn and Company. The Commissioner ought to consider that, upon the question whether or not in substance and in truth the assets which had belonged to Burn and Company were being bought by the firm of Martin and Company or whether in sub-



stance and in truth there was an entirely different firm (it may be composed of the same partners and it may be that the partners were interested in the same shares but as a matter of intention of the parties, an entirely different partnership). The Commissioner has not found whether there is or is not truth in the statement which appears to have been the case of the assessee, that the firm of Burn and Company was bought not with any funds belonging to the firm of Martin and Company at all but with other funds being the private property of the individual persons who were partners of Messrs. Martin and Company. A finding as to that is very necessary.

In remitting the case to the Commissioner, I would point out not by way of deciding this case but entirely for the guidance of the Commissioner that this case may ultimately have to be decided upon findings which do not at present appear in the case stated. The proposition that the same persons in the same shares cannot for income-tax purposes be partners of two entirely separate firms is a highly abstract proposition. It may or may not be correct but I am not prepared as at present advised to proceed upon so very general a principle without a careful enquiry into the concrete case and into the matters above mentioned. It may turn out that the case depends on the question of fact whether the two firms were entirely separate—a question of fact including the question of intention. It is necessary that we should know whether in substance and in truth the partners as part of the business of Martin and Company bought up certain assets (in which case the fact that these assets went by a different name would have no importance whatever) or whether, on the other hand, it was an entirely separate venture not intended to be any part of the business of Martin and Company or to have any connexion with Martin and Company. If the fact is that certain persons—be they 5 or 7 put their hands in their pockets to buy the assets of Burn and Company with the intention of running a firm which would have nothing to do with Messrs. Martin and Company, then the Commissioner should in justice to the assessee give a finding to that effect. Looking upon it in that way, it seems to me desirable that this case should be sent

back to the Commissioner to make such additions thereto or alterations therein as are required to meet the points which in this judgment I have mentioned.

**C. C. Ghose, J.**—I agree.

**Buckland, J.**—I agree.

V.B./R.K.

*Case sent back.*

## A. I. R. 1929 Calcutta 754

MUKERJI, J.

*Nibaran Chandra Bhattacharyya and another—Accused—Petitioners.*

v.

*Emperor—Opposite Party.*

Criminal Revn. No. 1246 of 1928, Decided on 29th January 1929, against order of Deputy Magistrate, Madaripur, D/- 31st July 1928.

Criminal P. C., S. 196-A—Magistrate trying and convicting accused under charges which require no sanction along with such as require sanction under S. 196-A—No sanction having been accorded—Whole trial held vitiated.

A Magistrate held trial of the accused on charges which did not require sanction along with such as were not cognizable without sanction under S. 196-A, and convicted him although the necessary sanction had not been accorded. In his explanation the Magistrate suggested that the convictions against the accused under those sections only for which no sanction was required might be maintained and that the sentences passed on them may be treated as having been passed under those sections only.

*Held:* that, as the two charges could not thus be separated, the trial was vitiated.

[P 755 C 1]

*Suresh Chandra Taluqdar, Ramendra Chandra Roy and Mahendra Kumar Ghose—for Petitioners.*

**Order.**—The petitioners have been convicted under S. 120-B, I. P. C. Petitioner 1 has also been convicted under S. 384, I. P. C. and No. 2 under S. 384/114, I. P. C. The ground upon which this rule has been issued is that the trial was vitiated as the sanction contemplated by S. 196-A, Criminal P. C. had not been accorded by the Local Government to the prosecution of the petitioners under S. 120-B, I. P. C. Now the object of the conspiracy having been to commit an offence under S. 384, I. P. C. which is a non-cognizable offence the Court could not take cognizance of the said offence without the sanction of the Local Government or of the District Magistrate empowered in



that behalf. In the explanation which the learned Magistrate has submitted in answer to the rule he has suggested that the convictions under Ss. 384 and 384/114, I. P. C. as against petitioners 1 and 2 respectively may be maintained and that the sentence passed on them may be treated as having been passed under the said sections. Apart from anything else, this course, in my opinion, is likely to result in prejudice to the petitioners. They had been put on their trial in respect of offences under Ss. 384 and 384/114 along with a charge under S. 120-B. It is just possible and indeed it is not unlikely that a good deal of evidence that was adduced on behalf of the prosecution in this case in order to establish the charge of conspiracy would not be relevant as against the petitioners on the substantive charges under Ss. 384 and 384/114, I. P. C. The trial held on charges which do not require sanction along with such as are not cognizable without sanction under S. 196-A, Criminal P. C., cannot be separated in this way.

I am accordingly of opinion that this rule should be made absolute and the convictions and sentences passed on the petitioners should be set aside and the fines if paid by them should be refunded. It will be open to the prosecution to proceed afresh against the petitioners in respect of the charges under Ss. 384 and 384/114, I. P. C. or even as regards the charge under S. 120-B, I. P. C. provided that the requisite sanction under S. 196-A, Criminal P. C. has been duly obtained. Such retrial, if it is to take place, will be held before some Magistrate other than the learned Magistrate who has already dealt with this case.

S.N./R.K.

*Rule made absolute.*

### A. I. R. 1929 Calcutta 755

SUHWARDY AND JACK, JJ.

*Sulav Chandra Das*—Accused—Petitioner.

v.

*Prafulla Kumar Roy*—Complainant—Opposite Party.

Criminal Revn. No. 358 of 1929, Decided on 5th July 1929, from order of Dist. Magistrate, Goalpara, D/- 12th February 1929.

Criminal P. C. S. 437—Further inquiry—

Superior Court not to order further enquiry unless there is palpable error in decision of lower Court.

Though the revising Court has jurisdiction to order further enquiry on the same materials, a superior Court should hesitate before exercising its power under S. 437 to order further enquiry, unless there are palpable errors in the decision of the lower Court: 15 Cal. 608 (F.B.) and A. I. R. 1924 Cal. 229, *Rel. on.* [P 755 C 2]

*Girja Prasanna Sanyal* and *Bijali Bhusan Sanyal*—for Petitioner.

*Debendra Narain Bhattacharjee*—for the Crown.

**Judgment.**—This Rule is directed against an order of the District Magistrate of Goalpara, dated 12th February 1929, ordering further enquiry into the case in which the petitioner was charged under S. 380, I. P. C. The only ground that the Magistrate found for further enquiry is stated by him in these words:

"With regard to the evidence, the contention that the learned Magistrate has taken an entirely wrong view of the evidence with the result that there has been a miscarriage of justice appears to be not without foundation. I consider it desirable in the interest of justice that the case should be further enquired into."

We have gone through the judgment of the trial Magistrate and find that the trial Magistrate has carefully scanned the evidence and come to the conclusion that the case against the accused is at least very doubtful. It is not necessary for us to discuss the evidence and the learned District Magistrate has not done so; but we are of opinion that the view taken by the trial Magistrate cannot be held to be unjustifiable. Though it may be conceded in view of the Full Bench decision in *Haridas Sanyal v. Saritulla* (1), that a revising Court has jurisdiction to order a further enquiry on the same materials, a superior Court, as has been pointed out in *Abdul Rashid v. Montaz Sheikh* (2) should hesitate before exercising its powers under S. 437, Criminal P. C., to order further enquiry unless there are palpable errors in the decision of the lower Court. The District Magistrate has not given any indication in his judgment that there have been such palpable errors in the judgment of the trial Magistrate as to justify him in holding it to be wrong. We think that this is a case in which further enquiry is not necessary. We accordingly make

(1) [1888] 15 Cal. 608 (F.B.).

(2) A. I. R. 1924 Cal. 229.



the rule absolute and set aside the order of the District Magistrate.

V.B./R.K

*Rule made absolute.*

**\* \* A. I. R. 1929 Calcutta 756  
Full Bench**

RANKIN, C. J. AND C. C. GHOSE,  
BUCKLAND, B. B. GHOSE AND  
MUKERJI, JJ.

*Girish Chandra and others—Accused.*  
v.

*Emperor*

Full Bench Ref. No. 1 of 1929, Decided on 2nd September 1929, made by Lord Williams, J., on 9th September 1928.

\* (a) Criminal P. C., S. 432—Reference by Presidency Magistrate under S. 432 is confined to question of law necessary to dispose of case before him.

The power of reference conferred upon the Presidency Magistrate by S. 432 is confined to questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him, and the Magistrate ought not to refer to High Court questions of law unless they are matters upon which he has duty to make up his mind.

[P 757 C 2]

(b) Criminal P. C. — Application of Code to internal arrangements of the High Court.

The internal arrangements of the High Court are dealt with by its rules and the Code does not decide what functions can be exercised by a single Judge or must be exercised by a Division Bench. Code deals with the High Court as one and the definitions of the High Court are not intended to do more than to point to the Court itself so as to distinguish it from other Courts.

[P 759 C 2]

\* \* (c) Criminal P. C., S. 215—S. 215 is negative or restrictive and confines High Court's powers to quash commitment only in case where commitment is bad in law—However it does not take away any power to quash commitment prima facie incident to any superior Court receiving commitments from lower Courts as basis of its own jurisdiction.

Section 215 is a negative or restrictive section. It is intended to negative the existence in Sessions Courts to quash commitments and it is intended to restrict a High Court to cases in which it can be said that the commitment is bad in law. This last restriction is a restriction upon all powers which the High Court might otherwise possess, and it attaches to revisional powers as well. However, it does not take away by implication any other power to quash commitment which is prima facie incident to any superior Court receiving commitments from lower Courts as the basis of its own jurisdiction.

[P 759 C 2, P 760 C 2]

\* \* (d) Criminal P. C., S. 532—Offence not triable by Sessions or High Court—Accused committed—S. 532 does not apply.

Section 532 has no reference to a case in

which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence which upon true construction of the Code is not triable by a Court of Sessions or High Court.

[P 760 C 1, 2]

(e) Criminal P. C., S. 532—Section to be interpreted in interests of accused.

Section 532 is a curing or remedial section and it must be strictly interpreted in the interests of the accused person.

[P 760 C 2]

\* \* (f) Criminal P. C., S. 273—Section has no reference to illegal commitments.

Section 273 is a special power given to High Court. It has no reference to illegal commitment. The reference to portions of a charge and to the charge or portion thereof being "clearly unsustainable" is sufficient to show that the section is intended to provide a short and an effective way by which charges which have no merits may be disposed of.

[P 760 C 2]

(g) Criminal P. C., S. 215—Effect of quashing commitment is to supersede action taken by Magistrate under S. 210 and proceedings subsequent thereto.

Primary effect of the order quashing the commitment is to supersede any action taken by the Magistrate under S. 210 and his proceedings subsequent thereto, and in such a case it is necessary for the Magistrate to go back to the point at which he took cognizance of the complaint. The order does not amount to discharge and no fresh complaint is necessary.

[P 761 C 2]

D. N. Bhattachargee and Nirmal Chandra Chakravarti—for the Crown.

Rankin, C. J.—On 19th September 1928, Lord Williams, J., exercising the jurisdiction of the High Court under the Presidency Towns Insolvency Act (3 of 1909 as amended by Act 9 of 1926) and being of opinion that there were grounds for thinking that certain insolvents had committed offences under S. 103 of the said Act, made a complaint under S. 104, thereof to the Chief Presidency Magistrate of Calcutta. The Magistrate issued process on the accused and from the earliest stage of the proceedings determined to conduct them under Chap. 18, Criminal P. C., being of opinion that the case was one which ought to be tried at the High Court Sessions. On 17th December 1928, he formally committed the three accused Girish Chandra Kundu, Sudhir Chandra Kundu and Pramatha Nath Kundu accordingly. On 8th March 1929 the case came before Buckland, J., in the ordinary original criminal jurisdiction of the Court. The learned Judge took the view that as on conviction for an offence under S. 103 of the Act of 1909, the maximum punishment to which



the accused is liable to imprisonment for a term which may extend to two years and as there is no provision for imposition of a fine in addition to imprisonment, it was not possible to say of the offence charged that it could not be adequately punished by the Magistrate who has power to impose two years' imprisonment. In this view, being of opinion that the commitment was illegal, Buckland, J., directed that the commitment be quashed and that the record, with a copy of his judgment, be returned to the Chief Presidency Magistrate in order that he might deal with the complaint according to law. The accused persons had an opportunity before Buckland, J., of being heard upon the question whether the commitment should be quashed, but nothing was urged upon this point on their behalf. When the matter went back to the Magistrate, they filed a petition contending that the order of Buckland, J., read as a whole amounted to a discharge of the petitioners. The Magistrate thereupon has acted under S. 432, Criminal P. C., with a view to obtaining a decision upon certain question of law which he has indicated.

Section 432 provides that a Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him; and S. 433 provides that when a question has been so referred the High Court shall pass such order thereon as it thinks fit and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order. It will be observed that while the power of the Magistrate is to refer any question of law, the power of the High Court is to pass such order thereon as it thinks fit. In the present case the Magistrate has formally stated seven questions:

"(i) What is the correct interpretation of S. 215, Criminal P. C.?

(ii) Does it give power to the Judge presiding at the Sessions to quash a commitment made to him by a competent Magistrate?

(iii) Does it refer to a power of the High Court in its revisional jurisdiction?

(iv) Does it, refer to both of these powers?

(v) If it gives the power referred to in (ii), what is the effect when the Judge so presiding quashes a commitment? Has it, as suggested by the accused in their petition, the effect of a discharge, so that the Committing Magistrate has no further jurisdiction in the matter,

in the absence of a fresh complaint; or can the Magistrate proceed with the case as it stood prior to his passing the order of commitment.

(vi) Subsidiary to the question raised in (v) is the question whether the Judge presiding at the Sessions has power to direct what shall be the effect of his order quashing the commitment.

(vii) The learned Judge in the present case has quashed the commitment on a point of law, viz., that the charge in the case under S. 103, Presidency Towns Insolvency Act, is punishable with a maximum imprisonment of two years, that this being not more than the maximum punishment the Magistrate could award, his order of commitment was illegal. . . . Is the Magistrate bound by that order, so that in due course when the matter comes on again, he must not commit the case, though with all respect, he differs from the view of the law thereby expressed, and is of opinion that he has power to commit the case?

Upon the reference coming before a Division Bench, the learned Judges have intimated their opinion and have referred two questions to this Full Bench for determination. Their opinion in substance is that Buckland, J., had no power to quash the commitment; that the ground upon which he decided to quash it was erroneous and that if he acted under S. 215, Criminal P. C., the accused should stand discharged. The two questions which they have referred to us are as follows:

(1) Has a Judge presiding over the Sessions of the High Court power under S. 215, Criminal P. C., to quash a commitment made to him by a competent Magistrate?

(2) Where in a case triable by a Magistrate and not exclusively triable by a Court of Sessions, the Magistrate commits to the Court of Session, being of opinion that it should be tried by that Court, without saying that he could not award adequate punishment or the case is such where maximum punishment is within the competency of the Magistrate, is the commitment without jurisdiction?

Now, it appears to me that the power of reference conferred upon the Presidency Magistrate by S. 432 of the Code is confined to questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him; and that the Magistrate ought not to refer to this Court questions of law unless they are matters upon which he has a duty to make up his mind. In substance the Chief Presidency Magis-



trate has in this case asked this Court to express its opinion upon three questions :

(1) whether the learned Judge at Sessions had power to quash the commitment ;

(2) whether he was right in law in quashing the commitment for the reasons given by him ; and

(3) whether it is competent for the Magistrate to proceed in the absence of a fresh complaint or whether he can proceed with the case as it stood prior to his passing the order of commitment.

I have some difficulty in seeing that either of the first two questions is a question which arises in the hearing of the case pending before the Magistrate. I should have thought that for the purpose of this case the Magistrate had amply discharged his duty if he had taken the order of the High Court as an effective order quashing the commitment and had proceeded to deal with this case upon the footing that it was for him to deal with it himself as a warrant case under the provisions of Chap. 21, Criminal P. C.

Assuming, however, that the first question which has embarrassed the Magistrate is the question whether it is open to him to ignore the order of the learned Judge and to treat it as null and void, I am of opinion that the answer to this question is in the negative.

Prior to Act 13 of 1865 which abolished Grand Juries in the Presidency towns, original criminal jurisdiction of the High Court over an individual accused was based upon the presentment of the Grand Jury. Act 18 of 1862 contained elaborate provisions for the amendment of indictments and provided that every verdict and judgment should be of the same force and effect in all respects as if the indictment had originally been in the amended form. It contained also various provisions according to which an offence might be dealt with, tried and punished by the Supreme Court according as the offence had been either commenced or completed, or as the consequence had ensued, within the local jurisdiction of the Court. It gave jurisdiction in the case of offences committed on a journey or on a voyage in British India. It provided that every objection to an indictment for uncertainty or for any formal

defect apparent on the face thereof should be taken by demurrer or motion to quash such indictment before the jury had been sworn and not afterwards. It defined the word "indictment" to include information, inquisition or presentment as well as indictment ; and also plea, application or other pleading.

Act 13 of 1865 provided that any Magistrate who shall commit to custody or hold to bail any person for trial before the High Court for an offence committed, or which according to law may be dealt with as having been committed, within the local limits of its ordinary original civil jurisdiction, should deliver to the clerk of the Crown a written instrument of charge signed by him stating for what offence such person is so committed or held to bail. It empowered the clerk of the Crown to alter, amend or add to the charge and directed that the charge, with such amendments, alterations or additions, if any, should be recorded in the High Court. S. 6 enacted that upon the charge being recorded as aforesaid, the persons committed to custody or held to bail shall be deemed to have been brought before the High Court in due course of law and should be arraigned at suit of the Crown and the verdict recorded thereupon. Under this Act it is evident that the foundation of the jurisdiction of the High Court was the written instrument of charge signed by the Magistrate and delivered by him to the clerk of the Crown. It was only after charges so made had been recorded that the accused were to be deemed to have been brought before the High Court in due course of law.

Between 1865 and the enactment of the Criminal Procedure Code of 1872 the effect of these provisions of the Act of 1865 was considered in *Queen v. Thompson* (1). The accused was tried for an offence committed on Board a British ship on the high seas. The written instrument of charge in that case had in fact been made by a Magistrate but the fact did not appear from the instrument itself. Peacock, C. J. made it clear that if in fact it had not been preferred by a Justice of the Peace, it could not have been supported. But with reference to the provisions which

(1) [1868] 1 B. L. R. 1.



I have already cited from Act 18 of 1862, he held that :

"although we do not see on the face of the record that the charge has been preferred by a Justice of the Peace, we know that it was so preferred and that the Judge presiding at the trial would not have quashed the charge for the defect now relied upon but would have caused the charge to be amended."

He refers to S. 41, Act 18 of 1862 and to S. 7, Act 13 of 1865 which provided that in the former Act the word 'indictment' should be understood to include the word 'charge' and that all the provisions of the said Act should apply to charges recorded as aforesaid and the trial of such charges. It is clear, therefore both on authority and on the terms of the statutes themselves, as well as upon principle that after 1865 the power of the Court to quash an indictment had become a power to quash the charge comprised in the written instrument of charge delivered by a Justice of the Peace to the clerk of the Crown.

The written instrument of charge, or as it is now called the order of commitment, has from 1865 onwards a double aspect: it is in the first place an order of the Magistrate: it is in the second place the foundation of the jurisdiction of the superior Court. It may be regarded in either of these ways and it may have to be dealt with under either aspect.

This was the position when the legislature passed the Criminal Procedure Code of 1872 which purported to be:

"An Act for regulating the procedure of the Courts of Criminal Judicature, other than the High Courts in Presidency towns in the exercise of their original criminal jurisdiction."

Chapter 15 of that Code dealt with the procedure to be adopted in enquiries before Magistrates in cases triable by Courts of Sessions or High Courts. Section 196 provided that when evidence has been given before a Magistrate which appears to justify him in sending the accused person to take his trial for an offence which is triable exclusively by the Court of Sessions or High Court, or which in the opinion of the Magistrate is one which ought to be tried by such Court, the accused person shall be sent for trial by such Magistrate before the Court of Sessions or High Court as the case may be. Section 197 was as follows:

"If such accused person (not being a European British subject) is accused of having committed an offence conjointly with a Euro-

pean British subject who is about to be committed for trial, or to be tried before the High Court on a similar charge, and the evidence appears to justify the Magistrate in sending the accused person for trial, he shall commit such accused person to take his trial before such High Court, and not before a Court of Sessions; and such High Court shall have jurisdiction to try such person.

*Explanation.*—A commitment once made by a competent Magistrate can be quashed by the High Court only, and only on a point of law.

This explanation applies also to S. 196."

It may well be that in this Code, as in the subsequent Codes, the definition of "High Court" (which is the same as that now appearing in S. 4 of the Code of 1898) is one that does not always fit in with the meaning of the words as used. This is no great matter in the Code of 1872 as S. 4 of the Act qualifies the definition therein contained by the phrase "unless a different intention appears from the context." Remembering, however, that it was no part of the purpose of the Act of 1872 to regulate the procedure of High Courts in the exercise of their original criminal jurisdiction, we will find it impossible to suppose that an "explanation" appended to S. 197 of this Code which itself speaks of "trial before the High Court" was intended to alter the law under which a High Court Judge at Sessions had the right and the duty to quash the charge if the prisoner had not been brought before him in due course of law. In the Code of 1882 this explanation re-appears as S. 215. In that Code the old definition of "High Court" is still applicable to Chap. 18. Section 215 re-appears in the Code of 1898 in which Code the definition applicable to Chap. 18 is the definition in S. 266.

In my judgment the question is put upon a wrong footing if it be asked in the form whether the power conferred by S. 215 is conferred upon the Judge exercising the ordinary original criminal jurisdiction. To begin with the internal arrangements of the High Court are dealt with by its Rules and the Code does not decide what functions can be exercised by a single judge or must be exercised by a Division Bench. It deals with the High Court as one and the definitions of High Court are not intended to do more than to point to the Court itself so as to distinguish it from other Courts. In the second place S. 215 is a negative or restrictive section. It is intended to negative the existence in Sessions Courts of



power to quash a commitment and it is intended to restrict the High Court to cases in which it can be said that the commitment is bad in law. This last restriction is a restriction put upon all powers which the High Court might otherwise possess. I have no doubt at all that it is a restriction which attaches to the powers of the High Court in revision. Indeed as a Court of trial there could be no question of the High Court quashing a commitment on the ground that the evidence would not support the charge. But it is a very different matter to contend that it takes away by implication any other power to quash a commitment for illegality which the High Court may have had. If a Judge of the High Court trying a prisoner discovers that the accused or the offence is, for any reason, outside the jurisdiction of the Committing Magistrate or that the accused has been brought before him by an illegal order of an inferior Court, it is clearly his duty to take some action upon these considerations. His concern with S. 215 is, in my judgment, only this, that he is bound to see that he does nothing which the section prohibits.

The question of what he has to do takes us first to S. 532 of the Code. This section, it is to be observed, is one of a series which give power to remedy defects of procedure, which otherwise might result in criminal proceedings being set aside for errors not productive of injustice. Section 532 in my opinion is directed to the case of commitments that are bad by reason of a defect personal to the committing officer. It envisages a Magistrate purporting to exercise powers duly conferred upon him and this in my judgment is a reference to S. 206. The case supposed is one in which everything that has been done has been regular but the person who has committed the accused for trial is not empowered so to do. In these circumstances S. 532 provides that if the Court of Sessions or High Court considers that the accused has not been injured by the irregularity, it may accept the commitment, provided, however, objection had not been made to the jurisdiction of the Magistrate before the order of commitment was made. This section in my opinion has no reference to a case in which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over

whom he has no jurisdiction or commits him for an offence which, upon a true construction of the Code, is not triable by a Court of Sessions or High Court. Section 532 has, in my judgment, no application to the present case but it does remind us that an order of commitment has a double aspect, being at once an order of the committing Court and an order which is the foundation of the jurisdiction of the higher Court. For the limited purposes of the section the Court of Sessions as well as the High Court has to make up its mind whether to accept a commitment or to quash a commitment. The section is a curing or remedial section and it must be strictly interpreted in the interests of accused persons. It is idle to argue from the provisions of this section that it assumes or implies that the High Court at a trial has no other authority to quash a commitment.

The next section to be considered is S. 273. This is a special power given to High Courts. If it appears to the High Court at any time before the commencement of the trial that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect and

"such entry shall have the effect of staying proceedings upon the charge or portion of the charge as the case may be."

In my judgment this section has no reference to cases of illegal commitment. The reference to portions of a charge and to the charge or portion thereof being "clearly unsustainable" is sufficient to show that the section is intended to provide a short and effective way by which charges which have no merits may be disposed of.

The prohibition in S. 215 by which the High Court is limited to a point of law as a reason for quashing a commitment has in my opinion a plain purpose. In *Charoo Chunder Mullick v. Empress* (2) the Court refused an application under S. 147, High Courts Criminal Procedure Act (10 of 1875), finding that the object of the application was to get an order quashing a commitment on the ground that there was an insufficient case upon the evidence. The Judges pointed out that if a commitment may be quashed



upon the merits and application to this effect may be made, it would in practice be made only in doubtful cases. If such an application were entertained and refused the result would be that a prisoner committed upon evidence, sufficiently weak to make the result of a trial doubtful, would come to his trial prejudiced by the opinion of the High Court pronounced against him to the effect that the commitment ought not to be quashed. Applications of this character would clearly be objectionable. But S. 273 provides suitably for this very class of cases. The charge must be "clearly" unsustainable or else the Judge will not take into his own hands the functions of the jury.

If these Ss. 532 and 273 are not addressed to a case in which the High Court as a Court of trial has before it a prisoner whose commitment is contrary to law in the sense that he is not amenable to the jurisdiction of the Court at all, it would seem that there is no express provision in the Code to direct the Judge's action. The Sessions Judge has a power of reference to the High Court. Is the High Court Judge left in such a case to some irregular or informal arrangement by which he may call in aid a different jurisdiction of the Court—the revisional jurisdiction over the committing Magistrate? Or is he to say to the prisoner:

"You have made a very good plea in Bar but I cannot listen to it. I will try you though I see I have no right to try you but I will let you take your objection on the general issue?"

One may well hesitate to impute either intention to the legislature.

As it appears to me to be clear that prior to the Code of 1882 at all events, the right and duty of the High Court at Sessions to quash a charge is plain, I am of opinion that before it could be held that the Judge in the exercise of the original criminal jurisdiction of this High Court is unable to quash a commitment, it must be shown from the language of the Code or from the scheme of the Code that the legislature has taken away this power *prima facie* incident to any superior Court receiving commitments from the lower Courts as the basis of its own jurisdiction. In my opinion no construction that could properly be placed upon S. 215 of the Code could be put so high. The legislature in this matter has I think been somewhat wiser than has been supposed. It has been content, in

view of the revisional powers of the High Court, to take away the power of quashing a commitment, save under S. 532, from Courts of Session on which formal powers of reference have been conferred, and to leave the powers of the High Court upon this matter unaffected by special provision save that commitments are not to be quashed except upon a point of law. The Code of 1882 intends no more than the Code of 1872 intended. It was unnecessary for the purpose of the legislature in any of the Codes and it was no part of its scheme, to analyse High Courts as though they were a complex of jurisdictions or to set forth the different ways and occasions which might present the question of quashing a commitment for the consideration of High Courts.

In the present case the High Court has in fact quashed the commitment and I think in answer to this reference the Chief Presidency Magistrate may be informed that it is his duty to treat that order as a valid and subsisting order.

The next question raised by the Magistrate is whether the order of Buckland, J., has the effect of a discharge so that the Magistrate has no further jurisdiction in the matter in the absence of a fresh complaint, or whether the Magistrate can proceed with it as it stood prior to the passing of the order of commitment. To this question I would reply that while the primary effect of the order quashing the commitment is to supersede any action taken by the Magistrate under S. 210 and his proceedings subsequent thereto, it is necessary for the Magistrate in this case to go back to the point at which he took cognizance of the complaint. There is no need whatever for a fresh complaint but it is necessary for the Magistrate to treat the case as a warrant case and not as the subject matter of an enquiry under Ch. 11. The Magistrate must begin the trial afresh under S. 252.

The last question raised by the Magistrate concerns the merits of the order of Buckland, J., and raises the question whether the learned Judge was right in holding that it is illegal for a Magistrate to commit the accused to trial when the offence is neither exclusively triable on commitment nor one of which it is possible to hold that the Magistrate has insufficient power to inflict adequate punishment.



That the Magistrate should think fit to raise this question is presumably to be explained by the circumstance that he entertains a doubt whether or not the order of the learned Judge was without jurisdiction. That doubt having been resolved, it is not to be supposed that the Magistrate will entertain a suggestion that when he rehears the case, he should again commit the accused to the High Court Sessions. Such a procedure would in this case be in the highest degree disorderly. The question whether it is lawful for the Magistrate to commit this case to the High Court Sessions has been decided by this Court once. This Full Bench is not sitting on appeal from the order of the learned Judge. Whatever be the difficulties in the question raised and whatever be the answer, there is only one order which could in this case be correct and I am of opinion that it is open to us on this reference to direct the Chief Presidency Magistrate to proceed with the case as a warrant case and to try it as such in conformity with the decision which has already been given in the presence of the accused.

This reference to the Full Bench has been made under R. 5, Chap. 7 of the Rules of the appellate side. Under this rule the whole case is referred to the Full Bench for such orders as to the Full Bench may deem fit. The order which I would propose is as follows:—

1. Declare that the order of Buckland, J., is a valid and subsisting order.

2. Direct the Chief Presidency Magistrate to try the accused under Chap. 21, Criminal P. C., upon the basis of the complaint already made.

3. Direct the Magistrate that he is not again to commit this case for trial at the High Court Sessions.

4. Save as aforesaid, this Court does not think fit to make any further order upon this reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

B. B. Ghose, J.—I agree.

Mukerji, J.—I agree.

V.B./R.K. Order accordingly.

## A. I. R. 1929 Calcutta 762

MUKERJI, J.

*Rajaram Majhi*—Complainant.

v.

*Panchanan Ghosh*—Accused.

Criminal Ref. No. 26 of 1929, Decided on 17th April 1929, made by Addl. Sess. Judge, Hooghly.

(a) Criminal P. C., S. 250 (1)—Order to show cause for compensation—No date fixed—Complainant has to show cause then and there unless adjournment is obtained.

The effect of an order calling upon a complainant to show cause why he should not pay compensation to an accused, under S. 250, without fixing date is that the complainant is to show cause then and there unless he obtains from the Court some order adjourning the matter to a further date. [P 763 C 2]

(b) Criminal P. C., S. 250—Order to show cause—Date fixed verbally—Complainant absent on fixed date—Another date fixed—Magistrate must issue notice or summons to complainant.

Where after an order calling upon the complainant to show cause why he should not be made to pay compensation, the Magistrate fixes the date verbally, and on the date of hearing fixed, the complainant does not appear it being doubtful whether complainant knew the date, and a further date is fixed, the Magistrate ought to issue a summons to appear and show cause, or at any rate he ought to issue a notice to the complainant informing him that the date for showing cause has been fixed for a particular day. [P 764 C 1]

(c) Criminal P. C., S. 250—Acquitting—Magistrate should deal with cause shown.

It is the Magistrate who deals with the substantive case and makes the order of acquittal or discharge, who has got to deal with the cause that is shown why compensation should not be awarded. [P 765 C 1]

*Suresh Chandra Talukdar*—for Complainant.

*Manmatha Nath Ray* and *Suryya Kumar Aich*—for Accused.

**Judgment.**—This is a reference made by the Additional Sessions Judge of Hooghly, under S. 438, Criminal P. C. recommending that an order passed against the complainant *Rajaram Majhi* under S. 250, Criminal P. C. should be set aside and the said complainant should be summoned and an opportunity given to him to show cause why compensation should not be ordered.

In order to appreciate the confusion that has arisen and in consequence of which this reference has been made it is necessary to state the facts quite shortly. *Rajaram Majhi* was the complainant.



in a case which he had instituted against one Panchanan Ghose for an offence under S. 420, I. P. C. On 21st July 1928 which was a Saturday, the accused Panchanan was acquitted and if anything is clear in this case it is this that on the acquittal of Panchanan as aforesaid the trial Magistrate Mr. Basanta Kumar Banerji recorded an order which ran in these words:

"Complainant to show cause why he should not pay the accused the sum of Rupees one hundred as compensation under S. 250 Criminal P. C."

What happened immediately after this order was recorded is a matter of some dispute. But in a matter of such controversial character it is preferable always to go upon the statement of the Magistrate if in point of fact there is nothing in the record to contradict such a statement. In the explanation which the learned Magistrate submitted in answer to the rule that was issued by the Sessions Judge it was made clear by him that immediately after he had recorded this order,—and it was an order by which he wanted the complainant to show cause then and there for he had not fixed any date in the order by which the cause was to be shown—he received some intimation of some sudden illness in his family which compelled him to leave the Court. He said in that explanation that at the time when he left the Court immediately after recording the aforesaid order he gave verbal orders that cause might be shewn on 23rd July 1928. He did not say, however, that he himself told the complainant that the latter was to appear on 23rd July and show cause in pursuance of the said order. According to the explanation what happened afterwards was as follows: On 23rd July 1928 when he came to the Court what he did was that he sent for the complainant and then his pleader Babu Bhagwan Das Chatterjee. The complainant, of course, was not to be found, but the pleader appeared and represented to him that in his absence his Bench Clerk had fixed the date for showing cause as 2nd August 1928. The Magistrate made an enquiry of the Bench Clerk as to whether he had done so and told Babu Bhagawan Das that the Bench Clerk had no power to allow any time as he himself fixed 23rd July 1928. The Bench Clerk denied

having fixed the date for 2nd August 1928. Babu Bhagawan Das, as far as can be made out from the Magistrate's explanation, then asked the Magistrate to give time till 2nd August 1928. On being asked by the Magistrate to file a petition, Babu Bhagawan Das did so, with the result that the Magistrate made an order allowing time till 24th July 1928. On 24th July 1928 the complainant did not appear and the learned Magistrate then recorded the following order:

"On 23-7-1928 complainant wanted time to show cause and he was granted one day's time. No cause has ever been shown today. He is not found even after calls. The order to pay compensation of Rs. 50 to the accused is therefore made absolute."

It is this order which forms the subject matter of this reference.

Now two things are quite clear. One is that on 21st July 1928 when the Magistrate called upon the complainant to show cause by the written order that he passed he fixed no date, and as I have said the natural consequence of that order was that the complainant was to show cause then and there until and unless he obtained some order from the Court adjourning the matter to a further date. As the Court was unable to sit any longer it was obviously the duty of the Court to fix a date on which the cause was to be shown. No written order was passed fixing such date and all that the Magistrate is able to tell us is that before leaving the Court he made a verbal order. There is nothing at all on the record to indicate—and indeed all circumstances point to the contrary,—that the complainant was aware that it was the intention of the Magistrate to take the matter up on Monday 23-7-1928. The fact that the complainant's pleader had the audacity to tell the Court knowing full well that an enquiry would immediately be made from the Bench Clerk that the Bench Clerk had fixed 2nd August 1928, goes a long way to indicate that some such impression must have been produced in the mind of the complainant, and although I am prepared to accept the explanation which the Bench Clerk offered to the Magistrate saying that he had not fixed the 2nd August in contravention of the Magistrate's verbal order, I cannot for a moment believe that the whole of this story as to 2nd August 1928 was a pure invention and an



afterthought for the purpose of getting rid of the liability to show cause. Enquiry in point of fact was made and the Bench Clerk denied having fixed the date. But then the fact remains that when the application was filed on 23rd August the complainant was not present in Court. The other fact is that there is absolutely no reason to suggest that the order which the Magistrate passed on the petition of 23rd July fixing the date for 24th July was ever communicated to the complainant. It is only natural therefore that on 24th July the complainant did not appear with the result that the order was passed in his absence. What the law contemplates is that the complainant is to show cause, not that it would be enough to serve notice on the pleader or pass an order on a petition filed by the pleader which may or may not be communicated to the complainant. In the present case I am not at all satisfied either that the complainant knew that he had to show cause on 23rd July 1928 or that he had to show cause on 24th July 1928. For these reasons I am of opinion that the ground upon which the reference has been made by the learned Additional Sessions Judge is perfectly well founded and that if the Magistrate on 23rd July thought that the order which he had passed on 21st July was to be complied with by the complainant he ought to have issued a summons, as the learned Judge suggests, in accordance with the procedure prescribed by the latter part of S. 250 (1), Criminal P. C., which says:

"If such person is not present, directing the issue of a summons to him to appear and show cause as aforesaid."

In any event he should have given notice to the complainant that the date for the showing of cause had been fixed by him for 24th July 1928.

It has been contended on behalf of the opposite party who has appeared in this case that when no date was fixed for showing cause by the order of 21st July 1928 it was the bounden duty of the complainant to appear in Court on 23rd July 1928, and if he did not do so he cannot be permitted to complain. In support of this view reliance has been placed on two decisions to which I shall presently refer. One is the case of *Lalit*

*Mohan v. Kunja Behari Ghose* (1). There what happened was this. The order to show cause was passed on 3rd September 1910. No cause was shown on that date or on any of the dates following and on 6th September the order to show cause was made absolute. Now the point which distinguishes that case from the present one is that in that case there was nothing to show that on 3rd September 1910 immediately after recording the order which purported to be an order calling upon the complainant to show cause then and there in pursuance of the order the Magistrate left the Court depriving the complainant of an opportunity to show cause at that time. This case in my opinion, is not an authority for the proposition that when an order has been made without fixing a date the man is to come necessarily on the next day and comply with the order. If at all, the case is an authority for the position that if no date is fixed cause is to be shown on that very date unless time is taken by the complainant for the purpose.

Another case relied upon is the decision of the Madras High Court reported in 5 *Madras High Court Reports Appendix* p. 15. What happened in that case was that under the Code of 1861, an accused person appeared on a particular date before the Magistrate but the Magistrate was unable to take up the case. The Magistrate then left the Court making a verbal order on the accused asking him to appear on the following day. The accused did not turn up on the day so fixed and on that he was convicted under S. 174, I. P. C. It is clear from the proceedings that the accused when called upon to answer a charge under S. 174, I. P. C., admitted that he had received the Magistrate's verbal order but pleaded that he had some other case to attend to in another Court. The contention that was put forward before the Court was that the accused was absolved as there was no written order and no recognizance had been taken from him in pursuance of the verbal order. This contention was overruled. If in the present case there is anything to suggest that the complainant admitted that he knew of the order asking him to show cause on 23rd July the position would have been entirely different. As matters stand the facts are

(1) [1914] 18 C. W. N. 702=22 I. C. 726=15 Cr. L. J. 150.



entirely distinguishable and the ruling has no bearing whatsoever on the points that arise in the present case.

The question then arises as to whether the part of the recommendation made by the Sessions Judge to the effect that the complainant should now be given an opportunity to show cause in pursuance of the order passed on 21st July 1928 should be accepted or not. Now it is quite clear from a perusal of S. 250, Criminal P. C., that the intention of the legislature is that it is the Magistrate who deals with the substantive case and makes the order of acquittal or discharge who has got to deal with the cause that is shown as to why compensation should not be awarded. The word "forthwith" used in sub-S. (1), S. 250, the words "the Magistrate" appearing in sub-S. (2) and (2-A) and the provisions contained in sub-S. 2 which regulate the amount of compensation as being dependent on the class to which the Magistrate who has dealt with the substantive case belongs unmistakably point to the conclusion that the legislature never intended that one Magistrate should deal with the case and make the order for calling upon the complainant to show cause and that another Magistrate may pass the order for compensation. Now in the present case an unfortunate circumstance has happened, namely, that the trial Magistrate Mr. Basanta Kumar Banerji has been transferred from the district. I say unfortunate, because as far as I can make out from the perusal of the order he passed by which he acquitted the accused in the case in which Rajaram was the complainant that there was very little justification for the complaint that was filed by the complainant, but the clear intention of the law makes it impossible to make an order directing that the matter should be dealt with by another Magistrate.

I am, therefore, of opinion that this reference should be accepted. The order for compensation against which it is directed should be set aside and it is further ordered that there should be no further proceeding under the section against the complainant. The compensation, if paid, will be refunded to the plainant.

V.B./R.K.

Reference answered.

### A. I. R. 1929 Calcutta 765

RANKIN, C. J. AND C. C. GHOSE, J.

*Jati Mali and another*—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 886 of 1928, Decided on 20th March 1929 against an order of Addl. Sess. Judge, 24-Parganas.

(a) Evidence Act, S. 33—Application is essentially matter of discretion of Court.

It is impossible to lay down hard and fast rule for the application of S. 33. Each case must depend upon its own facts and the matter is essentially one for the exercise of discretion on the part of the Court applying it. [P 766 C 1]

(b) Criminal P. C., S. 297—Charge to jury—Judge should place before jury in coherent manner salient points arising on evidence adduced—Evidence of witnesses need not be incorporated.

In a trial by jury it is an entirely wrong view to hold that it is the duty of the Judge to incorporate in his charge the evidence of witnesses who have already given their depositions before the jury. The duty of the Judge is to place before the jury in a coherent manner the salient points arising on the evidence adduced before the jury and further it is no part of the Judge to make a second speech on behalf of the defence. [P 766 C 2]

*Sasi Sekhar Bose and Tarapada Banerjee*—for Appellants.

*Khundkar*—for the Crown.

C. C. Ghose, J.—The appellants before us were charged before the learned Additional Sessions Judge of the Twenty-four Parganas and a jury under Ss. 366 and 376, I. P. C. They were convicted on an unanimous verdict of the jury under the said sections and sentenced each to suffer rigorous imprisonment for five years under S. 376, I. P. C. and for three years under S. 366, I. P. C., the sentences to run concurrently.

The short facts are as follows: On the night of 25th April 1928, it appears that Uttami Dassi's husband was absent from home and so also was his brother. Taking advantage of that fact, 8 or 10 persons including the present accused are alleged to have entered the house of Uttami Dassi and forcibly carried her off. They also attempted to seize Uttami's sister, but the latter managed to run away. It is further alleged that these men took Uttami to the bank of the river near by, threatened her that she would be put to death, beat her and forcibly ravished her, and



then left her in the fields. Uttami was found by her son Haripada, her sister, who is P. W. 3 and a neighbour, who is P. W. 4. She was taken home by these persons and nursed. She recovered after sometime, and related what had happened. She mentioned the names of the present accused. The Matbars of the village being informed about the occurrence came to her house but it appears that these men were at first against any information being lodged with the police. Their reason was that some of their relatives and friends were involved in the case. Uttami Dassi, however, managed to send Haripada to the thana on 27th April 1928, and the latter lodged an information with the police. A police investigation followed and the accused along with several others who were absconding, were sent up for trial.

The first point urged on behalf of the appellants is that the learned Sessions Judge ought not to have admitted in evidence in his Court the deposition of a witness named Sripati Maity under S. 33 Evidence Act. Now the matter stands thus. This witness Sripati Maity had given evidence on behalf of the Prosecution in the committing Magistrate's Court. In the Sessions Court, he was not available and the police officer in charge of the case stated on good authority before the learned Sessions Judge that enquiries had been made about the whereabouts of Sripati but he could not be traced. Thereupon the deposition of Sripati in the Committing Magistrate's Court was admitted in evidence by the learned Sessions Judge. In my opinion the learned Sessions Judge was entirely right in admitting in evidence the deposition of Sripati in the Committing Magistrate's Court. Sufficient foundation for the admission in evidence of that deposition had been laid in view of the evidence of the police officer who is P. W. 9 and it appears to me that the learned Sessions Judge had reasons to be satisfied that the requirements of the statute had been complied with. It is impossible to lay down any hard and fast rule for the application of S. 33, Evidence Act. Each case must depend upon its own facts and the matter is essentially one for the exercise of discretion on the part of the Sessions Judge. I am reluctant to say a single word which will have the effect of fettering

the exercise of such discretion. It is sufficient for me to observe that no attempt was made on behalf of the defence to challenge in any way the statements made by the police officer in the course of his deposition in the Sessions Court relating to the whereabouts of Sripati and if that was so, there was nothing wrong or illegal in what was done by the learned Sessions Judge. This point fails and must be negatived. The second and the third points relate to the question as to whether the evidence of two witnesses named Haripada Das and Preo Bera had been fully placed before the jury or not. The learned Sessions Judge's charge to the jury had been read out to us in its entirety and I am not prepared to say that the charge is in any way defective so far as the evidence of these two witnesses is concerned. I think it is an entirely wrong view to hold that it was the duty of the learned Sessions Judge to incorporate in his charge the evidence of witnesses who had already given their depositions before the jury. The duty of the Sessions Judge is to place before the jury in a coherent manner the salient points arising on the evidence adduced before the jury and in my opinion it is no part of the duty of the Sessions Judge to make a second speech on behalf of the defence. In this case, I have examined the passages in the evidence of these two witnesses to which attention has been drawn by the learned advocate for the appellants and I am satisfied that no prejudice, whatsoever, has been caused to the appellant in any way by the manner in which the charge was framed by the learned Sessions Judge. There is no substance in these two points and they must also be negatived.

There is one small point which has been urged and it is this: that the Chemical Examiner's report should have been placed before the jury. Now there is no evidence on the present record that any report from the Chemical Examiner was at all obtained by the police. It may be and probably is the fact that the Chemical Examiner was asked to examine a certain piece of cloth but it does not appear that the Chemical Examiner ever sent in his report or that such report was available to the prosecution and that such report has been withheld by the prosecution.



I am of opinion that there is no substance whatsoever in this appeal and it must be dismissed. The appellants, - if on bail, must surrender to their bail bonds and serve out the remainder of the sentences imposed on them.

**Rankin, C. J.**—I agree.

V.B./R.K. *Appeal dismissed.*

### A. I. R. 1929 Calcutta 767

RANKIN, C. J., AND C. C. GHOSE, J.

*Muktal Hossein and others*—Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeals Nos. 809 and 920 of 1928, Decided on 28th March 1929, from order of Addl. Sess. Judge, Tipperah, D/-15th September 1928.

Penal Code, Ss. 342, 368 and 109—Conviction of minor offenders under Ss. 368 and 109 after acquittal of principals under S. 342 is not sustainable.

Conviction of some persons who, as minor offenders, are charged as engaged in a conspiracy to conceal a minor girl after abduction, under S. 368 read with S. 109, after having acquitted the principal offenders under S. 342 is not sustainable. [P 767 C 2]

*Mrityunjoy Chatterjee and Bholanath Roy*—for Appellants.

*Khundkar*—for the Crown.

**Rankin, C. J.**—This is a case which has had reference to the abduction from her home of a minor girl and the accused Muktal, it is clear, wanted to marry her. There were eight persons put on their trial of whom we are concerned with four only. Muktal has been given five year's rigorous imprisonment and Imamuddin has been given two years' rigorous imprisonment under S. 366, I. P. C., that is, abducting a woman to compel her to marry. The other two Tobdul and Sundar Ali have been fined Rs. 200 each upon a conviction under S. 368 read with S. 109, I. P. C. and the charge against them was that they were engaged with Muktal and Imamuddin in a conspiracy wrongfully to conceal Jobeda Khatun—an abducted girl—knowing her to have been abducted in pursuance of which conspiracy she was actually wrongfully concealed. All the accused were charged under S. 342, I. P. C. (wrongful confinement) and all were expressly acquitted under that section.

Mr. Chatterji on behalf of Tobdul and Sundar Ali points out that, if there was no conviction of Muktal and Imamuddin or anybody else under S. 342, I. P. C. and no conviction or even accusation against them under S. 368, I. P. C., then it cannot be that the conviction of Tobdul and Sundar Ali upon this charge is sustainable. By S. 109, it is premised that the offence abetted is an offence which has been committed. If persons who are said to have been the principals are acquitted under S. 342, it cannot, therefore, be right, according to Mr. Chatterji's argument, to convict the others under S. 368 read with S. 109. That argument is logical and there is no escape from it. Mr. Chatterji has pointed out that abetment does not necessarily involve that the offence has been committed; but, in this case, it would not seem right merely to alter the conviction to one under S. 368 read with S. 116 because in this case we have to consider that the abetment alleged is an abetment by conspiracy; and, if we were to alter the charge in the manner suggested, we would probably have to retry the case from an angle at which it has not yet been examined. That too, if I may say so, appears to me to be a sound argument.

Mr. Khundker for the Crown points out that what is really wrong in this trial is that, on the prosecution case which has been accepted by the jury, the principal accused Muktal and Imamuddin ought never to have been acquitted under S. 342 and that certainly it would seem paradoxical to say in this case that the jury accepted the prosecution case for any purpose and still were able to find that Muktal and Imamuddin had not committed an offence under S. 342.

In these circumstances, no doubt there has been a miscarriage of justice in that sense; that is to say, the jury having acquitted people under S. 342, it becomes impossible to sustain what otherwise is a perfectly good charge against Tobdul and Sundar Ali under S. 368 read with S. 109. In this case, it is to be observed that Tobdul and Sundar Ali have been fined Rs. 200 each and I am not minded to enter a conviction for any purpose where the jury have entered an acquittal merely to get over a technical difficulty. I doubt extremely whether in a case of this sort the powers of the Court under



S. 537, Criminal P. C., could be employed so as to straighten the matter out. I am of opinion that the correct course in this case is to give effect to the argument of Mr. Chatterji and to acquit Tobdul and Sundar Ali. They will, therefore, be acquitted and the fines, if paid, will be refunded.

As regards Muktal and Imamuddin, the only question which arises is the question of sentence. I do not know that this is as bad a case as one often met with; but, at the same time, there remains the fact that this girl of 13 or 14 years of age was gagged and taken away by force and very elaborate steps were apparently taken to induce her to marry Muktal. I do not think it necessary to interfere with the discretion of the learned Sessions Judge and the appeal of Muktal and Imamuddin must be dismissed.

C. C. Ghose, J.—I agree.

V.B./R.K.

*Order accordingly.*

### A. I. R. 1929 Calcutta 768

SUHWARDY AND GRAHAM, JJ.

*Osman Munshi and others*—2nd Party  
—Petitioners.

v.

*Kader Pramanick and others*—1st  
Party—Opposite Parties.

Criminal Revn. No. 1211 of 1928, Decided on 22nd March 1929, against order of Sub-Divisional Officer, Tangail, D/- 28th November 1928.

Bengal Alluvial Lands Act (5 of 1920)—Order of Sub-Divisional Officer, ordering huts erected on disputed char to be sold is not revisable under Criminal P. C., S. 439.

Order passed by Collector as such under the Alluvial Lands Act cannot be revised by Criminal Bench of the High Court under S. 439.

*Per Suhrawardy, J.*—Order passed by a Sub-Divisional Officer under the Alluvial Lands Act directing that some huts which were erected on the disputed char were to be sold and the sale proceeds credited to the treasury, is not passed in judicial capacity but as an executive officer and as such cannot be revised by the High Court.

[P 768 C 2]

*Langford James and Asitaranjan Ghose*—for Petitioners.

*Probodh Chandra Chatterjee*—for the Crown.

*Mukund Behary Mullick*—for Opposite Parties.

**Suhrawardy, J.**—This rule is directed against an order purported to have been passed by the Sub-Divisional Officer of Tangail under the Bengal Alluvion Lands Act (5 of 1920) directing that some huts which were erected by the second party on the disputed char were to be sold and the sale proceeds credited to the treasury. This rule should in my opinion be discharged on several grounds. The first is that the order passed by the Sub-Divisional Officer is an order passed in his capacity as Collector as defined in the Act. That being so, it is an order which is passed not in his judicial capacity but as an executive officer invested with certain powers under the Act. That an order passed under the Act is an executive order is indicated by certain provisions in the Act itself. It is laid down that in attaching a char the Collector has to determine what costs are to be paid by any party and any person who is aggrieved by such order must prefer an appeal to the Commissioner. Thus it is clear that the order passed by the Collector is not a judicial order but an executive one.

The second ground on which this rule should fail is that conceding that it is a judicial order, it is not an order which can be revised by the Criminal Bench of this Court under S. 439, Criminal P. C. I am not prepared to say that it is an order which can be revised by the civil side of this Court but that is the proper side to approach in matters like this.

The third ground which seems to settle the matter is that there is no indication in the Act that an order under it is open to appeal or revision by any Court, civil or criminal. The Collector acts in his ordinary capacity of a revenue officer and is not subject to the control of ordinary Courts. Moreover, considering the circumstances of this case it seems to me that it is a very proper order to secure tranquillity in the locality.

The rule fails and is discharged.

**Graham, J.**—I agree; but I prefer to base my decision solely upon the ground that the order complained of having been passed by the Collector in his capacity as such, we have no jurisdiction to deal with the matter in the exercise of our criminal jurisdiction.

S.N./R.K.

*Rule discharged.*



## A. I. R. 1929 Calcutta 769

MUKERJI, J.

Arjoon Singh and others—Applicants.  
v.

Emperor

Criminal Ref. No. 24 of 1929, Decided on 8th May 1929, made by Sess. Judge, Hughly.

(a) Bengal Public Gambling Act (2 of 1867), S. 2 (as amended by Act 4 of 1913)—Definition of gaming is only descriptive—To bring case under "gaming" it must be established that game was for money staked on result of game.

The definition in the Act does not really define gaming but merely indicates what it is like and excludes wagering or betting on some particular occasion and in some particular circumstances and also excludes "lottery." To bring the case within the meaning of "gaming" all that has to be seen is whether the game that was going on was for money which was staked on the result of the game which was to be lost or won according to the success or failure of the person who has staked provided of course that it was not a lottery: 31 Cal. 542; 39 Cal. 968; 40 Mad. 556, Ref. [P 769 C 1, P 770 C 1]

(b) Bengal Public Gambling Act (2 of 1867), S. 2 (as amended by Act 4 of 1913)—Question whether game is of pure chance or one in which skill preponderates is no longer pertinent.

The question as to whether a game is one of pure chance or one in which the element of skill preponderates are no longer pertinent under the Act as it stands now. What is to be seen is whether the game is covered by what is meant by "gaming"; if it is, it is hit by the Act unless it is a game of mere skill: 6 C. L. J. 708, Expl. [P 769 C 2]

Khoda Bux and Satindra Nath Mukerji—for Applicants.

Santosh Kumar Bose—for the Crown.

**Judgment.**—This is, reference made under S. 438, Criminal P. C., by the Sessions Judge of Hooghly recommending that the conviction of 15 persons, one Arjoon Singh and 14 others, under S. 4, Act 2 (B. C.) of 1867 and the fine imposed thereunder may be set aside. The case has been argued before me in great detail on behalf of the petitioners as well as on behalf of the Crown.

The only question that arises for determination in the case is whether the game that was being played at the time when the petitioners were arrested was "gaming" within the meaning of the Act. The definition in the Act does not really define "gaming," but merely indicates what it is like and excludes wagering or betting on some particular occasion and in particular circumstances

and also excludes a "lottery." In *Hari Singh v. Emperor* (1) it was held that a game of skill is not an offence under the Act but a game of chance is, and that if a game involves a certain amount of skill as well as a certain amount of chance, if the chief element of the game is skill it is not an offence. This decision was passed in 1907. It was incidentally approved of in *Bengali Shah v. Emperor* (2). In *Ram Newaz Lal v. Emperor* (3) the learned Judges referring to S. 10 of the Act which said:

"Nothing in the foregoing provisions of this Act contained shall be held to apply to billiards, whist or any other game wherever played"

observed:

"The criterion is not whether it is a game of mere chance, but whether it is a game of mere skill and we may point out that the word "mere" is used in legal language in its meaning derived from its Latin origin and imports the meaning of "pure skill" . . . . . There is a further point which we wish to set out and which was not apparently discussed in *Hari Singh's* case and that is that the games of skill referred to in S. 10 obviously refer to a game where there are two parties pitting their skill against each other."

The Allahabad High Court dealing with a case under S. 12, Act 3 of 1867 in which *Hari Singh's* case appears to have been cited held that the words of the Bengal Act were materially different and held that under the other Act the conviction was all right as the game was not a game of mere skill. Bengal Act 2 of 1867, however, was amended by Bengal Act 4 of 1913 by which amongst other alterations S. 10 was repealed and a new section numbered 11-A was introduced which is in these words:

"Nothing in this Act shall apply to any game of mere skill wherever played."

The result, therefore, is that we are left with the definition of "gaming" such as it is in S. 1 and the provision exempting games of mere skill as contained in S. 11-A. The question as to whether a game is one of pure chance or one in which the element of skill preponderates—considerations which were thought important under the Act as it stood before—are no longer pertinent. We have to see whether the game is covered by what is meant by "gaming"; if it is, it is hit by the Act unless it is a game of mere skill.

As regards the definition of "gaming"

(1) [1907] 6 C. L. J. 708.

(2) [1913] 40 Cal. 702=20 I. C. 612=17 C. W. N. 883.

(3) [1914] 15 Cr. L. J. 276=23 I. C. 484.



it has been already said that it is hardly a definition. Etymologically it is equivalent to playing a game. In the Imperial Dictionary gaming is defined as :

"to use cards or other instruments according to rules with a view to win money or other things waged upon the issue of the contest."

In Murray's Dictionary it is defined as "the action of playing at games for stakes." In Wharton's Law Lexicon it is defined as :

"the act or practice of playing or following any game, particularly those of chance."

In *Hari Singh v. Jadunandan Singh* (4) Stephen, J., incidentally laid stress on the accompaniment of stakes or betting as the distinguishing element of "gaming." In *Ram Pertap v. Emperor* (5) where the meaning of "gaming" pure and simple was in question, it was explained as meaning :

"playing at any game for money, which is staked on the result of the game, i. e., which is to be lost or won according to the success or failure of the person who has staked."

In the case of *Emperor v. Musa* (6) Oldfield, J., said that

"the existence of a stake, not the character of the game as one of skill or chance, is regarded as constituting the distinction between playing a game and gaming,"

and Sadasiva Ayyar, J., observed :

"I do not think that the question of chance or skill enters into the connotation of the verb."

I entirely agree in this view. In my judgment, all that has to be seen in this case is whether the game that was going on was for money which was staked on the result of the game which was to be lost or won according to the success or failure of the person who has staked, provided of course that it was not a lottery.

The version of the game given by the witnesses for the defence, a version by putting forward which the accused obtained sanction or permission to play—is one that is perfectly understandable. That perhaps would amount to a "lottery" as D. W. No. 2 says, but it is not necessary to express any definite opinion on this question as this, according to the prosecution, was not the game that was being played on this occasion. I may, however, mention in passing that I do not understand the sense of this game,

because called by whatever name it may either as "the American sale system" or the "Jullendhur play" it fetches nothing to the principals for whose benefit the game is meant to go on. According to the defence as I understand it, each player has to put in four annas in lieu of which all the players get articles worth ranging from four annas to Re. 1-8-0. It may be that the agents get a commission, but the principals undergo a loss of a good decent sum at each round of the play. I need not dilate further on it as I do not believe that that was the kind of game that was ever seriously pursued.

As regards the game which the prosecution allege was being played on the occasion Mr. Basu has made several attempts before me to construct it out of the evidence of the prosecution witnesses, but I must say I am not satisfied that he has been successful. The witnesses examined in the case have not been made to describe the play in detail or at any rate in a sensible way and I entirely agree in the opinion which the D. W. 1 has expressed, viz., that the description as given by the witnesses is "nonsense" and in what the Sessions Judge says namely, that their evidence as recorded is "extremely incomprehensible." It does not signify much that one witness says that on one occasion he lost Rs. 2, for we have to see what was done not on one occasion but on the present occasion. The putting out of the light on the arrival of the police though significant, cannot be held as supplying all lacunæ in the evidence. I share in the view which the Sessions Judge has expressed, namely, that the offence has not been proved. The consequence is perhaps regrettable but a case of this sort should certainly have been more adequately tried.

It may be noted here that there is on the record the warrant which was issued by the Superintendent of Police for the search that took place. It is not possible to avail of the presumption that the law provides for a case like this, because the warrant has not been marked as a piece of evidence against the accused persons. Moreover, it may again be that such presumption, even if it did arise, has been rebutted by the fact that the presence of the dice, etc., is accounted for by the kind of game which the de-

(4) [1904] 31 Cal. 542=8 C. W. N. 458.

(5) [1912] 39 Cal. 968=16 C. L. J. 250=16 I. C. 171=16 C. W. N. 858.

(6) [1916] 40 Mad. 556=31 M. L. J. 285=4 M. L. W. 503=36 I. C. 839=(1916) 2 M. W. N. 196.



fence says is the game that used to be played, though for my part I should be very reluctant to accept it.

On the whole, I agree in the view which the learned Sessions Judge has taken of the case. I accept the reference and acquit the accused and direct that the fines if paid be refunded.

V.B./R.K.

*Accused acquitted.*

### A. I. R. 1929 Calcutta 771

JACK AND MITTER, JJ.

*S. a Pleader, In the matter of—*  
Petitioner.

Civil Rule No. 223 of 1929, Decided on 28th March 1929.

(a) Legal Practitioner's Act (18 of 1897), S. 12—Conviction for criminal offence—High Court can proceed without enquiry.

Conviction of a legal practitioner is sufficient without any further enquiry to justify the High Court in taking proceedings under S. 12. It is not permissible to go behind the conviction and the pleader cannot be allowed to have indirect appeals against the judgment of conviction. [P 772 C 2]

(b) Legal Practitioner's Act (18 of 1897), S. 12—High Court has absolute discretion.

The use of word "may" in S. 12 after the words "the High Court" shows that the discretion of the High Court in each particular case is absolute. [P 772 C 2]

(c) Legal Practitioner's Act (18 of 1897), S. 12—Conviction—Circumstances of mitigation—Less severe punishment awarded.

A legal practitioner was convicted of criminal breach of trust and abetment thereof, in respect of certain moneys of a client. It was found that he was to a certain extent the victim of his senior. He paid the amount of defalcation after his conviction. High Court in consideration of the fact that he was victim of circumstances and had expressed his repentance and assured to lead honourable life suspended the practitioner for one year. [P 773 C 1]

*H. D. Bose, Sarat Kumar Mitter and Anil Chandra Roy Choudhuri—*for Petitioner.

**Jack, J.**—By this rule under S. 12, Legal Practitioners' Act, *S. a Pleader*, has been directed to show cause why he should not be suspended or dismissed on the ground that he has been convicted of two offences of breach of trust and abetment of the same implying a defect of character unfitting him to be a pleader.

He does not dispute the accuracy of the recitals of the two judgments of the Chief Presidency Magistrate in the cases in which he was convicted.

From these we find that Babu A. C. Chundra his co-accused in one of these

cases was previously prosecuted for embezzlement and had been declared an insolvent and prohibited by the Court from withdrawing money on behalf of clients from the Court. Knowing all this *S* withdrew in each of these cases a large sum on account of a client of Babu A. C. Chunder by virtue of a power of attorney in which his name was entered unknown to the client. These sums were not paid to the clients and hence his conviction in these two cases.

Further it appears that when asked for the money he told various untruths to explain the delay in payment.

In his application to be allowed to resume practice in the Small Cause Court he urged (i) that he always acted bona fide under the direction of his senior (i. e., his co-accused in one case, Babu A. C. Chundra) little knowing that he would be put to such trouble, and now repents his extreme indiscretion; (ii) that he has paid up the amount of the defalcations; (iii) that he has already suffered considerably through his prosecution and conviction.

These pleas indicate that he scarcely seems to appreciate the extent of moral delinquency indicated by his conduct. Such conduct is not compatible, as he seems to imagine, with bona fides and is not merely a matter of indiscretion. That he should have thought such pleas justified in the circumstances seems in itself an indication that his present character unfits him to be a member of an honourable profession and that he is not a man to whom the affairs of clients could be safely entrusted. His learned advocate very wisely does not now seek to justify his conduct though he still seems anxious to put most of the blame on his co-accused.

He has, it is true, since he was convicted paid up the amount of the defalcations and, putting the most favourable interpretation on this, some credit must be given to him for restoration of the amounts embezzled. But the fact that he did not act in a straightforward manner after the defalcations occurred is very much against him. An order of dismissal seems almost to be demanded in the interests of the profession and of the litigant public. So much so that it is with some hesitation that we refrain from ordering that his name be struck off the roll of pleaders and adopt



the alternative course suggested in the rule. Both the Chief Judge of the Small Cause Court and the Chief Presidency Magistrate regard as a mitigating circumstance, the fact that he was apparently led astray by Babu A. C. Chundra, and in this view of the case we are disposed to treat him leniently in the hope that when he resumes practice he will have been so impressed with the heinousness of such conduct that nothing of the kind will recur. We accordingly order that S be suspended from practice as a pleader for one year from this date.

**Mitter, J.**—This rule was issued by the Full Court by virtue of the powers vested in the High Court by S. 12, Legal Practitioners' Act (Act 18 of 1879) by which S, a pleader practising in the Calcutta Small Cause Court, was called upon to show cause why he should not be suspended or dismissed on the ground that the offences of which he was convicted imply a defect of character which unfits him to be a pleader.

It appears that the pleader was charged with aiding and abetting another pleader Amar Chandra Chandra in committing breach of trust of a sum of Rs. 1,002 withdrawn on 14th November 1925 by the said Chandra from the Court, the sum being due to one Bholaram Kundalal. He was convicted under S. 406 109, I. P. C., by the Chief Presidency Magistrate and was sentenced to undergo rigorous imprisonment for six weeks. He was also charged under S. 409, I. P. C., with criminal breach of trust for misappropriation of a sum of rupees 1,350 drawn on behalf of his client one Sudarshan Chandra Mallik and he was sentenced to another six weeks' imprisonment on this charge. The pleader moved the High Court and C. C. Ghose, J. and Gregory, J., reduced the sentences observing in their judgment that he has tried to make amends after his conviction. Mr. H. D. Bose has appeared on behalf of the pleader and has argued that the money misappropriated had been paid up and that as the pleader was a junior pleader of only six years' standing and that as regards the first offence the Presidency Magistrate observed in his judgment that he was to some extent the victim of the co-accused Chandra a merely nominal punishment should be given. When a pleader does an act which in-

volves dishonesty it is for the interest of the suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as pleader of the Court. In this case the pleader had been proceeded against criminally and has been convicted of breach of trust and abetment of the same and upon those convictions being brought to our notice it is the bounden duty of the Court to act. It is not permissible to us to go behind the conviction nor has learned counsel for the pleader asked us to do so. In our opinion the convictions followed by the sentences were sufficient without further enquiry to justify the High Court in taking proceedings under S. 12 of the Act, for it is now firmly established that the pleader cannot be allowed to have indirect appeals against the judgment of the Chief Presidency Magistrate confirmed by the High Court: see in the matter of *Rajendra Nath Mukerjee* (1). Where a pleader has been convicted of criminal offences for misconduct committed strictly in his professional character that prima facie at all events renders him unfit to be a member of the honourable profession. I do not, however, mean to say that wherever a pleader has been convicted of a criminal offence the Court is bound to strike him off the roll. The use of the word 'may' in S. 12 after the words 'the High Court' shows that the discretion of the Court in each particular case is absolute. In this connexion the following observations of Lord Esher, Master of the Rolls are instructive and may be usefully referred to:

"Where a man has been convicted of a criminal offence, that prima facie at all events does make him a person unfit to be a member of the honourable profession. That must not be carried to the length of saying that wherever a solicitor has been convicted of a criminal offence the Court is bound to strike him off the roll. That was argued on behalf of the Incorporated Law Society in the case of *In re, a Solicitor, Ex parte Incorporated Law Society* (2). It was there contended that where a solicitor had been convicted of a crime it followed as a matter of course that he must be struck off but Baron Pollock and Manisty, J., held that although his being convicted of a crime prima facie made him liable to be struck off the roll, the Court had a discretion and must inquire into what kind of a crime it is of which he has been convicted, and the Court may punish him to a less

(1) [1900] 22 All. 49=26 I.A. 242=7 Sar. 556 (P.O.).

(2) [1889] 61 L. T. 812.



extent than if he had not been punished in the criminal proceeding. As to striking off the roll, I have no doubt that the Court might in some cases say, 'under these circumstances we shall do no more than admonish him'; or the Court might say 'we shall do no more than admonish him and make him pay the costs of the application'; or the Court might suspend him or the Court might strike him off the roll. The discretion of the Court in each particular case is absolute. I think the law as to the power of the Court is quite clear": see *in re, Weare* (3).

Bearing these observations in mind let us consider what are the circumstances of mitigation in this case. There is the fact that he has paid the sums withdrawn by him. On the other hand it is to be noticed that the repayment was after the discovery of the fraud. If he had spontaneously come forward and acknowledged the truth and of his own accord had made good the loss his clients had sustained through the embezzlement in question I think that would have entitled him to much more favourable consideration than the mere fact of his payment on the discovery of the fraud. He paid the money more for the purpose of protecting himself from the consequences of his misconduct rather than from any contrition on his part and desire to make good the mischief he had done. But still taking into consideration the facts that he has paid the money, that he was to some extent the victim of circumstances in that he associated himself with his senior pleader whose conduct was known not to be above board, that he has conducted himself well and had done nothing wrong since his last offence that he through his counsel has expressed his repentance and has given us the assurance that he would lead an honourable life henceforth we think we are not called upon to go the extent of striking him off the roll; but we cannot pass the case over without marking our sense of the misconduct of the pleader in the two instances of misappropriation which are found to have taken place. The least that we can do is to say that he must be suspended from practising as a pleader for the period of one year from this date. For these reasons I agree with my learned brother in the order which he proposes to make.

V.B./R.K.

Order accordingly

## A. I. R. 1929 Calcutta 773

MUKERJI, J.

*Kalachand Ghose and others*—Petitioners.

v.

*Tatu (Tahir) Shaik*—Opposite Party.  
Criminal Revn. No. 628 of 1929, Decided on 29th July 1929.

(a) Criminal P. C., S. 421—Summary dismissal—Reason need not be recorded.

No reasons need be recorded in support of the summary dismissal of an appeal.

(b) Criminal P. C., S. 237—Accused charged under S. 379 but convicted under S. 426, Penal Code—Conviction held not to have prejudiced accused.

A Magistrate found that the kalai that was cut and taken away was unripe and convicted the accused for mischief under S. 426, Penal Code, while he was charged with an offence under S. 379. [P 773 C 2]

*Held*: that the conviction, for an offence with which the petitioner was not charged, has not been to the prejudice of the petitioner.

*Benode Lal Ghose and Mahim Chandra Roy*—for Petitioners.

*Asaduzzaman and Jnana Nath Boral*—for Opposite Party.

**Mukerji, J.**—The petitioners who have been convicted under S. 426, I. P. C., have obtained the present rule upon three grounds. Two of these grounds relate to the summary dismissal of the appeal and they purport to state that the judgment of dismissal was wrong as no sufficient reasons have been given therefor. This argument cannot be supported in view of the fact that no reasons need be recorded in support of the summary dismissal of an appeal. The third ground complains of the prejudice that has been occasioned to the petitioners by reason of the fact that while they were charged with an offence under S. 379, I. P. C., they have been convicted under S. 426, I. P. C. This conviction for an offence with which the petitioners were not charged, however, has not been to the prejudice of the petitioners. It is clear that they would not have liked a conviction under S. 379, I. P. C., to justify which there are ample findings in the judgment of the trial Court, any more than a conviction under S. 426, I. P. C. In any event, the Magistrate having found that the kalai that was cut and taken away was unripe, the conviction for mischief is fully justified. The rule is discharged.

V.S./R.K.

Rule discharged.



## A I. R. 1929 Calcutta 774

B. B. GHOSE AND S. K. GHOSE, JJ.

*Bhusan Chandra Ghose*—Applicant.

v.

*George Henderson & Co.*—Opposite Party.

Appeal No. 500 of 1928, Decided on 19th July 1929.

(a) Civil P. C., O. 18, R. 18—It is not desirable to order scene before accident to be re-enacted in local inspection—Workmen's Compensation Act.

It is not a desirable thing for the Commissioner to order the parties, in local inspection to re-enact the scene just before an accident in which the workman claiming compensation is alleged to have lost his arm, to decide the question whether the machine was in motion or not when the workman began the work of cleaning it. It is common knowledge that when an accident has happened it is very difficult to recall every little incident that happened just before the accident as the parties were not working anticipating an accident. [P 774 C 2]

(b) Workmen's Compensation Act (1923), S. 30—Appeal lies when finding is based upon no evidence.

Where the finding is based upon no evidence, a substantial question of law arises and an appeal lies. [P 775 C 1]

*Pannalal Chatterjee*—for Applicant.*Lalit Mohan Sanyal*—for Opposite Party.

**B. B. Ghose, J.**—This is an appeal against an order of the learned Commissioner under the Workmen's Compensation Act dismissing the application made by a workman who had been injured by his arm being torn off by a machine while in the service of the respondent. His case was that he was cleaning jams by putting his arm into the machine when another, a boy named Panchu who was employed under the respondent, put the machinery in motion and the result was that his hand was torn off above the arm. He asked for compensation of a lump sum of Rs. 882. The learned Commissioner dismissed his claim. Two witnesses were examined on behalf of the appellant before the learned Commissioner and one witness was examined on behalf of the respondent. Two issues were framed by the learned Commissioner. One refers to the fact whether the accident arose out of the employment. There is no question that that issue should be decided in favour of the appellant and the learned Commissioner has apparently done so. Issue 2 was:

"Was the accident directly attributable to

the wilful disobedience of the workman of a rule expressly framed for the purpose of securing the safety of the workman namely not to work on the machine while it is in motion."

The petitioner stated that he was cutting away the tangled thread with a knife putting his hand through the pinion. His case was that the machine was at rest at the time and not in motion and that the boy Panchu who was either a spinner or a shifter started the machine without warning, with the result that the accident happened. There is no doubt that this man was cleaning the machine. The question really is whether the machine was in motion or not when this man actually began the work of cleaning the machine. The learned Commissioner visited the locality; but he visited it not for the purpose of understanding the evidence that was given before him, but he went there after the examination-in-chief of two witnesses for the applicant but before they were cross-examined. The learned Commissioner seems to have asked the parties to re-enact the scene just before the accident happened. It seems to us that it is not a desirable thing to do on a local inspection. It is common knowledge that when an accident has happened it is very difficult to recall every little incident that happened just before the accident. The parties were not working anticipating an accident. The use, therefore, made of the local inspection does not commend itself to us.

It appears next that a suggestion was made at the time of the cross-examination of the applicant that Mr. Mahong, the Spinning Superintendent of the machinery, came and warned the appellant as he was cleaning the machinery when in motion. The appellant repudiated that suggestion and he said that it would be dangerous to do so. It seems to us that a man must be demented to put his arm through a moving machine. How can that be done it is difficult to imagine. Mr. Mahong does not say that he saw the applicant cleaning the machinery when it was in motion. He only says that he spoke to the applicant about the guard being unfastened and away from machine. That rather supports the story of the applicant that the machinery was not then in motion. The next thing is that Panchu who was brought into Court by the oppo-



site party and exhibited before the Commissioner was not examined. The learned advocate for the opposite party says that it was the duty of the applicant to examine him. It is difficult to say that it is so, because Panchu is accused of having done the thing which caused injury to the applicant and certainly the applicant would not expect that Panchu would support his story, if that was a true story. The learned Commissioner dismissed the claim on the ground, first, that Panchu must have been so close to the applicant as practically to touch him at the time of starting the machinery. Assuming that to be so, there is nothing in the evidence that Panchu could not have started the machinery through inadvertence. The learned Judge really disposed of the case in two sentences, where he says that the evidence subsequently taken on oath confirmed his view that the story of the claimant is incredible.

We do not find anything in the record of the evidence taken to support this finding. The Commissioner again finds that there can be no doubt that the machine was in motion when he (the applicant) tried to clean the jam. There is no evidence to support this finding. As the finding is based upon no evidence, that is a substantial question of law which entitles the applicant to maintain this appeal. We, therefore, set aside the decision of the learned Commissioner and decree the appeal. As there is no question raised in the Court below or in this Court as to the reasonableness of the damage claimed, we decree that the appellant should get Rs. 882 as compensation for the loss of his hand with costs in this Court as well as in the Court below. We assess the hearing-fee in this Court at three gold mohurs.

**S. K. Ghose, J.**—I agree.

R.M./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 775

RANKIN, C. J. AND PATTERSON, J.

*Gagan Chandra De and another—Accused—Petitioners.*

v.

*Emperor—Opposite Party.*

Criminal Revn. No. 735 of 1929,  
Decided on 16th August 1929.

### Criminal P. C., S. 109 (a)—Application.

It is an entire mistake to read Cl. (a), S. 109 as applying to any person who takes a step to conceal himself in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes in the dark or by a deserted road, or by some other secret means to commit a crime in his neighbourhood: *A. I. R. 1927 All. 50, Foll.* [P 776 C 1]

*Upendra Kumar Roy—*for Petitioners.

**Rankin, C. J.**—In this case the accused men have been bound down under S. 109, Criminal P. C., and they have been ordered rigorous imprisonment in default of their giving security. It appears that these two men were found not very far from their home in a place outside a village and there is evidence to show that they were bent upon committing burglary at night, one man was found in possession of a sindh-kati and a pair of tin-cutters and the other of a bunch of keys and there can be little doubt these people were outside the village in which they lived for the purpose of committing burglary. They were seen to be approaching a certain house and at the barking of a dog they lay quiet and sometime afterwards they attempted to approach again and in these circumstances they were arrested and they were charged as being people who were taking precautions to conceal their presence within the local limits of the Magistrate's jurisdiction and that there was reason to believe that they were taking such precautions with a view to commit an offence. It appears that they were trying to conceal themselves from persons in the house and from anybody who might come to pass that way, and there is no doubt that they were taking such precautions with a view to commit an offence. But has this anything to do with the meaning of S. 109? In my opinion, it has nothing whatsoever to do with the meaning of S. 109. The first thing to be noticed is that this is not a section which constitutes certain conduct a crime. It is not a section which gives authority to arrest somebody who otherwise could not have been arrested. The section says that where a Magistrate receives information of certain kind he may require the person to show cause why he should not give security. Looking at it from that point of view the Magistrate is supposed to have had an information that there were persons who were taking precautions to conceal the fact



that they were present within the local limits of the Magistrate's jurisdiction. The idea is that someone may be taking precaution to conceal himself within the local limits of the Magistrate's jurisdiction, not to conceal himself as one who hides from a policeman but to conceal the fact of his infesting the Magistrate's jurisdiction, and in that class of case if there is reason to believe that this is a precaution taken with a view to commit an offence, the Magistrate can require him to give security. It is reasonable in that view that Cls. (a) and (b) should be found together, treating a man who has no ostensible means of subsistence and cannot give satisfactory account of himself as a person of the same kind as a person trying to escape notice and to inhabit the locality without his presence in the locality becoming known, and doing this for the purpose of committing an offence. Authority on this point has been cited to us in the case of *Reshu v. Emperor* (1), *Piru v. Emperor* (2) and *Emperor v. Bhairon* (3). The exposition of the law given in the latter case is the correct exposition of the meaning of Cl. 1. It is quite true that Cl. 1, S. 109, is not likely to come into operation every day. That is no reason why it should be applied to fill up any gap that there may be in the criminal law, or in a case in which it does not apply. The learned Judges of the Allahabad High Court say:

"In our view it is an entire mistake to read that clause as applying to any person who takes steps to conceal himself, in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes in the dark or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood."

I agree with that proposition and that is sufficient to decide this case.

In the circumstances the order made by the Magistrate must be set aside and the petitioners are discharged from the obligation of giving any security. If the prisoners are in custody they must be forthwith released.

**Patterson, J.**—I agree.

V.B./R.K. *Petitioners discharged.*

## A. I. R. 1929 Calcutta 776

RANKIN, C. J. AND PATTERSON, J.  
*Sirajaddin Kazi*—Petitioner.

v.

*Sergeant H. Jenner*—Opposite Party.

Criminal Revn. No. 717 of 1929, Decided on 16th August 1929.

Penal Code S. 336—Accident to motor due to negligence of another motor—Case ought to be tried within a week.

The case of an accident to a motor car due to the negligent and reckless driving of another motor car ought to be tried within a week. [P 776 O 2]

S. K. Sen and S. N. Mukherjee—for Petitioner.

*Jyotish Chandra Guha*—for Opposite Party.

**Rankin, C. J.**—In this case it is alleged that the applicant was driving a motor bus at 10-45 a. m. on 22nd October 1928 in Chowringhee Road and that he stopped the bus too suddenly in the centre of the road without warning: thereby causing another bus which was behind to dash against it. The Magistrate proposed to try this case upon the question of negligent driving. This incident happened on 22nd October 1928, and the Magistrate proposed to try the case sometime in May 1929. A case like this ought to have been tried within a week. Instead of that it was proposed to be heard months afterwards when the accused and his witnesses might be entirely unable to reconstruct their recollection as to what had happened. In this case it appears that on 1st December 1928 the Magistrate ordered that the case should be tried on 17th December. On 17th December the petitioner appeared in Court with his witnesses but neither the complainant nor his witnesses were present. Consequently the matter seems to have been adjourned sine die. Witnesses at that late stage could not be traced and the Magistrate's order was "takid." The petitioner was again served with summonses, the idea being that the police had revived the case. It appears to me that such proceedings are most lamentable proceedings. In our opinion these proceedings must be quashed and the order complained of must be set aside.

The Rule is made absolute.

**Patterson, J.**—I agree.

V.B./R.K.

*Rule made absolute.*

(1) [1918] 22 C. W. N. 163=41 I. C. 649=27 C. L. J. 382.

(2) A. I. R. 1925 Cal. 616.

(3) A. I. R. 1927 All. 50=49 All. 240.



## \* A. I. R. 1929 Calcutta 777

BUCKLAND, J.

*Emperor*

v.

*Girish Chandra Kundu and others*  
—Accused.

Original Criminal Case, Decided on 8th March 1929.

(a) Presidency Towns Insolvency Act (3 of 1909), Ss. 103 and 104 — Offence under S. 103—Commitment to High Court Sessions is illegal—Criminal P. C., S. 254.

Due to S. 104, Presidency Towns Insolvency Act as amended read with S. 254, Criminal P. C., commitment of an accused for trial to the High Court Sessions for an offence under S. 103, Presidency Towns Insolvency Act, is illegal because the case under that section is a warrant case and the maximum punishment for the offence is only two years' imprisonment: 24 Cal. 429; (1906) A. W. N. 28 and 41 All. 454, Ref. [P 778 C 1]

\*(b) Criminal P. C., S. 215—High Court Judge exercising original criminal jurisdiction can quash commitment.

Under S. 215 the Judge of the High Court exercising original criminal jurisdiction has jurisdiction to quash a commitment made to it: 36 Cal. 48, Ref. [P 778 C 2]

A. K. Basu—for the Crown.

A. N. Chaudhuri, B. N. Das, A. C. Mukerjee and Nishith Chandra Sen—for Accused.

**Judgment.**—Girish Chandra Kundu, Sudhir Chandra Kundu and Pramatha Nath Kundu have been committed to this Court for trial upon charges under S. 103, Presidency Towns Insolvency Act. A doubt as to the legality of the commitment having arisen in my mind, I have given the learned counsel for the Crown and the prisoners an opportunity of arguing the point. Though nothing has been urged on behalf of the prisoners, it is desirable that I should state my reasons for the order which I propose to make.

Before a recent amendment, the procedure prescribed by S. 104, Insolvency Act, was that the Insolvency Court should cause notice to be served upon the insolvent, and if it framed a charge against him, it should follow the procedure for the trial of warrant cases by Magistrates prescribed by Chap. 21, Criminal P. C. The Chapter of the Code relating to trials before High Courts and Courts of Sessions was not applicable to such trials. In the year 1926, S. 104 was altered and it was provided that where the insolvency Court is satisfied that there is ground for in-

quiring into any offence referred to in S. 103 and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Presidency Magistrate and such Magistrate shall deal with such complaint in the manner laid down by the Criminal Procedure Code, 1898. That new section may at first sight appear to empower the Magistrate to commit the person charged with an offence under S. 103 of the Act to this Court for trial, but, as I shall show, that is not a correct view of its effect. The objects of the amendment would appear to be, firstly, to avoid the necessity of trials upon charges under S. 103 being held by the Judge by whom jurisdiction under the Presidency Towns Insolvency Act is exercised and, secondly, in order to bring the procedure into conformity with that prescribed by S. 476, Criminal P. C.

Section 103 provides that, on conviction, the insolvent may be punished with imprisonment for a term which may extend to two years. There is no provision for the imposition of a fine in addition to imprisonment. A case under S. 103 is a warrant case, which is defined in S. 4 (1) (w) of the Code as a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months. S. 54, Criminal P. C., provides that if the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under Ch. 21, the chapter prescribing the procedure in warrant cases, which he is competent to try and which in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused. There is no question as to the Magistrate's competency to try this case, nor can any question arise as to whether he can adequately punish the prisoners for the offences with which they are charged, for the reason that he may impose a sentence of imprisonment as long as any which this Court could impose. It was, therefore, the duty of the Magistrate under that section to frame a charge in writing against the accused and he had no power to commit them to this Court for trial.

Support for this view is to be found in *Queen Empress v. Kayemulla Mandal* (1).

(1) [1897] 24 Cal. 429=1C. W. N. 414.



That was a case under S. 147, I. P. C. which had been committed for trial to the Court of Sessions. The learned Judges, in the course of their judgment, pointed out that, as under S. 207, Criminal P. C., a Magistrate who is competent to commit a case to the Court of Sessions, can commit to that Court both cases triable exclusively by that Court and cases which in his opinion ought to be tried by that Court, the commitment of a case under S. 147 to the Court of Sessions was not necessarily illegal. The same observations apply to this case with reference to S. 207. The learned Judges, however, went on to say that there are sections which limit a Magistrate's power of commitment and that, in a warrant case, he is bound by the provisions of S. 254, which they quote and lay emphasis on the word "shall." They then pointed out that an offence under S. 147, I. P. C., is also punishable with a fine of unlimited amount while the Magistrate could impose a fine of Rs. 1,000 only. The Magistrate might, therefore, have committed the case to the Court of Sessions, if he had considered that the fine which he had the power to impose would not be an adequate punishment for the offence. That is the only distinction which can be made between that case and this case. The conclusion at which the learned Judges arrived was that as the Magistrate did not say that he considered the case to be one in which he was not competent to inflict an adequate punishment, he could not under S. 254, Criminal P. C., commit the case to the Court of Sessions. In this case, no similar considerations arise as the utmost sentence which the law allows any Court to impose is one within the competency of the Magistrate and this case, therefore, is even a stronger case than that cited. The commitment, in my judgment, was clearly illegal. The same view was taken in *Emperor v. Dharam Singh* (2), where Knox, J., held that the commitment of the prisoner was wrong, among other reasons, because the maximum penalty under each offence charged was one which the Magistrate could inflict. My attention has also been drawn to *Emperor v. Bindeshri Goshain* (3), which is a further authority for the same proposition.

(2) [1906] A. W. N. 28=3 A. L. J. 14.

(3) [1919] 41 All. 454=50 I. C. 161=17 A. L. J. 456.

The question of jurisdiction to make an order under S. 215 has been touched upon by the learned counsel for the Crown. I do not think that this presents any difficulty. Whatever may be the effect of the definition of "High Court" in S. 4 (1) (j), another and a wider definition, comprising the High Court in every jurisdiction, is substituted in Chaps. 18 and 23, Criminal P. C., (excluding Ss. 276 and 307) by S. 266. As this definition, therefore, applies to "High Court" in S. 215, there can be no doubt about the matter. The Clerk of the Crown has drawn my attention to the unreported case of *Emperor v. Mahadeo Bhujia* (1st Sessions on Original Criminal side decided on 21st February 1912), in which a Judge of this Court, when exercising original criminal jurisdiction, quashed a commitment and the jurisdiction seems to have been taken for granted in *Phanindra Nath Mitra v. Emperor* (4).

The order will be that the commitment be quashed. The record with a copy of this judgment will be returned to the Chief Presidency Magistrate, in order that he may deal with the complaint according to law. The Clerk of the Crown will communicate this order to the Chief Presidency Magistrate by letter in the course of to-day, so that, if he thinks fit, he may grant bail in anticipation of the record reaching him. The prisoners, meanwhile, will remain in custody and I direct that they be placed before the Chief Presidency Magistrate.

V.B./R.K. Commitment quashed.

(4) [1909] 36 Cal. 48=1 I. C. 469=12 C. W. N. 1014.

### \* A. I. R. 1929 Calcutta 778

MUKERJI AND JACK, JJ.

Jamir Sheik and others—Petitioners—  
v.

Murari Mohan Chaudhury and another—Opposite Parties.

Criminal Revn. 412 of 1929, Decided on 1st August 1929, from order of Sess. Judge, Burdwan, D/- 25th February 1929.

(a) Criminal P. C., S. 526 (8)—Applicability

Section 526 (8) does not apply to proceedings under S. 145. [P 779 C 1]

\* (b) Criminal P. C., S. 526 (8)—Proceedings under S. 145—Application by one party



**for adjournment for applying to High Court for transfer—Magistrate should overrule it.**

In proceedings under S. 145 it is not obligatory upon the Magistrate to grant an adjournment on receipt of an application filed by a party, intimating him that an application would be made for transfer under S. 526, and asking him to adjourn the case for that purpose. The application should be overruled and the rejection is not violation of the provisions of the Code. [P 779 C 2]

**(c) Criminal P. C., S. 526 (8)—Application for adjournment for applying to High Court for transfer not stating grounds, or made at very late stage—Magistrate is not bound to entertain it.**

The Magistrate is not bound to entertain an application for adjournment, for applying to High Court for transfer, if it does not state the grounds or if it is made at very late stage of the proceedings, e. g., when the evidence of one party has been closed. [P 779 C 2]

*Mirtyunjoy Chattopadhyaya and Debarata Mukerji*—for Petitioners.

*Sures Chandra Talukdar and Sathangsu Sekhar Mukerji*—for Opposite Parties.

**Judgment.**—The question raised in this rule is whether Cl. (8), S. 526, Criminal P. C., applies to proceedings under S. 145, Criminal P. C. The words in Cl. (8) as they stood before the amendment of 1923 were:

"If in any criminal case or appeal, before the commencement of the hearing &c."

By the amendment aforesaid these words have been altered into:

"If in the course of any enquiry or trial or before the commencement of the hearing of any appeal &c."

The introduction of the word "enquiry" in place of the words "any criminal case" may ordinarily be taken to have been intended for the purpose of including proceedings under S. 145, Criminal P. C., but the rest of the clause if read properly would militate against this view. Proceedings under S. 145, Criminal P. C., are no doubt proceedings by way of enquiry. But then the words of Cl. (8), S. 526, such as "the complainant" "the accused" and perhaps also the word "public prosecutor" would be wholly inapposite in connexion with proceedings under S. 145, Criminal P. C. The parties to proceedings under S. 145 are described as parties in that section and use of the words "complainant" "accused" and perhaps also the word "public prosecutor" and the non-mention of the word "party" in the latter part of Cl. (8) makes it perfectly clear that it was not the intention of the legislature to include proceedings under S. 145, Criminal P. C., within the

meaning of the clause. For this reason we are of opinion that the contention that has been urged on behalf of the petitioner, which is to the effect that it was obligatory on the learned Magistrate to grant an adjournment on receipt of the application filed by the petitioner intimating to him that an application would be made for transfer under S. 526 and, asking him to adjourn the case for that purpose, should be overruled, and the rejection of that application cannot be held to have been in the violation of the provisions of Code. Apart from Cl. (8), S. 526 the petitioner had no case whatsoever because in the application that was made asking for an adjournment to enable the petitioner to move this Court for transfer no ground whatsoever was stated and also because the said application was made at a very late stage of the proceedings, after the evidence on behalf of the opposite party, which had been taken on two different dates, was closed. We are of opinion that there is no substance in this rule. It is accordingly discharged.

V.B./R.K.

*Rule discharged.*

## A. I. R. 1929 Calcutta 779

MUKERJI, J.

*Yadali*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 747 of 1929, Decided on 30th July 1929.

**Penal Code, S. 500—Statements in petition to Court subject of charge—Intelligence of accused, his capacity to reason and circumstances he is in, should be considered while determining "due care" by accused.**

In matter of a case under S. 500 when it is said to rest upon allegation made in petition to a Court, in determining whether due care was taken by the accused allowances should be made for the intelligence of the accused, his capacity to reason, the circumstances under which he was placed, and the occasion which necessitated his making the imputation. When the facts seem to show that the accused being a comparatively ignorant and timid man apprehending harassment by the complainant did what a man of superior intelligence and knowledge could not have done, namely presented a petition, there can be little doubt that he acted with a desire to protect himself by an appeal to the Magistrate rather than to injure others and he should not be convicted; 31 Bom.



293 ; 12 Bom. 377 and A. I. R. 1923 Cal. 470.  
Ref. [P 781 C 1,2]

*Hiralal Ganguly*—for petitioner.

*Mrityunjoy Chattopadhyaya* and *Manindra Nath Banerjee*—for the Crown.

**Judgment.**—The petitioner has been convicted under S. 500 I. P. C., and sentenced to pay a fine of Rs. 40 in default to undergo rigorous imprisonment for one month. There were two items forming the subject-matter of the charge. One of them was certain imputations made orally as against the complainant and the other consisted of certain statements made in a petition which the petitioner had filed before the Sub-Divisional Magistrate of Barrackpore. As regards the first of these items the evidence that was brought to establish it was not accepted as reliable by the trial Magistrate. The conviction is based upon the statements contained in the petition to which I have referred. Those statements are to the effect that the complainant was threatening the petitioner with assault and also with murder, imprisonment and so forth ; and that the complainant was giving out that he would institute civil as well as criminal cases against the accused and further that the complainant belonged to a gang of badmashes and goondas and the members of that gang were all conspiring together for the purpose of putting the petitioner into trouble and that for all these reasons the petitioner was apprehensive of his safety.

The learned Magistrate has recorded certain findings in his judgment in which he has dealt with the whole case very clearly and elaborately and to these I shall now refer. One line of defence taken by the petitioner was that he had himself heard the complainant and others hatching a plot against him. The learned Magistrate has held that the direct evidence that the accused gave for the purpose of establishing that he overheard a plot being hatched against him by the complainant was not reliable. The substance of the other line of defence was that there was enmity between the parties and the petitioner had reasonable ground for believing that there was such a plot. The learned Magistrate had observed, so far as this line of defence is concerned that

“there was no doubt that the petitioner

had some reason for filing the petition, because it is probable that the petitioner feared something in the way of a litigation.”

At the same time the learned Magistrate was of opinion that the petitioner “had no justifiable grounds for wording the petition in the way that he did or at least that the contents of the petition were gross exaggerations.”

The learned Magistrate appreciated fully the difficulty of sustaining a charge under S. 500, I. P. C., upon a petition of this character presented before a Magistrate and has pertinently observed thus :

“As regards the written defamation the responsibility of the accused for stating that the complainant meant to kill him is a problem of great difficulty.”

He appreciated also that the motive of the complainant in instituting the present case was “not to vindicate himself but to injure the accused”. In the result, however, he held that the accused did not use due care in wording his petition in the way in which he had done and being of opinion that the accused had overstepped his privilege convicted him under S. 500, I. P. C.

In convicting the accused on the findings to which I have referred the learned Magistrate in my opinion has not given due weight to two important matters. In the first place it seems that there is a body of evidence proceeding from the witnesses who were examined on behalf of the defence and which to a certain extent showed that from time to time threats were uttered by the complainant or his associates, though not exactly of the same nature as was alleged in the petition which the accused filed. It may be that the witnesses who have deposed to these threats are people in whom not much confidence may be placed. This I say because of the fact that the learned Magistrate has not thought fit to make any particular reference to the evidence of these witnesses. Even then the question remains as to whether these witnesses who have now come before the Court to speak to these threats did not supply to the petitioner the information which formed the foundation of his petition and which information was to a certain extent exaggerated for the purpose of making out that there was a threat to murder the petitioner and so on. This in my opinion, is not an altogether unreasonable assumption to make and if these witnesses communicated the information to the petitioner and



the petitioner apprehending that there was some risk of his life or his safety exaggerated the information that he received and put in the petition in matters which ultimately brought about this case. I am very doubtful as to whether a conviction under S. 500, I. P. C., would be maintainable.

The other matter is the important principle which should guide a Court in the matter of a case under S. 500, I. P. C., when it is said to rest upon allegations made in a complaint to a Court. That principle has been laid down in a series of decisions amongst which I propose to refer to only a few. In the case of *Emperor v. Abdool Wadood* (1) the High Court of Bombay in dealing with Excep. 9 to S. 499, I. P. C., and following an earlier decision of that Court in the case of *Bhawoo Jivaji v. Mulji Dayal* (2) observed thus ;

"Good faith in the Excep. 9 requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind, may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning."

This principle has been accepted as well-founded by Suhrawardy, J., in the case of *Promotho Nath Mukhopadhaya v. Emperor* (3). In determining whether due care was taken by the accused allowances, therefore, have got to be made for the intelligence of the accused, his capacity to reason, the circumstances under which he was placed and the occasion which necessitated his making the imputations. Bearing this principle in mind, I am of opinion the learned Magistrate in considering the question as to whether there was due care and caution on the part of the accused has applied to the case a rather too exacting standard. In view of the findings to which I have referred I think this is a case in which I might say adopting the words of Markby, J., as used in the matter of a petition in *Sibo Prosad Pandah*, In the matter of (4) that the facts seem to me to show that the accused, a com-

paratively ignorant and timid man apprehending harassment by the complainant did what a man of superior intelligence and knowledge of the law could not have done, namely, presented a petition to the Magistrate but I have little doubt that he acted with a desire to protect himself by an appeal to the Magistrate rather than to injure others. I am of opinion, therefore, that it would not be right to uphold the conviction of the petitioner under S. 500, I. P. C., in the circumstances to which I have referred.

The result is that the rule is made absolute, the conviction and sentence passed on the petitioner are set aside and ordered that the fine, if paid, be refunded.

R.M./R.K.

*Conviction set aside.*

### A. I. R. 1929 Calcutta 781

BUCKLAND, J.

*On difference between*

SUHWARDY AND GRAHAM, JJ.

*Sham Lal Khettry—Petitioner.*

v.

*Corporation of Calcutta — Opposite Party.*

Criminal Revn. No 1340 of 1928, Decided on 12th April 1929.

(a) Calcutta Municipal Act (3 B. C. of 1923), S. 363—(Per Buckland and Graham, JJ.,) However necessary for privacy it is breach of S. 363 to erect boundary walls 18 feet high without sanction—Magistrate's discretion ordering demolition held rightly exercised. (*Suhrawardy, J. contra*).

A person without sanction and in defiance of the Calcutta Municipal Act and rules of the Corporation erected a boundary wall 18 feet high though under law he was limited to a height of 10 feet and the Magistrate ordered demolition. It was admitted that the walls were necessary for securing privacy of the premises. [P 782 C 1]

Held: (Per Buckland and Graham, JJ.), that there was breach of S. 363 read with S. 3 (7) and the order of demolition by the Magistrate was valid and legal and the discretion was rightly exercised. [P 784 C 2]

That Magistrate should not as a course of equity order demolition and that Magistrate did not exercise proper discretion when he took into account simply the fact that the structure was put up without the sanction of the Corporation. (Per *Suhrawardy, J. contra*.) [P 782 C 2 P 783 C 1]

(b) Calcutta Municipal Act (3 B. C. of 1923), S. 363—Scope—Discretion should be exercised on equitable grounds.

*Suhrawardy, J.*—S. 363 is not imperative inasmuch as it says that the Magistrate may make an order directing that such erection etc., or so much thereof as has been executed

(1) [1907] 91 Bom. 298=9 Bom. L. R. 230.

(2) [1888] 12 Bom. 377.

(3) A. I. R. 1923 Cal. 470.

(4) [1879] 4 Cal. 124=3 C. L. R. 122.



unlawfully be demolished or altered. One of the grounds on which such an order can be passed is that the erection has not been commenced after obtaining the permission of the Corporation but the section makes it discretionary with the Magistrate to make such an order and it has been interpreted by the Court that the discretion vested in the Magistrate under this section should be exercised on equitable ground: 33 Cal. 287; 34 Cal. 341, *Foll.* [P 782 C 2]

(c) Calcutta Municipal Act (3 B. C. of 1923). Sch. 17, Rr. 30 and 32—Scope.

Rules 30 and 32 are intended to affect buildings and structures dealt with by the Act of 1899 and were never intended to apply to boundary walls which are included in the term "building" by the Act of 1923. [P 783 C 1]

(d) Equity—Equitable consideration not to be invoked in favour of wilful wrongdoers.

*Graham, J.*—Equitable considerations ought not to be invoked on behalf of the party who has put himself in the wrong by wilfully disregarding the law. [P 784 C 1]

*Bepin Chandra Malik and Probodh Krishna Shome*—for Petitioner.

*D. N. Bagchi and Gopendra Krishna Banerji*—for Opposite Party.

**Suhrawardy, J.**—In this revision application the petitioner has asked us to set aside the order of demolition of the boundary walls constructed by him in his premises passed by the Municipal Magistrate of Calcutta. The facts are that sometime in 1911 the petitioner obtained sanction to build a house and according to it he constructed the present house with boundary walls 10 feet high. Recently he raised the height of the boundary walls in order to secure the privacy of his premises to 18 feet. This he did without obtaining sanction from the Corporation. A notice was therefore served upon him under S. 363, Calcutta Municipal Act (Ben. Act 3 of 1923) and the case started against him resulted in the order complained of.

"Building" was not defined in the previous Act of 1899, but a definition has now been added by the Act of 1923. According to that definition a wall other than a boundary wall and not exceeding 10 feet in height is a building; and under the provisions of the Act, sanction has to be obtained from the Corporation before constructing any building. It is not disputed that the walls were raised to their present height of 18 feet without sanction from the Corporation; and an application subsequent to the prosecution was made for necessary sanction. The learned Municipal Magistrate has ordered

demolition of the boundary walls mainly upon the ground that they were built without the sanction of the Corporation. The order passed by the learned Magistrate is in these words:

"As the 18 feet high boundary walls are unlawful, I direct that so much of those walls be demolished by the Corporation of Calcutta at owner's expense as will reduce their height to 10 feet."

Then he goes on to add:

"As it is stated that ladies would be visible by the reduction of the high walls, I have no objection to temporary screens of mats or corrugated iron sheets being put up where required until a change in the configuration of the buildings in the vicinity makes such screens unnecessary."

The ground therefore upon which the order was passed is that the building is unlawful, that is, in contravention of the provisions of the law. S. 363, Act of 1923 is not imperative inasmuch as it says that the Magistrate may make an order directing that such erection &c., &c., or so much thereof as has been executed unlawfully be demolished or altered. One of the grounds on which such an order can be passed is that the erection has not been commenced after obtaining the permission of the Corporation but the section makes it discretionary with the Magistrate to make such an order and it has been interpreted by this Court that this discretion vested in the Magistrate under this section should be exercised on an equitable consideration of all the circumstances of the case: *Abdul Samad v. Corporation of Calcutta* (1). In *Chuni Lal Dutt v. Corporation of Calcutta* (2), it was held that the power of the Municipal Magistrate under S. 449, Act of 1899, corresponding to S. 363 of the present Act is similar to the power exercised by a Court of equity in granting mandatory injunctions and therefore such power should be exercised with due regard to those rules which guide Courts of equity in granting injunctions. The learned Magistrate, it seems to me, has not considered whether the walls have as they are at present caused any inconvenience to neighbours house-owners or are otherwise undesirable from sanitary or any other point of view. The Magistrate does not exercise proper discretion when he takes into account simply the fact that the structures

(1) [1906] 33 Cal. 287=10 C. W. N. 182=3 O. L. J. 90.

(2) [1907] 34 Cal. 341=11 C. W. N. 30.



were put up without the sanction of the Corporation and orders their demolition. The object which the legislature had in view by making it discretionary with the Magistrate to order demolition of unauthorized structures will be defeated if it is held that unauthorized structures as such must be demolished. In my judgment the legislature has intentionally vested the Magistrate with such discretion in order that the Magistrate should take into account all the circumstances present in a particular case and then if in its judgment, it is necessary that such structures should be demolished, he should so order. In the present case the Building Inspector of the Corporation has stated (and it has been accepted by the Magistrate) that the walls are necessary for securing privacy of the premises; and further that it would not be objectionable from the municipal point of view if the petitioner put up instead of brick-built walls, matwalls or corrugated iron sheets. This view may or may not be correct but it shows from the point of view of the petitioner that these walls were necessary and that the Corporation could have no objection on the ground of inconvenience to the neighbours or on any other ground if the walls instead of bricks are made of iron-sheets.

In the course of his judgment the learned Magistrate has referred to certain rules contained in Sch. 17 of the Act which require some spaces to be left on two sides of a building and some other rules relating to the height of a building with reference to spaces around it which must be at the angle of prescribed degrees mentioned in those rules. They are Rr. 30 and 32, Sch. 17 of the present Act. These rules and some others laying down special considerations which should prevail in allowing construction of a building were also in the repealed Act of 1899. Though by the Act of 1923 the definition of building has been introduced no change has made in these rules. Reading these rules it would appear that they were intended to affect buildings and structures dealt with by the Act of 1899 and were never intended to apply to boundary walls which are included in the term "building" by the Act of 1923. For instance there is a provision that some space should be left on both sides of a building; it can hardly apply to boundary walls for it would not be possible to

leave any space on the outer side. There were other matters also dealt with by the rules which cannot apply to boundary walls. In my opinion these rules do not apply in the case of boundary walls. R. 18, Sch. 17, empowers the Corporation to allow boundary walls to be erected to any height which the Corporation may think fit and proper. This discretion is not given in the case of any other building and therefore it is clear that the rules affecting buildings properly so-called are not applicable in the case of boundary walls.

I am therefore of opinion that the learned Municipal Magistrate should not have passed his order only on the fact that these walls were raised to a height of 18 feet without the sanction of the Corporation. He should have taken into consideration the circumstances of this particular case and if in his opinion it was necessary that these walls should be removed he might under S. 363 order their demolition. If, on the other hand, as is apparent from his judgment there is no such special objection to the walls remaining in their present condition, he should not as a Court of equity order their demolition. In this view of the matter I would make the rule absolute to this extent that the order of the Municipal Magistrate of Calcutta dated 8th October 1928 should be set aside and the matter remitted to him for a consideration of the entire case and all the circumstances attending it and decide it according to law.

**Graham, J.**—In this case a rule was issued to show cause why an order of the Municipal Magistrate of Calcutta directing a portion of the boundary walls to be demolished should not be set aside. The facts are not disputed. The petitioner Sham Lal Khatri residing at 21½ Baranashibashi Ghose's Street erected or caused to be erected a boundary wall upon this premises to the height of 18 feet without obtaining the sanction of the Corporation. Now, that being so, it is clear that there was a breach of S. 363, Calcutta Municipal Act (3 of 1923) read with S. 3 (7) of the Act, and that the order for demolition is a valid and legal order.

But it is argued that, even if the order was a legal order, the learned Magistrate was not bound to direct the demolition of the wall and that he ought not,



having regard to the facts of the case, to have made such an order. One of the reasons advanced in support of this contention is that the Magistrate has himself observed that there would be no objection to a temporary screen consisting of mats or corrugated iron sheets, and therefore it is urged that the walls although over 18 feet in height should have been allowed to remain, and the petitioner should have been merely fined, if necessary, for not obtaining previous sanction. Such temporary erections would, it may be observed, not be the same thing as a pucca wall; but the learned Magistrate may be in error in this view that they would not be open to objection. for such erections, though temporary, may amount to an interference with the rights and amenities of persons occupying houses in the immediate neighbourhood. Be that as it may, the order of the Magistrate is warranted by law and I see no reason why we should interfere with it. The petitioner is not certainly entitled to any sympathy, since he admittedly failed to comply with the law, and it was only after these proceedings were instituted that he made his belated application to the Corporation for sanction. On grounds of principle I think that we ought not to interfere unless there has been some gross or palatable failure of justice. In the exercise of our revisional jurisdiction, all that is necessary for us to see is whether there has been any error of law, or irregularity, or abuse of, or failure to exercise judicial discretion such as to justify our interference. In my judgment no such case has been made out. It has been urged that the matter should be looked at from the point of view of equity; and reference has been made to the case of *Chunni Lal Dutt v. Corporation of Calcutta* (2). In my opinion equitable considerations ought not to be invoked on behalf of a party who has put himself in the wrong by wilfully disregarding the law. Furthermore even if the view laid down in the reported case which I have just referred be accepted, I would hold that the Magistrate has exercised his discretion and has on a due consideration of the facts made the order for demolition. For these reasons the rule should in my judgment be discharged. (Their Lordships having differed, the case was put before Buckland, J.)

**Buckland, J.**—This is really a very simple matter. The petitioner without sanction and in defiance of the provisions of the Calcutta Municipal Act of 1923 and the rules of the Corporation erected a boundary wall 18 feet high though under the law he was limited to a height of 10 feet. That he has broken the law there is no question. Nor is there any doubt that the learned Magistrate had the power to make the order which he has made. It has been argued that the learned Magistrate did not properly exercise his discretion and that it has not been shown that the wall erected to the height of 18 feet would be a nuisance or, as has been said, an obstruction to the public whatever that may mean. In this connexion it is necessary to point out that there was only one witness called before the Magistrate and that was the Building Inspector. After establishing the case for the prosecution he was cross-examined on points arising out of the provisions of the Calcutta Municipal Act. It is true that he said that:

"Had the boundary walls been made 10 feet high and corrugated iron sheets properly fixed over them to the present height there would be no objection."

This appears to have been adopted by the Magistrate in making his order for he said:

"I have no objection to temporary screens of mats or corrugated iron sheets being put up where required, until a change in the configuration of the buildings in the vicinity makes such screens unnecessary."

The Magistrate in my opinion not only exercised his discretion in the matter upon the very limited materials before him but did so correctly, and his order therefore should be upheld.

I desire, however, to add, without expressing any final opinion on the matter, that so far as the Magistrate has referred to corrugated iron sheets it is doubtful whether having regard to the definition of "building" in S. 3, sub-S. 7, Calcutta Municipal Act, corrugated iron sheets superimposed upon a boundary wall 10 feet high would not in law have the same effect as the erection of a masonry structure 18 feet in height. It is also questionable whether upon a prosecution of this nature the Magistrate was competent in effect to give sanction to a structure such as he describes. The Rule is discharged.

V.B./R.K.

Rule discharged.



**A. I. R. 1929 Calcutta 785 (1)**

PEARSON AND PATTERSON, JJ.

*Surendra Nath Banerjee* — Complainant—Petitioner.

v.

*Dhirendra Nath Dhar* and *another*—Accused—Opposite Parties.

Criminal Revn. No. 405 of 1929, Decided on 14th June 1929.

**Criminal P. C., S. 562 (1-A)—Release after conviction on due admonition under S. 562 (1-A) is discretionary with Magistrate.**

It is discretionary with the Magistrate to act under S. 562 (1-A) having regard to all or the various matters which are there enumerated and unless it can be said that discretion has been wrongly exercised or has not been judicially exercised, High Court cannot interfere. [P 785 C 1]

*Probodh Chandra Chatterjee* — for Petitioner.*Mrityunjoy Chattopadhyaya* and *Biraj Mohan Roy*—for Opposite Parties.

**Judgment.**—In this case the accused was charged under S. 427, I. P. C. relating to an incident whereby the accused cut down a coconut tree belonging to the complainant. The accused set up the case of consent, but that has been negatived by the learned Magistrate. He, however, was satisfied that the offence was of a trivial nature. Accordingly he dealt with the case under the provisions of S. 562 (1-A) whereby the accused was released with an admonition.

The complainant has obtained this rule and asks that some punishment should be awarded in respect of the offence committed. It is not a matter which commends itself to us, whether we look upon it as an application made by a complainant for enhancement of sentence, or as in the nature of an appeal against an acquittal, and it is quite clear that a strong case would have to be made out on the merits before this Court would interfere at all in such a case. It is a case for the discretion of the learned Magistrate to act under this subsection having regard to all or any of the various matters which are there enumerated, and unless it can be said that that discretion has been wrongly exercised or has not been judicially exercised we should be in any event unable to interfere. It is not necessary to express any opinion as to the practice to be followed in a case such as this where the rule has been issued and at the hear-

ing it is not supported on behalf of the Crown but is supported by the complainant only, though it is said that on that ground also the rule ought to fail.

As the rule in this case has been granted by a Bench of this Court we have gone into the case on the merits and we think that it ought to be discharged.

V.B./R.K.

*Rule discharged.***A. I. R. 1929 Calcutta 785 (2)**

BUCKLAND, J.

*on difference between*

MUKERJI AND GRAHAM, JJ.

*Ali Akabbar*—Complainant — Petitioner.

v.

*Kasem Ali*—Accused—Opposite Party.

Criminal Revn. No. 1036 of 1928, Decided on 1st February 1929, against decision of Additional Sess. Judge, Backergunj, D/- 26th June 1928.

**Criminal P. C., S. 439—Rule issued for the enhancement of sentence on application of complainant should ordinarily be discharged, if the Crown does not support the application.**

Where a person was convicted on a plea of guilty and on a rule being issued for enhancement of sentence on the application of the complainant, the Crown did not appear to support it.

*Held*: that in such a case the rule should ordinarily be discharged unless it is clear beyond doubt that it should be made absolute [P 787 C 2]

*Radhika Ranjan Guha*—for Petitioner.*Suresh Chandra Taluqdar*—for Opposite Party.

**Mukerji, J.**—This rule has been issued at the instance of the complainant in a case in which the accused has been convicted by the Additional Sessions Judge of Backergunj under Ss. 304 (ii), 326 and 148, I. P. C. and sentenced to undergo rigorous imprisonment for one year under S. 304 (ii), I. P. C. and for six months under S. 148, I. P. C., the sentences to run concurrently, no separate sentence under S. 326, I. P. C., being considered necessary by the learned Judge. The accused had pleaded guilty to the charges and prayed for mercy. The learned Judge in passing the sentence has observed that he had considered the circumstances under which the offences had been committed and also taken into consideration the age of the accused.

The Crown has not moved in this matter nor has the Crown appeared to



back up the application for enhancement though the rule was issued upon the District Magistrate.

Apart from the reasons which I have set out in full in my judgment in *Superintendent and Remembrancer of Legal Affairs, Bengal v. Jnanendra Nath* (1), which have led me to hold that in a case like this it is not possible to enhance the sentence unless there has been a regular trial of the case in spite of the accused's plea of guilty. I think the rule should be discharged on the simple ground that the Crown has not supported it. For the view I take I have given my reasons in full in *Pramatha Nath v. Ganga Charan* (2).

I would discharge the rule.

**Graham, J.**—In this case a rule was issued to show cause why the sentence passed upon the accused Kasem Ali should not be enhanced.

The case for the prosecution was that on 13th December 1927 at about 1 p. m. one Asmat Ali, uncle of the petitioner, was going to a place called Baliakhali to receive instructions in connexion with a civil suit when he was waylaid and severely beaten by the above mentioned Kasem Ali and others, and Asmat Ali, who raised an alarm, received a spear wound in the chest from Kasem Ali which resulted in his death some 10 days later.

The accused was committed for trial to the Court of Sessions on charges under Ss. 304 (2), 326 and 148, I. P. C., and pleaded guilty. The learned Additional Sessions Judge accepting the plea convicted the accused under these three sections and sentenced him under S. 304 (ii) to one year's rigorous imprisonment and to six months' rigorous imprisonment under S. 148, I. P. C. both sentences to run concurrently. No sentence was passed under S. 326, I. P. C. Thereafter the present rule was obtained.

The question is whether the sentence is so manifestly inadequate that we ought to interfere. In my opinion there can be no doubt that the sentence which has been inflicted is altogether out of proportion to the offence committed. It seems to be clear that Asmat Ali was deliberately waylaid by a number of persons including the accused Kasem Ali the motive for the attack being civil and

criminal litigation between the parties. Afsar Ali appears to have gone to the spot where Asmat Ali was lying and was thereupon speared through the chest by Kasem Ali. The medical evidence shows that it was a penetrating wound on the left side of the chest and was severe in character.

The learned Additional Sessions Judge has referred to the circumstances under which the offence was committed and accused's age as his reasons for inflicting a lenient sentence. But neither of these reasons appears to me to carry much weight. The attack seems to have been a deliberate pre-arranged affair and as there was no evidence before the Judge it is difficult to know what circumstances he was referring to.

As regards the question of age it appears that the accused's age is given as 23 so that there can be no question of leniency on that account.

In my judgment the sentence passed is inadequate and I would make the rule absolute and enhance it from 1 year to 3 years' rigorous imprisonment.

(On difference the matter came before Buckland, J.)

**Buckland, J.**—In this case a rule has been issued at the instance of the complainant calling upon the accused to show cause why the sentence should not be enhanced.

The accused was convicted on his plea of guilty by the Additional Sessions Judge of Bakarganj under Ss. 304 (ii), 326 and 148, I. P. C., and sentenced to one year's rigorous imprisonment under S. 304 (ii) and six months' rigorous imprisonment under S. 148, the sentences to run concurrently. The learned Judge stated that considering the circumstances under which the offence was committed and having regard to the accused's age he accepted the accused's plea and convicted him accordingly. The rule was issued by this Court at the instance of the complainant on the ground that in considering the nature of the offence and the circumstances in which the occurrence took place the learned Sessions Judge ought to have passed a more severe sentence. Notices were issued to the person convicted as the law requires and to the District Magistrate of Bakarganj.

Upon the hearing of the rule nobody has appeared for the Crown. This is a

(1) A. I. R. 1929 Cal. 747=1929 Cr. Cases 395.

(2) A. I. R. 1929 Cal. 340.



matter of some importance because it makes it clear that the Crown has not thought it necessary in the interest of public justice either to apply or, on the matter being brought to the notice of the Court at the instance of the complainant, to appear in support of the rule. On behalf of the complainant it is stated that he is actuated solely by the desire to further the ends of justice and that nothing is further from his mind than to gratify his personal vindictiveness, but this cannot be taken literally. That the gratification of personal spite should be discouraged is no doubt the reason why the Court has consistently refused to entertain applications of this nature at the instance of a private prosecutor. At the same time there is no absolute rule, and in a case where there is manifestly a ground for interference beyond all reasonable doubt, it matters not whether the case comes before the Court of its own motion or at the instance of a private prosecutor or through any other channel whatever and the Court will interfere. This aspect of the matter was considered by my learned brothers Mukerji and Graham, JJ. in *Pramatha Nath v. Ganga Charan* (2), in which they differed and the case was thereupon laid before C. C. Ghose, J. who appears to have taken the view that a rule having been issued there was nothing to be done but to consider whether or not the sentence should be enhanced, which he did by restoring the sentence passed upon the person convicted by the trial Court and which had been reduced on appeal. I do not take the same view for the reason that a rule is issued *ex parte* and matters have to be taken into consideration upon the hearing of the rule which are not before the Court at the time when it is issued, for instance, contentions urged on behalf of the accused, the attitude of the Crown and other possible contingencies. In this case it has been urged before me by the learned advocate for the accused that the circumstances of the occurrence were all taken into consideration by the learned Sessions Judge, that the deceased man was injured in the course of an affray, and consequently it cannot be affirmatively held that a more severe sentence should have been passed.

I have considerable doubt whether the sentence is adequate, and had the appli-

cation been made at the instance of the Crown I should have been more inclined to enhance it. The learned Judge has not stated what circumstances he took into consideration and it would have been helpful had he stated what the circumstances were which led him to pass what appears at first sight to be too lenient a sentence. But as I take a decided view that applications of this nature ought not to be encouraged at the instance of a complainant or private prosecutor, I am not disposed to give such an application any support unless it is clear beyond all question that it should be allowed. In my judgment this is not such a case, for in the circumstances I will give the accused the benefit of a very doubtful supposition that there were sufficient reasons present to the mind of the learned Sessions Judge for the sentence which he passed. The rule will be discharged.

P.R./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 787

MUKERJI AND MALLIK, JJ.

*Amar Chandra Chakravarty*—Defendant 1—Appellant.

v.

*Sarodamoyee Debi and others*—Plaintiffs—Respondents.

Appeals Nos. 14 and 15 of 1926, Decided on 13th February 1929, against appellate decrees of Addl. Dist. Judge, Howrah, D/- 3rd July 1926.

**Hindu Law — Guardian has authority to gift immovable property for estate's benefit or necessity — Gift even in excess of his authority binds ward on ratification, after attaining majority.**

The Hindu Law does allow a gift even of immovable property by a guardian, just as much as by a karta, for the benefit of the estate or for necessity and that however much a guardian may have exceeded his powers, or otherwise acted improperly in his trusts, his acts will be rendered binding on the ward by being ratified or acquiesced in, by him, after he had attained majority: 8 M. I. A. 319 and 2 Mad. 91 (P. C.), *Ref.* [P 788 O 1, 2]

*Jadu Nath Kanjilal and Subodh Chandra Dutta*—for Appellant.

*Harendra Kumar Sarbadhikari and Mahima Mukul Hazra*—for Respondents.

**Judgment.**—These two appeals have been preferred by defendants 1 and 2, respectively from a decree of the Addl.



tional District Judge of Howrah, confirming a decree passed by the Subordinate Judge, First Court, of that place. The suit was one for partition and for some other reliefs with which we are no longer concerned. The claim for partition was based on the following allegations:—One Ganesh Chandra Chakravarty was the father of the plaintiff, defendant 1 and defendant 2's husband Prosanna. The properties in suit belonged to Ganesh and he during his lifetime desired to give one-third share thereof to the plaintiff who was her daughter but being unable to carry out this wish, directed his sons, namely Prosanna and defendant 1 to do so after his death, that in accordance with this direction Prosanna, the eldest son, during the minority of defendant 1, and for himself and as guardian of defendant 1, made a gift of a one-third share of the properties to the plaintiff. Defendant 3 is a purchaser of one of the plots from defendant 2. The defence denied the gift and also challenged its validity.

In S. A. No. 15 of 1927, defendant 2 is the appellant. On her behalf the genuineness of the transaction has been questioned. The findings of the Courts below are conclusive on this question.

In S. A. No. 14 of 1927 in which defendant 1 is the appellant the validity of the gift is questioned. The first question that arises upon this contention is whether the gift was void or voidable. Prosanna admittedly was the elder brother of defendant 1 and karta of the family, and the natural guardian of the latter, on the death of their father. The Hindu Law makes no distinction between a gift and other kinds of alienation. The guardian of a minor cannot give away his ward's property in charity, and under ordinary circumstances the karta of a family cannot bind the other members of the family by making an alienation in the nature of a gift. But the Hindu Law does allow a gift even of immovable property by a guardian, just as much as by a karta, for the benefit of the estate or for necessity: see the Mitakshara Chap. I, S. 1, paras. 28 and 29; and *Kalu v. Barsu* (1). It cannot, therefore, be said that the gift will not operate on the share of defendant 1 under any circumstances or that it was altogether void. There is clear authority for the proposi-

tion that however much a guardian may have exceeded his powers, or otherwise acted improperly in his trusts, his acts will be rendered binding on the ward by being ratified or acquiesced in, by him, after he has attained majority: *C. C. Venkatachala Reddyar v. Rangaswamy* (2) and *Ramaswami Aiyar v. Venkataramaiyar* (3). Nothing in the shape of a justifying necessity has been proved in the present case. The true question therefore is whether there has been ratification or acquiescence.

On the question of ratification or acquiescence the finding of the learned District Judge is that

"some 10 or 12 years after the execution of the deed of gift the provisions of that deed had actually been put into operation between the parties."

This finding, he has arrived at upon two documents only, viz., Exs. 1 and 3 which, in our opinion do not by themselves lead to any such conclusion. They only go to indicate that defendant 1 knew that the plaintiff held some share under a gift from Prasanna, and even though they conveyed an information to defendant 1 as to the quantum of that share, they do not show that defendant 1 was aware that the plaintiff had got under the gift a half of one-third out of the share of defendant 1. There are we find other materials on the record on which a finding on the question of ratification or acquiescence was arrived at by the trial Court, but the learned District Judge has not dealt with those materials or examined them with a view to see whether they would support such a finding.

The decree of the lower appellate Court is accordingly set aside and the case is remanded to that Court to rehear the appeal on the aforesaid question and then to dispose of it finally.

The result is that S. A. 15 is dismissed but without costs, and S. A. 14 is allowed in the manner indicated above, costs therein being dependent on the result of the remand.

P.R./R.K.

Case remanded.

(2) [1860] 8 M. I. A. 319=1 W. R. 71 (P.O.).  
(3) [1878] 2 Mad. 91=6 I. A. 196=5 C. L. R. 347=4 Sar. 42 (P.O.).

(1) [1895] 19 Bom. 803.



**A. I. R. 1929 Calcutta 789**

RANKIN, C. J. AND CAMMIADE, J.

*Haran Chandra Karmakar*—Defendant—Appellant.

v.

*Kishori Lal Ghosh*—Plaintiff—Respondent.

Appeal No. 2096 of 1924, and Cross-Appeal No. 119 of 1925, Decided on 19th May 1927.

(a) Deed—Construction—Instrument purposely altered by person in lawful possession in material part is void and no suit can be brought on it nor can it be used in defence.

Wherever any instrument is purposely altered by a person in lawful possession of it in a material part of it the instrument is void for the purpose of enabling any person to sue on it or defend himself by using it as a direct defence depending on its obligatory force as an instrument : *Master v. Miller*, 4 T. R. 320, *Foll.* [P 790 C 1]

(b) Bengal Tenancy Act (8 of 1885), Ss. 105 and 50—Claim for amount on account of submerged land on basis of kabuliati and further for enhancement of rent for excess of land—Kabuliati materially changed by interpolation regarding unit of measurement—Kabuliati was held void for claim and in latter case presumption under S. 50 took effect.

In a proceeding under S. 105, a landlord put forward a kabuliati as the governing document of the tenancy and on the basis of that asked first of all for Rs. 5 on account of the suspension of rent on account of  $3\frac{1}{2}$  bighas of land submerged under water at that time. The second relief was for enhancement of rent on account of the rise in the price of crops. Thirdly he asked for additional rent on account of additional area. The kabuliati contained the usual terms : "Whenever you so desire at future time you will measure the land and for the land thus found out on measurement you will be competent to settle the jama according to the rates prevailing for the different classes of land in the village." In the margin there was a subsequent interpolation "measurement of the land will be made in accordance with the terms of the kabuliati by a rasi of 80 cubits, 1 cubit being equal to 18 inches." The kabuliati was thus materially altered.

*Held* : (i) that as the kabuliati formed the foundation of the claim of Rs. 5 kabuliati cannot be the evidence at all on the part of the landlord and further (ii) that it cannot be evidence for additional rent as it was immediately necessary to enquire what land was comprised in kabuliati so as to determine amount of encroachment which in its turn necessitated the reference to the void instrument, and thereafter presumption under S. 50 took effect and took away the claim altogether. [P 790 C 1, 2]

*Radha Binode Pal* and *Bhupendra Kumar Basu*—for Appellant.*Samarendra Nath Dutt* and *Tarakeshwar Nath Mitter*—for Respondent.

**Rankin, C. J.**—In this case the question arises in a proceeding before the Assistant Settlement Officer under S. 105, Ben. Ten. Act. The position is quite shortly this that the plaintiff has three causes of action. He puts forward a kabuliati as being the governing document of this tenancy and he asked first of all for Rs. 5 to be allowed because that sum of Rs. 5 was, on the basis of the terms of the kabuliati, a suspension of rent on account of  $3\frac{1}{2}$  bighas of the holding being submerged under water at that time. He asked secondly for enhancement of rent because of rise in the price of the crops and he asked thirdly additional rent for additional area. There can be no doubt that the claim for Rs. 5 is a claim based upon the kabuliati; that appears from the plaintiff's own claim before the Settlement Officer. The question of excess land is plainly a claim based upon the kabuliati not because he could not get it but for the kabuliati under the Bengal Tenancy Act but because it is immediately necessary to enquire exactly what land was then comprised within the kabuliati in order that one may know whether there has been an encroachment or not. The kabuliati contains the usual terms :

"Whenever you so desire at any future time you will measure the land and for the land thus found out on measurement you will be competent to settle the jama according to the rates prevailing for the different classes of land in the village. . . ."

Now in that kabuliati there was an interpolation :

"measurement of the land will be made in accordance with the terms of this kabuliati by a rasi of 80 cubits, 1 cubit being equal to 18 inches."

It all depends upon the standard of measurement employed at the time of this kabuliati, what area was included in it and the plaintiff when he had his claim put forward under this kabuliati insisted upon it being accepted as the term of the tenancy including the interpolation.

Now the question arises because the lower appellate Court has found that the kabuliati itself is not a forgery altogether but that it is clear enough that this writing in the margin is a subsequent interpolation. In dealing with the kabuliati it appears that the interpolation must have been made by a person



in whose possession the kabuliati was, namely from the side of the landlord and the doctrine which is relied on in this appeal is the doctrine laid down in the case of *Master v. Miller* (1) a doctrine which has been stated in this way :

"whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it or to defend himself by using it as a direct defence depending on its obligatory force as an instrument."

These are the words used by Brett, L. J., in *Supfel v. Bank of England* (2).

The lower appellate Court has held that the tenant has proved that he has held the tenancy at an unvarying rate of rent for over 20 years and when the tenant appeals to the presumption under S. 50, Ben. Ten. Act, that lower appellate Court holds that the claim would be good but for the fact that the kabuliati shows that the jama was created in 1275.

We have therefore to consider whether this kabuliati may be used in connexion with that point in connexion with the question of Rs. 5 the suspended rent and the question of additional rent for the excess area. As the tenant has succeeded upon all the points except on the question of rise in the price of crops and haja, we consider that aspect of the case first.

In my judgment this kabuliati in these circumstances is not evidence at all on the part of the landlord because it is the foundation first of all of his claim to the Rs. 5. In the second place I do not think it is any evidence on the question of the rise in the price of staple crops. Prima facie the tenant has a tenancy which would entitle him to the presumption that he held it at a fixed rate of rent since the Permanent Settlement. This document has been put forward in a claim for enhancement of rent as the foundation of the landlord's title to enhance the rent because in its absence the presumption under S. 50 would take away the claim altogether. The landlord has been using the very terms of the kabuliati to show the origin of this tenancy to rebut this presumption; and to say that that can be distinguished from a case in which he is suing on the kabuliati is to my mind a distinction without difference. The landlord takes his stand

on this kabuliati as the origin of the tenancy and fails to prove it otherwise. The presumption under S. 50, Ben. Ten. Act therefore prevails against him.

In my judgment therefore the correct view is to allow the appeals by the defendant and to find that he has a tenancy the rent of which is not enhancible by virtue of the presumption under S. 50 disregarding the kabuliati. In the same way the claim for Rs. 5 as charged is also disallowed. In my judgment the plaintiff's claim for excess rent for excess area must be disallowed, first of all it is impossible to make that case without putting in the kabuliati as the basis of the case; secondly it was with respect to this very matter that the interpolation was originally put in; and thirdly the claim laid was upon the document as altered and not upon the document as it originally stood.

In my judgment the principle of the case of *Master v. Miller* (1) should be enforced very strictly when the occasion for its application arises. In this case I think the result is that the defendant's appeals should be allowed with costs and the cross-objection of the plaintiff is dismissed with costs.

**Cammiade, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

### A. I. R. 1929 Calcutta 790

B. B. GHOSE AND PANTON, JJ.

*Prasanna Kumar Saha* — Decreeholder—Appellant.

v.

*Dhirendra Lal Gupta* — Judgment-debtor—Respondent.

Appeal No. 229 of 1927, Decided on 18th February 1929, from original order of 1st Sub-Judge, Chittagong, D/- 19th February 1927.

**Bengal Court of Wards Act (9 of 1879), S. 60**—A Court of Wards appointed common manager under Ben. Ten. Act—All co-sharers do not become wards of Court so as to prevent them from incurring debts or selling their interest, or their creditors from selling property in execution—**Bengal Tenancy Act (8 of 1885), Ss. 95 and 97.**

Appointment of Court of Wards as common manager by the District Judge under the provisions of the Bengal Tenancy Act, does not render all the co-sharers of the property wards of the Court so as to disqualify them from incurring debts or selling their interest in the property in question or to bar the creditor

(1) [1891] 4 T. R. 320=2 H. & Bl. 141.

(2) [1882] 9 Q. B. D. 555.



of such cosharer from selling his interest in execution of his decree against him.

[P 791 C 1]

*Sarat Chandra Basak and Chandra Sekhar Sen*—for Appellant.

*Surendra Nath Guha and Nasim Ali*—for Respondent.

**Judgment.**—In this case the order of the Subordinate Judge appears to us to be wrong. He has applied the provisions of S. 60-A, Court of Wards Act, in holding that the interest of the judgment-debtor in the property attached is not saleable. S. 60-A, however, refers to debts incurred by a ward. The judgment-debtor in this case is not a ward of Court. The Court of Wards was appointed the common manager under the provisions of the Bengal Tenancy Act by the District Judge. That does not render all the cosharers of the property wards of Court so as to disqualify them from incurring debts or selling their interest in the property in question. As every cosharer is entitled to sell his interest a creditor of such cosharer is entitled to sell his property in execution of his decree against him.

The order of the Subordinate Judge is set aside and the case remitted to the Court below for proceeding with the execution. The appellant is entitled to his costs as against the respondent, which we assess at five gold mohurs.

V.B./R.K.

*Order set aside.*

## A. I. R. 1929 Calcutta 791

B. B. GHOSE AND BOSE, JJ.

*Sachidananda and others*—Defendants—Appellants.

v.

*Jyoti Prosad Singh Deo Bahadur and another*—Plaintiffs—Respondents.

Appeal No. 338 of 1927, Decided on 7th June 1929, from original decree of Offg. Sub-Judge, Assansole, D/- 7th May 1927.

(a) Bengal Regulation (19 of 1793)—Grant of land by zamindar antecedent to Company's accession—Land revenue-free and possession with grantee—Zamindar has no interest.

All grants made antecedent to 12th August 1765, and by whatever authority made and whether in writing or not, were admitted or allowed to be valid, if the grantees had got possession of the land and the land had not subsequently been made subject to the payment of revenue by competent officers of

Government, and the zamindar can have no interest in such lands. [P 793 C 1]

(b) Bengal Regulation (19 of 1793)—Rent free grant of patah to debuttar by zamindar—Grant becomes rent-free lease and rights to subsoil remain with grantor unless expressly granted.

Where the document or sanad granting a piece of land describes the grant as a debuttar patah rent-free and not as danapatra or arpanam the grant becomes a rent-free lease and unless the grantor expressly gives away his rights in the subsoil the grantee has no right to it: A. I. R. 1929 P. C. 152, *Foll.*

[P 795 C 2]

*Khitish Chandra Chakravarti, Gopendar Nath Das and Satindra Nath Roy Chowdhuri*—for Appellants.

*N. N. Sircar, Sarat Chandra Bose and Karunmoy Ghose*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by the defendants against a judgment and decree of the Officiating Additional Subordinate Judge of Assansol partially decreeing the plaintiff's suit. The plaintiff has preferred a cross-objection against that part of the decree by which the learned Subordinate Judge dismissed a portion of his claim. The suit refers to a mouza called Itapara and the plaintiff claims that the property is situated within the ambit of this zamindari. An ancestor of his made a grant of the lands within the mouza to an ancestor of the defendants for performing the sheba of an idol named Sri Sri Gopi Nath Jue without payment of any rent. Recently, at the instance of the defendants the revenue authorities recorded the mouza in the Register under the Bengal Land Registration Act (Act 7 of 1876) as a revenue-free estate. Coal has recently been discovered underneath the mouza and the defendants have set up their right to the underground minerals. The plaintiff, therefore, brought the suit praying that his title to the mouza Itapara as zamindar might be declared and his possession of the uncultivated waste lands and subsoil minerals might be confirmed. No argument was addressed as regards those surplus waste lands. It was also prayed that it might be declared that the defendants are only entitled to the surface lands consisting of an area of about 121 bighas and 18 cottas for the service of the idol above mentioned. There was a further prayer that the record of the mouza in the Register by the revenue authorities as a revenue-free property may be declared to be erroneous



and ultra vires. The defendants pleaded that the mouza is their revenue-free property. It is admitted that the original grant of the property in suit was to one of their ancestors by an ancestor of the plaintiff. It was alleged that the land originally formed part of a mouza called Bilagram. Subsequently the land granted to the defendants' ancestor formed a different mouza called Itapara a name which it now bears having been carved out of the parent village Bilagram. The grant was made prior to the accession of the East India Company to the Diwani of Bengal and this grant was confirmed by a Superintendent of Baje-Jamin-Duftar, the result of which was that it constituted a revenue-free estate quite unconnected with the zamindari of the plaintiff. That being so, the defendants are the proprietors of the mouza including the subsoil minerals and the plaintiff has no connexion whatsoever with the property. This being the principal question in dispute between the parties several issues were framed in the Court below. It was found by the learned Subordinate Judge that the grant in this case was in the nature of a demise for divine service but that it was not a grant in favour of the deity and that, therefore, the idol was not a necessary party to the suit.

The main issues for trial are issues 6, 8 and 9. The learned Subordinate Judge held in favour of the defendants' contention that the mouza in dispute formed part of mouza Bilagram alias Chaitanyapore.

It became subsequently necessary to give a separate name to the land demised and it was named Itapara. But the plaintiff was not in possession of any portion of the land in dispute and the land in dispute formed a separate revenue-free estate and it did not form a part of the revenue paying estate of the plaintiff. The learned Subordinate Judge, however, held that the defendants were not entitled to the subsoil minerals, because the grant in their favour was made by the zamindar who was an ancestor of the plaintiff and that, as there was no grant of the minerals by the zamindar, according to the long line of authorities the defendants are only entitled to live upon the land and to enjoy the profits from the surface and that they are not entitled to the subsoil minerals. On these findings he made a decree to the effect

that the plaintiff's possession of the underground minerals in the disputed mouza be confirmed in view of the finding that he was the zamindar of the disputed mouza and was entitled to the minerals and did not part with them in the defendants' favour, but that the other reliefs claimed by him including the prayer for a declaration that the said mouza appertained to his revenue-paying estate be disallowed. The defendants appealed against the former part of the decree declaring the plaintiff's right to the minerals and confirming his possession and the plaintiff preferred a cross-objection against the latter part of the decree principally against that portion where it is declared that the mouza does not appertain to his revenue-paying estate.

The argument on behalf of the appellants amounts to this that upon the finding of the learned Subordinate Judge that the mouza is a revenue-free estate and does not form part of the revenue-paying zamindari of the plaintiff, they are entitled to the minerals and that the Subordinate Judge's finding that the plaintiff is entitled to the minerals under the property in dispute is un consequential to his previous finding. The appellants based their title upon three documents Ex. (A) the date of which cannot be found; but it would appear from Ex. B (1) which is dated 16th June 1785 that Ex. (A) was granted sometime in 1761. The learned Subordinate Judge finds that by Ex. (A) a certain quantity of land in mouza Bilagram was granted to an ancestor of the defendants free of revenue. The Bengali word is to the effect that no "Rajaswa" was to be paid. This word "Rajaswa" may mean both rent and revenue. The Subordinate Judge finds that it was necessary to grant a second document Ex. B (1) in 1785 as the area of the land granted was not specified in the previous document. The third document is Ex. B dated 27th August 1807. This is a copy of an order from the Maharajdhiraj Bahadur, the ancestor of the plaintiff, to the Raj officers and thanadars and inhabitants of mouza Bilagram and runs to the effect, that there was a debuttar village Itapara and that on ceremonial occasions in the said village the persons named belonging to the village Bila wrongfully committed oppression on people with respect to



certain imports in respect of village Itapara and that those persons were forbidden from molesting the inhabitants of the village Itapara.

It is contended by the learned advocate for the appellants as it was found by the learned Subordinate Judge under S. 48, Regulation 19 of 1793, this grant in favour of the defendants was confirmed by the Superintendent of the Baje Jamin-Duftar, therefore although it was not registered under the provisions of S. 27 of that Regulation, the right given to the grantee to hold the land revenue-free cannot be considered to have been annulled. He further says that the Subordinate Judge ought to have held that the plaintiff has no concern whatsoever with this property and cannot claim any right as zemindar of the mouza and that consequently the cases upon which the learned Subordinate Judge held that there was no grant of the subsoil by the plaintiff's ancestor cannot be supported. The defendants being the proprietors of the property are entitled both to the surface and the minerals of the mouza. It seems to me that the Subordinate Judge is right in holding that if this grant be of a revenue free interest made antecedent to 12th August 1765, it having been confirmed by the Superintendent of Baje-Jamin-Duftar under S. 48, Regn. 19 of 1793, the defendants would be proprietors of the mouza and entitled to hold it revenue-free and the plaintiff would have no right to the property. As Mr. Field points out in his Regulation of the Bengal Code at p. 246 :

"Non-Badshahi lakheraj grants may be divided into three classes namely, (1) grants of dates antecedent to 12th August 1765 the date of the Company's accession to the Diwani, (2) grant posterior to 12th August 1765 but antecedent to 1st December 1790., (3) grants posterior to 1st December 1790."

With respect to the first class, all grants by whatever authority made, and whether in writing or not, were admitted or allowed to be valid if the grantees had got possession and the land had not subsequently been made subject to the payment of revenue by competent officers of Government. With regard to this class of lakheraj grant the zemindar can have no interest.

It is, however, contended on behalf of the respondent that reference should be made to the preamble of the Regulation

where it is stated that grants made previous to the date of the Diwani and provided the grantee had obtained possession before that date should be held valid to the extent of the intentions of the grantor as ascertainable from the terms of the writings upon which the grants might have been made, and from their nature and denomination. It is next contended by a reference to the grant (Ex. A) that the object was that the grantee should build a debuttar homestead and by blessing the grantor and performing the sheba of the deity should go on enjoying the lands without payment of rent. The intention of the grantor was not therefore to be presumed to be that he desired to make the grantee full proprietor of the lands concerned by the grant. It is argued by a reference to S. 7, Regulation 8 of 1793 which has now been repealed, where it was provided that when taluqdars hold their taluqs in writing or under sanads from the zemindar which did not expressly transfer the property in the soil but only entitled the taluqdars to possession so long as they continued as leaseholders and not actual proprietors of the soil, that the sanads did not transfer the property in the soil and that, therefore, the grantee should only be considered as a leaseholder. With regard to the question of fact as to whether the disputed lands are covered by the sanads Ex. (b) and Ex. B (1) it is argued that the defendants have not been able to make out that these lands were included within those sanads. The name of Itapara first appeared in the order Ex. (B) dated 27th August 1807 which has already been referred to. The defendants stated that Itapara has got an alias Chaitanyapore and that was stated with the object of identifying Itapara as included within mouza Bilagram, because in Ex. B(1) of 1785 in the schedule the mouza Bilagram is also called Chaitanyapore. The learned Subordinate Judge did not accept that statement of the defendants, as he observed:

"Defendant 1 is not correct in saying that the disputed mouza was also called Chaitanyapore."

The learned Advocate-General on behalf of the respondent contends that the Subordinate Judge is wrong in holding that Itapara was a portion of Bilagram, as he says, there is no evidence in support of



such a conclusion. It is also contended on behalf of the respondent that this mouza was included within the zemindari of the plaintiff and that the Subordinate Judge is wrong in holding otherwise. The two questions involved in the appeal and in the cross-objection are so connected that they must be decided together.

It is pointed out by the learned Advocate-General that all the documents except the very recent documents show that Itapara was always considered as included within the estate of the plaintiff. The documents on which the respondent relies are the following: Ex.7(a) dated 1859-60. It is a copy of a statement presumably of the villages within the zemindari of the Raj of Panchakote. Column(2) shows the number of the chakla 'Panchakoti' which has another name Pachete; the next column contains the names of the mouzas as Itapara (1) and Dhadka  $\frac{1}{2}$  mouza and Sri Sri Gopinath Jeu  $1\frac{1}{2}$ . This idol whose shebait is the defendant is said to be the owner of  $1\frac{1}{2}$  anna. This was filed by Raja Nilmoni Singh, the ancestor of the plaintiff. Panchakote or Pachete is the estate of the plaintiff. The next document is Ex. 7 (c) dated 1860-61 the name of the zemindar and landlord of the chakla is given as Nilmoni Sinha Deo. The name of the mouza is Itapara, one mouza and there is also the name of the deity Sri Sri Gopinath Jeu. In the remark column it is stated that the land under this party is applied to the seba of Sri Sri Jeu and that there is no particular of jama at this place. This document was also filed by Nilmoni Singh Deo. In Ex. 2 (a) which is a thak statement dated 10th May 1862 with regard to mouza Itapara the deposition was recorded of a gumasta on behalf of the ancestor of the present defendants who are described as bramottar-holders. In answer to the question :

"What is your connexion with this village? whether you are the zemindar, taluqdar, or mokararidar."

The answer recorded is :

"I am the gumasta of this village on behalf of Wooni Thakur and Nani Thakur, bramottar-holders; and the bramottadars are on behalf of Maharajh Nilmoni Singh, zemindar of (illegible) and the gross jama of the said entire village comes to about one hundred."

This is signed by the gumasta on behalf of the Wooni Thakur and Anir Thakur

brahmottar-holders and underneath that there appears also the signature of Wooni, who was one of the brahmottadars.

Exhibit (8) is the next document, which is an extract from the mouzawar register dated 1862-63. There mouza Itapara is recorded as appertaining to chakla Panchakoti, the plaintiffs zemindari. Next comes the general register of revenue-paying lands of estates in one district and borne on the touzi of a different district. This is Ex. (7) dated 1877-78—register kept under the provisions of the Bengal Land Registration Act (Act 7 of 1876). There the name of the mouza and the description of the interest are given as Itapara (1) khas, Seba Debuttar or Sri Sri Gopinath Jeu and the name of Maharajdhiraj Nilmoni Singh Deo Bahadur is given as the proprietor.

Exhibit (7) is also a similar document.

Then it is pointed out on behalf of the respondent that decrees for cesses have been obtained by the plaintiff and his predecessor, which have been exhibited in this case, from the year 1894. No assertion of any right was made by the defendants that they were not bound to pay any cesses to the plaintiff in those cases on the allegation that they did not hold an interest subordinate to that of the plaintiff.

The next document is the Record-of-Rights, Ex (5) where this mouza Itapara was recorded as within the zemindari of the plaintiff. This Record-of-Rights was published in 1919. It is argued on behalf of the respondent that the cumulative effect of these documents is that the plaintiff is the proprietor of the mouza in question and that the defendants hold a debuttar interest under him without payment of any rent. No question can be raised that the mouza is a revenue-free estate dissociated from the zemindari of the plaintiff.

It is quite true that the payment of cesses to the plaintiff will not affect any title which the defendants may have in the property and they are entitled to argue that in spite of the fact that they had paid cess to the plaintiff they can establish their right to their property as proprietors of the soil. But from the fact that never at any time before 1918 did the defendants raise the question that they held the mouza independently



of the plaintiff's right as proprietors of the soil, they are bound to prove that all these proceedings that had taken place for a considerable number of years were not challenged for some cogent reason. It is only in 1918 that the defendants made an application to the revenue authorities for recording this mouza as their revenue-free property in B Register (Part \*) under the Land Registration Act. The Deputy Collector allowed the prayer but on appeal, it appears, that the Commissioner doubted the identity of the land granted in the sanad being the same as the land of village Itapara and directed a further enquiry into the matter. In the end, however, the defendants succeeded in having the property recorded as revenue-free property under the order of the Board of Revenue. The learned Subordinate Judge considers this order of the revenue authorities as rebutting the Record-of-Rights Ex. (5). The learned Subordinate Judge observes:

"This mouza was treated as appertaining to the plaintiff's revenue-paying estate for a long series of years till the revenue authorities decided otherwise in 1920 and the plaintiff seeks relief against the decision of the revenue authorities. The onus is upon the plaintiff to show that the disputed mouza had been assessed with revenue at the time of the permanent settlement and in my opinion the plaintiff has failed to prove that."

Now whether this mouza was assessed with revenue or not at the time of the permanent settlement does not appear to me to be a guiding factor in this case. From the documents filed by the plaintiff it is quite clear that this mouza had all along been treated as within the revenue-paying estate of the plaintiff and his predecessor. The sanad as stated above does not distinctly make a grant of the soil to the defendants' ancestor, assuming that it includes the lands of the mouza. Under such circumstances, it seems to me to be rather a large assumption to make that the grant was a revenue-free grant to be held independently of the grantor for all time. That assumption is further negatived, in my opinion, by the description of the document by which the grant was made. This document is bogus as:

"This debuttar patta is granted in San 17 Sal to the effect following"

and it concludes thus: "To this effect I grant (this) debuttar patta." Now the expression patta can only mean that that is

a grant by way of a lease. It was contended by the learned advocate for the appellants that in common parlance every document is described as a patta. Even if it be so, the various documents to which I have referred show that this was not a gift out and out. If it had been a grant free of all interest it might have been described as danpatra or arpannama and not as a patta. The zemindar in this case maintained his interest in the property without objection till recently. The true inference, therefore, is that it was rent-free grant by way of a lease by the grantor for the purpose of deb sheba.

The question whether the mouza Itapara is covered by the sanad Ex. A and the confirming sanad Ex. B (1) is left in great obscurity by the evidence. It is difficult to say as the learned Subordinate Judge has found that at the time of the grant these lands formed part of the parent mouza Bilagram and that subsequently to the grant it became necessary to give the lands a separate name. The learned Subordinate Judge, however, notes:

"that the western, northern and eastern boundaries as given in the defendants' sanad, namely, mouza Bila and Nuniapore, obtained even at the time of the Revenue Survey as appears from the map Ex. (c)."

It is, however, very difficult to identify the boundaries of the lands in the sanad with the boundaries of mouza Itapara. In my opinion the finding that the sanad refers to mouza Itapara is one which cannot reasonably be arrived at. However, on the opinion that I have expressed the grant should be considered as a rent-free lease, even assuming that Ex. (a) refers to mouza Itapara, the defendants would not be entitled to the underground minerals and the plaintiff would remain the owner of those minerals. It is not necessary for me to pile up authorities for the proposition that even when a lease-holder is granted a rent-free tenure the rights to the subsoil remain with the grantor unless there are express words granting such rights. It is only necessary to refer to this case of *Ragu Nath Roy v. Raja Durga Prasad* (1) and to the last case on this point, the case of *Raja of Pittapur v. Secy. of State* (2). On the evidence also it should

(1) A. I. R. 1919 P. C. 17=47 Cal. 95=46 I. A. 158 (P. C.).

(2) A. I. R. 1929 P. C. 152.



be held that the defendants held the rent-free tenure for deb seba which was granted to them for the performance of deb seba of the idol of Sri Sri Gopinath Jeu.

The result, therefore, is that this appeal will stand dismissed with costs and the cross-objection allowed to this extent that the disputed mouza is declared to be within the revenue-paying estate of the plaintiff and not an independent revenue-free estate. The defendants, however, will be entitled to hold the whole of the surface of the mouza in their debuttar right including 121 bighas odd.

The plaintiff is entitled to his costs in the appeal and the cross-objection, the hearing-fee being assessed at ten gold mohurs consolidated in the appeal and the cross-objection.

V.B./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 796

RANKIN, C. J. AND C. C. GHOSE, J.

*Hurrybux Deora—Appellant.*

v.

*Johurmull Bhutoria and another—Respondents.*

Appeal No. 99 of 1928, Decided on 18th April 1929, from original decree of Page J., D/- 19th December 1928.

**Appeal—Competency—Party accepting benefit under conditional decree is precluded from appealing.**

So far as a final decree in a suit is concerned there is no reason for saying that the decree-holder cannot approbate a decree in respect of the sum which it awards to him and reprobate it in respect of the sum which it refuses to him. There is no rule that acting on any order necessarily debars a party from appealing against the order on any point. The only principle is that a party is precluded from challenging the validity of an order after accepting the benefit of a term imposed in his favour as a condition of that order upon the opposite party at whose instance the order is made : *A. I. R. 1924 Cal. 380, Rel. (on. Cases Referred.)* [P 798 C 2]

*B. K. Ghosh and S. C. Mitter—for Appellant.*

*N. N. Sirkar and R. N. Sarkar—for Respondents.*

**Rankin, C. J.**—In this case the appeal has been set down for hearing on a preliminary point. In 1911 the plaintiff executed a mortgage of the suit lands to the defendants whom he put in possession and empowered to realize rents from the tenants. In 1915, the plaintiff

claimed to redeem the mortgage. There was a dispute as to the amount due thereunder and on 11th February 1916 the plaintiff filed his suit for redemption of the mortgage and possession of property. It appears that under an order made on 17th March 1916, the plaintiff paid to the defendants Rs. 43,000 and the defendants made over possession of the property to the plaintiff. On 17th May 1922, it was referred to the Assistant Referee to take the mortgage account on the basis of wilful default and neglect and after protracted proceedings before the Assistant Referee, he reported that the defendants were liable to pay to the plaintiff Rs. 38,918. The defendants filed exceptions to this report and ultimately Page, J. allowed certain of the exceptions and disallowed certain others. On 19th September 1928 a decree was passed in favour of the plaintiff for Rs. 12,946-4-3 with certain costs. The decree continued :

“ And it appearing that there is now in the hands of the Registrar of this Court standing to the credit of the account in this suit 3½ per cent Government Promissory Notes of the face value of Rs. 60,000 deposited by the defendant Sobha Chand Bhutoria as security under an order made in this suit dated 25th November 1924, it is further ordered and decreed that the said Registrar do out of the said sum in his hands pay to the plaintiff the said sum of Rs. 12,946-4-3 and to the defendants the balance thereof.”

Under this decree the plaintiff has drawn out of Court Rs. 12,946-4-3 and has brought this appeal to establish his right to the balance of the amount found by the Assistant Referee to be due to him as also for certain costs not awarded to him by the decree. The defendant Sobha Chand Bhutoria has filed a cross-objection disputing the amount found to be due by the decree.

As the matters in controversy concern a voluminous and protracted account, and as the defendants desired to take a preliminary objection to the competency of the appeal, this Court ordered the appeal to be set down for hearing on the preliminary point.

The objection taken by the defendants is that the appellant having taken out of Court the sum of money awarded to him by the decree, he is incompetent to proceed with his appeal. They rely upon a decision in this Court in the case of *Banku Chandra Bose v. Mariam*



*Begum* (1) and upon *Manilal Guzrati v. Harendra Lal Roy* (2), *Tinkler v. Hilder* (3) and *Kenard v. Harris* (4).

I find that in Second Appeal No. 2676 of 1920 decided in this Court by Chatterjee and Cuming, JJ. in December 1922 cf. *Jogendra Nath v. Khoda Bakhsh* (5) the cases on this subject were carefully reviewed. In that case the suit was upon a registered bond for a money debt bearing compound interest at 18 per cent per annum. The trial Court allowed simple interest at 18 per cent and directed the decretal amount to be paid in three instalments with costs of the suit the costs to be paid by Jaista 1326, and the principal and interest in two equal instalments thereafter. The District Judge on appeal disallowed compound interest on the ground inter alia that the plaintiff had accepted Rs. 65-10-0 being the first instalment, namely the instalment in respect of the costs, under the decree. This Court reversed the decision of the District Judge and, upon a review of all the cases, held as follows :

"It will appear that in the English cases as also in the case in *Banku Chandra Bose v. Mariam Begam* (1) cited above, the opposite party having accepted the benefit which he would not have obtained otherwise than under such order, was held to be precluded from challenging the validity of the order.

In the case before us, there was no such thing. The plaintiff appealed against the decree in so far as it disallowed compound interest. After the appeal had been filed, against that part of the decree which disallowed compound interest, he accepted the costs (deposited by the respondent) and which was decreed by the lower Court on the basis of simple interest as to which there was no dispute and which the plaintiff would have got in any event whether the appeal succeeded or failed. In these circumstances, the principle of the cases referred to above does not apply to the present case."

In my opinion the principle of the cases relied upon by the defendants does not apply to the case before us and I agree in the observations that were made by Chatterjee, J. in the unreported case which I have cited.

To deal with the English cases first, we must distinguish cases which have reference to awards in arbitration. *Kenard v. Harris* (4), is a case of this type and in England under the Work-

men's Compensation Act, 1906, the principle contended for by the defendants has been applied to awards made by County Court Judges sitting as arbitrators under the Act. It is true that the principle appears to have worked some injustice and its results to have been regretted by Pickford, L. J. in the case of *Josey v. Vincent* (6), but the principle is well established : see *Harris v. Minister of Munitions* (7), *Johnson v. Newton Fire Extinguisher Co.* (8). An award is bad unless it deals with the whole matter submitted and prima facie cannot be set aside in part only. A person who accepts costs payable under an award or any other sum of money given to him by an award is held to be precluded from asking the Court to set aside the award.

If, however, we put on one side cases of this character, we find a series of cases which have reference to interlocutory orders of Courts of law. In *Banku Chandra Bose's* case (supra) an order was made setting aside the dismissal of a suit for non-prosecution and giving to the defendants certain costs of and incidental to the plaintiff's application. The defendants had their bill taxed and obtained an allocatur for the amount. They also received under the order the sum of Rs. 250 on account of their costs. In that case the defendants had no right to the costs except under the order and the Court purported to follow the principle of *Tinkler v. Hilder* (3). In the previous case, *Mani Lal Guzrati v. Harendra* (2), the plaintiff was given leave to amend his plaint upon payment of Rs. 150 as costs to the defendants. The costs were paid at once and were received by the defendants under protest. The defendants on appeal contended that the Subordinate Judge ought not to have allowed the amendment. This Court held that as the defendants had no option but to accept the payment of the costs and did so under protest, they had not debarred themselves from questioning the order, but it was said that if the Judge had directed the costs to be paid into Court to the credit of the defendants and they had voluntarily withdrawn the sum deposited they might have been debarred from questioning the validity of

(1) [1916] 21 C.W.N. 232=37 I. C. 804.

(2) [1910] 12 O. L. J. 556=8 I. C. 79.

(3) [1849] 4 Ex. 191.

(4) [1824] 2 B. & O. 801.

(5) A. I. R. 1924 Cal. 380.

(6) 9 B. W. C. C. 474.

(7) [1921] 124 L. T. 489.

(8) [1913] 2 K. B. 111=82 L. J. K. B. 541=108 L. T. 360.



the order. It is clear that in this case the payment of the sum of Rs. 150 was really a term or condition of the liberty given to amend the plaint.

Coming now to the English cases, *Tinkler v. Hilder* (3) was a case in which the Judge on summons made an order to stay an action for trespass on payment of the costs of the day and of the execution of a certain writ of enquiry. These costs had been taxed and paid. On a motion to rescind the order, it was contended that the plaintiff could not now question the order after having adopted it and acted under it by accepting the costs. *King v. Simmonds* (9) and *Pearce v. Chaplin* (10) were cited. In reply it was argued that in those cases the costs were given by the order and could not otherwise have been obtained whereas in the present case they would have followed the judgment. Parke, B. replied:

"you have obtained them more speedily by means of the order which gives you the advantage. You have therefore received the benefit under the order and cannot now say it is valid for one purpose and invalid for another."

In *King v. Simmonds* (9) the Judge having ordered on summons by the plaintiffs that the plaintiffs should be at liberty to amend the record and also that they should pay the defendant his costs occasioned by such amendment, it was held that the defendant could not, after taxing and receiving his costs, apply to set aside the order. In *Pearce v. Chaplin* (10) the judgment and execution were set aside on summons and it was ordered that no action should be brought. The Sheriff who had taken the defendant's goods relinquished them on being served with the Judge's order. The defendant objected to that part of the order which precluded him from bringing an action. It was held that the order of the learned Judge was not shown to proceed upon the basis of irregularity in obtaining the judgment and that the order did not appear to have been made *ex debito justitiae*, but should be construed to mean that the Judge was not prepared to make the order unless the defendant agreed to bring no action. Lord Denham, C. J. said:

"There is no case which shows that when a party has acted upon such an order and has availed himself of the benefit under it, he is not bound by all its terms."

(9) [1845] 7 Q. B. 289.

(10) [1845] 9 Q. B. 802=16 L. J. Q. B. 49.

A similar case was *Hayward v. Duff* (11).

It appears to me that the English cases are clearly inapplicable except upon the basis that the defendant is seeking to challenge an order after accepting the benefit of a term or condition imposed upon the opposite party at whose instance the order was made. So far as the final decree in a suit is concerned, there is no reason for saying that the plaintiff cannot approbate the decree in respect of the sum which it awards to him and reprobate it in respect of the sum which it refuses to him. The plaintiff in the present case was not awarded the sum which he has drawn out of Court as a term upon which the defendants were considered to be entitled to the dismissal of part of his claim. In the Irish cases of *McCullough v. Munn* (12) and *McHugh v. McGoldrick* (13), another principle may be discerned. The former was a very clear case, and in the latter a suit in the *King's Bench Division* had been remitted for trial before the Recorder unless the plaintiff within ten days gave security for costs to the satisfaction of a Master. The plaintiff applied to a Master to fix the amount of the security and an order was made fixing it at £100. The plaintiff then appealed against the order remitting the action. It was held that the plaintiff had accepted and adopted the order and could not appeal from it. Whether that decision was right or wrong, it has no application in my opinion to such a case as the present. There, if the appeal succeeded the proceedings before the Master would have become idle and the course adopted by the plaintiff was at least inconsistent and would have made the Court's action inconsistent: Contrast *Anlaty v. Proetorius* (14). I do not accept as a sound proposition that acting in any way on any order necessarily debars a party from appealing against the order on any point. In my opinion there is no such rule and the language used in the decided cases must be taken with reference to the substance of the matter before the Court.

(11) [1862] 12 C. B. (n. s.) 364=10 W. R. 562=6 L. T. 433.

(12) [1908] 2 I. R. 194.

(13) [1921] 2 Ir. R. 163.

(14) [1888] 20 Q. B. D. 764=57 L. J. Q. B. 287=33 W. R. 437=58 L. T. 671.



For these reasons it does not appear to me that the preliminary objection has any weight and the appeal must therefore proceed in the usual course.

**C. C. Ghose, J.**—I agree.

**V.B./R.K.** *Order accordingly.*

## A. I. R. 1929 Calcutta 799

### Special Bench

**RANKIN, C. J. AND C. C. GHOSE AND  
BUCKLAND, JJ.**

*Re: Marine Insurance Policies.*

v.

Reference by the Board of Revenue Bengal, under S. 57 (2), Indian Stamp Act, Decided on 25th June 1929.

**Stamp Act (2 of 1899), S. 57 (2) — Reference cannot be made unless question arises out of a particular case.**

Under S. 57 (2) it is not open to make reference to the High Court for obtaining an opinion as a question of general nature not arising out of any particular case: 3 Cal. 347; 25 *Mad.* 752 and 37 *All.* 125 (F. B.); *A. I. R.* 1923 *Bom.* 51, *Rel. on.* [P 800 C 1]

**N. Sirkar and N. N. Bose** — for the Board of Revenue.

**Rankin, C. J.**—This is a reference made by the Board of Revenue, Bengal, under S. 57, Stamp Act, 1899. The reference is for the opinion of the Court as to whether a certain type of document represented by a blank form attached to the statement of the case drawn up by the Board of Revenue should be stamped with duty payable under Art. 47 (A) (1) (ii), Sch. 1, Stamp Act, or with duty under Art. 62 (c) of the said schedule or with some other and what duty.

It appears that a certain company or association called the Marine Insurance Association, Calcutta, carry on business in India in the course of which they issue Marine Insurance Policies upon goods. Accordingly, they have upon their policies to pay the stamp duty required by the schedule to the Indian Stamp Act. This Association has observed that, in the course of shipments to India, the policies of insurance or their equivalents sometimes take the form not of policies that have been executed in India but of certificates that have been taken out abroad. It appears that this kind of certificate is so worded in some cases that it may be construed as a document which transfers the

rights of the original policy holder under a policy taken out abroad to the person interested in India in the goods shipped in many cases to the bank through whom the bills for the price of the goods are discounted. Accordingly, this Marine Insurance Association appears to have entered into correspondence with the Government of Bengal representing that these certificates, to give them a neutral name, ought to be subjected to duty under the Stamp Act before they are allowed to operate in India. This question has been discussed in the correspondence between this Association and the Government of India, Finance Department, (Central Revenues) as well as the Government of Bengal. Various views have been expressed.

One view has been expressed by the Stamp Superintendent, Calcutta, to the effect that these documents are chargeable with duty as though they were Marine Insurance Policies. Another view has been expressed by a Department of the Government of India that these documents are of the nature of transfers of interest in a policy and are chargeable with duty under some other heading in the schedule to the Stamp Act. Accordingly without taking steps with reference to any particular document or seeking to make any person liable for duty upon any particular document, the Board of Revenue, Bengal, have attached to their case stated a specimen blank form of certificate and have asked for the opinion of this Court under S. 57 of the Act upon the question whether documents of the character disclosed by this blank form are liable to stamp duty, and if so, under what heading.

In my opinion, this reference is entirely incompetent. It is not within the purview of S. 57, Stamp Act, at all. That section does not provide a means by which the authorities concerned in collecting stamp duty can get advice from the Court by laying a case before it for the decision of a general question. It provides the machinery by which, when an actual case is being dealt with a particular instrument being in question and a particular party being sought to be charged with duty upon that instrument, a question of doubt may be referred to this Court by the revenue authority setting forth facts in the form of a case



stated and the Court, either in the presence of the parties concerned or, at all events, with opportunity to the parties concerned to argue the matter, is to decide the question of law raised on the facts. In the ordinary way, if the Government desires legal advice upon a general question it can obtain it by consulting the law officers of the State or by taking such other advice as it may think desirable.

It is well settled by the decisions of all the High Courts in India that S. 57 cannot be used for the obtaining of an opinion from the High Court on questions of a general nature not arising out of any particular case. This is clear enough if one reads S. 56 of the Act together with S. 57. S. 56, sub-S. (2), contemplates that a Collector acting under S. 31, S. 40 or S. 41, that is to say, dealing with a particular document and finding a doubt in his mind as to whether that instrument is chargeable may draw up a statement of the case and refer it with his own opinion for the decision of the Chief Controlling Revenue authority. There is no provision there that the Collector at any time entertaining a doubt as to whether documents of a certain type amount or do not amount to policies of Marine Insurance can formulate this general question and get an opinion from the Controlling Revenue authority. The arrangement is that the Collector acting upon a particular case under one or other of the three sections named may refer to the Controlling Revenue authority in the manner set forth. Now, S. 57 goes on to say :

"The Chief Controlling Revenue authority may state any case referred to it under S. 56, sub-S. (2), or otherwise coming to its notice and refer such case with its own opinion thereon to the High Court."

It is quite clear that there again, it must be a specific case definite document, a definite person who is sought to be charged with duty—not an abstract question of chargeability of documents of a certain kind. When we go on, we find that the particular High Court to which the reference is to be made depends upon the territory within which the case arises. This emphasises, if possible, the necessity of a concrete case, and, lastly, it is quite clear that the revenue authority on receiving the judgment of the Court has to dispose of the case conformably to the High Court judgment.

These matters have not arisen in this case for the first time. So far that as 1877, *In the matter of Thomson Policy* (1), it was laid down by Garth, C. J. :

"I feel very strongly that, in giving an opinion upon questions submitted to us by the Board of Revenue which may serve in the future as 'guide to the Board in imposing' taxes upon the public, we are bound to advise upon the actual facts before us and have no right to speculate upon the possible nature of transactions of which we have no certain knowledge."

In the case of *Re : Reference under Stamp Act* (2), a Sub-Registrar had impounded certain documents and forwarded them to the Deputy Collector who certified that they were exempt from stamp duty. The Inspector-General of Registration disagreed and referred the matter to the Board of Revenue. The Board of Revenue referred the question to the High Court and the High Court held the reference was absolutely incompetent because when the Deputy Collector had certified that the documents were free from stamp duty there was no way by which any duty could be collected from the person sought to be made liable. The case was at an end. There was no case to be referred to the Court and no case which could be entertained by the revenue authority after the Court had given its opinion. In the same way, in *Re : Stamp Reference* (3) there had been certain legislation for the protection of agriculturists in Bundelkhand. When a decree on a mortgage was made against an agriculturist, instead of being executed in the usual way, it was provided that the decree should be sent to the Collector who should offer the decree-holder a mortgage in a certain form.

A question arose whether this document had to be stamped and, before any such mortgage had been executed the form of the mortgage which might or might not be executed was referred to the High Court for its opinion as to whether such a mortgage would be liable to stamp duty. It was pointed out by the Full Bench that, reading S. 56 and S. 57 of the Act, the power to make a reference to the High Court had reference to instruments which were already in existence and did not include a power to refer speculative questions of the liability to

(1) [1877] 3 Cal. 347.

(2) [1902] 25 Mad. 752.

(3) [1915] 37 All. 115=27 I.C. 501=13 A.L.J. 47 (F.B.)



duty of documents which had not been executed. Again, in the case of *Usuf Dadabhai v. Chand Mahomed* (4), there was a decision in Bombay of the Chief Justice and two other Judges pointing out that the Chief Controlling Revenue authority could refer a case under S. 57, Stamp Act, only when there was a case which was to be disposed of by him on receipt of the High Court judgment and that he had no power to refer an abstract question when there was no case pending before him. In that case, the Collector had validated certain documents on stamps of proper description being affixed thereto the documents having been admitted in evidence and a decree passed. Thereupon, the question was referred to the High Court as to whether or not the amount which had been levied was sufficient. It was held that there was no case remaining to be disposed of by the revenue authority and therefore, the reference was not competent.

In the present case, the person at whose instance this matter has been raised as a general question is the Marine Insurance Association, Calcutta. Its complaint is that certain of its rivals are wrongly escaping stamp duty. No one of these rivals has been attacked either by being threatened that the documents will be impounded or in any other way. No one of the persons concerned is before the Court or has had an opportunity of coming before the Court or can be brought before it. This case illustrates very strongly the necessity of seeing that general questions are not referred to the High Court under the machinery provided by S. 57, Stamp Act.

In my opinion this reference must be dismissed.

**C. C. Ghose, J.**—I agree.

**Buckland, J.**—I agree.

**V.B./R.K.**      *Reference dismissed.*

(4) A.I.R. 1926 Bom. 51.

### A. I. R. 1929 Calcutta 801

RANKIN, C. J. AND MITTER, J.

*Bipradas Goswami*—Plff.—Appellant.

v.

*Sadhan Chandra Banerji*—Defendant  
—Respondent.

Appeal No. 1183 of 1925, Decided on 11th August 1927.

(a) Will—Construction—Bequest of absolute interest to son—Bequest to daughter in same terms and in her absence, to her sons

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and grandsons — Bequest to daughter held not for life with remainder to her son but absolute.

*K*, a testator bequeathed his property to his son *B* and daughter *N*. The words by which he gave away property to son were as follows: "I give (arpan) to my (torn) son whatever rights I have in the said properties." The bequest to the daughter was in these terms: "I give (arpan) to my daughter Shrimati Nabinkali Debi . . . the Nishkar Brahmottar Baguladangi situate in the said Jalpaiguri district. In the absence of Nabinkali, i. e., on her death, her sons born of her womb and grandsons etc., shall enjoy and possess my 3-annas share in the said Brahmottar." A son was born to *N* after the death of testator. On *N*'s death *B* brought a suit for construction of the will contending that the bequest to *N* was only for life and then to her son and the son being born after *K* the bequest to him failed.

*Held*: that the daughter *N* got an absolute estate and not a life-estate as contended, with remainder to her son and the estate given was estate of inheritance; 35 Cal. 896, (P. C.), Dist. [P 803 C 1; P 804 C 2]

(b) Hindu Law—Will—Construction—Bequest without express words of inheritance carries estate of inheritance.

It is well established that if an estate were given to a man simply without express words of inheritance, it would in the absence of conflicting context carry by Hindu Law an estate of inheritance. The principle is of general application: *I. A. Sup. Vol. 47 (P. C.)*; 30 All. 84; *A. I. R. 1922 P. C. 63* and 24 Cal. 834, *Ref.* [P 803 C 2]

(c) Will—Construction.

The meaning of every word in an Indian will must always depend on the setting in which it is placed, the subject to which it is related and the locality of the testator.

[P 804 C 2]

*Brajlal Chakravarty, Radhabinod Pal, Bhupendrakishore Basu and Jatin-dramohan Banerji*—for Appellant.

*Gunadacharan Sen and Rameshchandra Pal*—for Respondent.

**Mitter, J.**—This is an appeal from a judgment and decree of the District Judge of Murshidabad, dated 9th February 1925, which affirmed a judgment and decree of the Subordinate Judge of the same place, dated 13th May 1924.

The plaintiff, now appellant, brought a suit for the construction of a will of his father, Kunja Behari Goswami, and for a declaration of his title to the immovable properties mentioned in the ka and kha schedules of the plaint and for recovery of possession of property ka with mesne profits and for an injunction restraining the defendant from taking any step for recovery of rent from the plaintiff with respect to properties described in schedule ka.



The case stated in the plaint is that plaintiff's father died on 13th Falgun 1924, corresponding to 24th February 1886, leaving behind him the plaintiff, his only son, and Nabinkali Debi, his only daughter; that the plaintiff's father executed a will sometime before his death: that probate was taken of the will and the plaintiff was possessing the properties left by his father according to the terms of the will; that in the will there was a provision that Nabinkali would get 3-annas share in a brahmottar property named Baguladangi and that there was a further provision in the will that a sum of Rs. 1,000 should be paid to Nabinkali for the construction of a dwelling house out of the estate of the testator, that Nabinkali possessed and enjoyed ka and kha schedule properties and died on 14th Falgun 1325, corresponding to 26th February 1919, that the defendant, Satyendra, son of Nabinkali, was born on 6th Aswin 1297, corresponding to 21st September 1890; that the said Satyendra having been born after the testator's death, any bequest in his favour was void under the Hindu Law, as being a bequest in favour of an unborn person; that Nabinkali got only a life-interest in the suit properties; that during Nabinkali's lifetime, the plaintiff took a jote settlement from Nabinkali in respect of the ka properties and that, on her death, the jote has ceased to exist and the plaintiff became entitled to the full brahmottar right in schedule ka properties and the plaintiff also acquired title to the dwelling house (schedule kha) and that the defendant, in spite of the plaintiff's protest, got his name registered in the land registration register with regard to the ka schedule properties and has brought a suit for recovery of rent against the plaintiff and that the defendant was in wrongful possession of the schedule ka properties.

The defence of the defendant is that the defendant's mother, Nabinkali, acquired an absolute interest in the properties in suit and that, on Nabinkali's death, her son Satyendra, succeeded to the properties in suit as her heir. It was further said that with regard to kha schedule property that it was partly acquired by the stridhan of Nabinkali and partly by the money derived from the estate of the testator and that the plaintiff was estopped from bringing this suit.

The defendant Satyendra died during the pendency of the suit and his son, Sadhan, has been substituted in his place.

Several issues were framed in the suit, of which it is necessary to notice only two, viz., issues 7 and 8.

Issue 7 is as follows:

"Had the defendant's mother permanent, absolute and heritable interest in properties in suit?"

And issue 8 is as follows:

"Has the plaintiff any title to the properties in suit?"

The Court of first instance came to the conclusion that, on a proper construction of the will, issue 7 should be answered in the affirmative and against the plaintiff and issue 8 should be answered in the negative. The trial Court accordingly dismissed the plaintiff's suit.

An appeal was taken by the plaintiff to the Court of the District Judge and the learned District Judge has come to the same conclusion as the trial Court and has affirmed its decision dismissing the plaintiff's suit.

Against this decision, an appeal has been taken to this Court and it has been contended by Mr. Brajalal Chakravarti, who has appeared for the appellant, that on a proper construction of the will, the Courts below should have held that Nabinkali had only a Hindu daughter's estate in the disputed properties, which after her death reverted to the plaintiff.

The question turns on the construction of the will of Kunja Behari and we sent for the original will from the Court of the District Judge of Murshidabad and we have before us both the original will and the authorised translation made in this Court. The respondent contends that the construction put on the will by the Courts below, namely, that Nabinkali acquired an absolute interest in the properties in suit, is the right one.

In order to decide between these conflicting contentions, it is necessary to set forth the material parts of the will. Para. 1 of the will runs as follows:

"My son, Bipradas Goswami, who is born of my loins, shall be entitled to the zamindaris, patnis, darpatnis, upanchouki taluks, jote jamas, brahmottars and other immovable properties in the districts of Rangpur, Jalpaiguri Burdwan, Murshidabad and Rajshahi, with power to make sale or gift, and shall enjoy and possess the same in great felicity, down to sons and grandsons and others in succession. I give to my (torn) son whatever rights I have in the aforesaid properties, and I give to my daughter, Srimati Nabinkali Debi, who



is born of my loins, the nishkar brahmottar Baguladangi situate in the said district Jalpaiguri. In the absence of Nabinkali, that is, on her death, her sons born of her womb and grandsons, etc., shall enjoy and possess my 3 annas share in the said brahmottar. If Nabinkali's sons do not reside at Sadikhandiar, then the said property shall vest in my heirs. If Nabinkali's sons and grandsons make any claim to that, the same shall be rejected. Nabinkali's husband Nagendra Nath Banerji or his agnates will not be entitled to possess the said properties or have any right to make a sale or gift of the same. A sum of Rs. 1,000 in cash shall have to be paid to Nabinkali as cost for the construction of a house or a house shall have to be built (for her) at a cost of Rs. 1,000."

It is not disputed that the testator's son, Bipradas (plaintiff), has got an absolute interest in the properties in the districts of Rangpur, Jalpaiguri, etc. The words by which he gets his absolute bequest are as follows :

"I give (arpan) to my (torn) son whatever rights I have in the said properties."

The bequest to the daughter, Nabinkali, is in the following words :

"and I give (arpan) to my daughter, Srimati Nabinkali Debi, who is born of my loins, the nishkar, brahmottar Baguladangi situate in the said district Jalpaiguri."

The bequest, therefore, if it is absolute in favour of the plaintiff by reason of the use of the expression "give" (arpan) in favour of the son (plaintiff) must also be taken to be absolute in favour of Nabinkali, for there is no reason that where the same expression is used to indicate the passing of a full proprietary right, that it should be cut down to anything less than a full proprietary right in the case of the daughter, Nabinkali, for if this construction is admitted, the appellants have to contend for two contradictory interpretations of the same phrase, which, however, is not permissible. In para. 5 of the will, the testator, while bequeathing an absolute interest in the moveable properties and the pucca buildings in his share uses the same expression "give" (arpan). Para. 5 of the will runs as follows :

"I give to my son, Bipradas Goswami, my moveable properties and the pucca buildings, etc. in my share."

By using the same dispositive term "give" in both cases, it seems to me, that the testator intended to bequeath the same kind of interest to both the son (plaintiff) and Nabinkali (defendant's mother). He gave the bulk of his properties, which consisted of zemindari, patnis, darpatnis, etc., in various dis-

tricts in Bengal, to his son and gave only a 3 annas share in certain nishkar brahmottar in Jalpaiguri and a sum for the construction of a dwelling house in favour of his daughter by another wife absolutely. The dispositive term in the will, indicating the passing of an absolute interest, is the word "give" (arpan). It is now well established that if an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law an estate of inheritance : see *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1). The same principle would apply if the donee was a woman, for, as has been pointed out by their Lordships of the Judicial Committee in the case of *Surajmani v. Rabi Nath Ojha* (2), this principle was of general application : see also *Sasiman Chowdhurain v. Shib Narayan Chowdhury* (3). As was pointed out by their Lordships of the Judicial Committee in the case of *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (4), one cardinal principle in the construction of wills is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. It is contended on behalf of the appellant that the words :

"In the absence of Nabinkali, that is, on her death, her sons born of her womb and grandsons shall possess the three annas share."

coupled with the provision that :

"If Nabinkali's sons do not reside at Sadikhandiar then the said property shall vest in my heirs."

show that it was intended to give Nabinkali a life-estate with remainder over to her son and as the son was not born during the testator's lifetime, the gift to the son was void under the Hindu law and, consequently, this property reverted to the next heir of the testator, viz., the plaintiff. It is also said that the words putra poutradikrame signify that the succession after Nabinkali's death would be in the line of male heirs and was intended to prevent the succession of female heirs and that this was a

(1) I. A. Sup. Vol. 47=9 B. L. R. 377=18 W. R. 359=2 3d 692=3 Sar. 82 (P. O.).

(2) [1907] 80 All. 84=35 I. A. 17=5 A. L. J. 67 (P. O.).

(3) A. I. R. 1922 P. O. 63=1 Pat. 305=49 I. A. 25 (P. O.).

(4) [1897] 24 Cal. 834=24 I. A. 76=1 C. W. N. 387=7 Sar. 155 (P. O.).



provision contrary to rule of succession under the Hindu Law and was void. It seems to me that this provision in the will as to what is to happen on the death of Nabinkali is somewhat involved and obscure. It is possible to read the words "*Nabinkalir o' garbhajata putra poutradikrame bhog dakhal karibe*" to mean that those born of the womb of Nabinkali will enjoy and possess from generation to generation. The words *putra poutradikrame* have acquired a technical meaning. The words giving lands to the donee *putra poutradikrame* confer upon him or her an absolute estate. The word *garbhajata* means born of womb and if after that word the testator had used the word "children" and after that the words *putra poutradikrame*, then the meaning would have been absolutely clear and there could be no doubt that an absolute interest would have been bequeathed to Nabinkali. The absence of any such word after the word *garbhajata* creates the obscurity, but it seems to me that would be a more natural construction to fill up the ellipses after the word *garbhajata* by using the word children, rather than split up the phrase *putra poutradikrame* into words by tacking the word *putra* with *garbhajata* and reading *poutradikrame* as an independent phrase. If we look to the setting in which these words are placed, the latter construction becomes all the more unnatural, for in an earlier part of para 1, while bequeathing an absolute interest to the plaintiff, the testator uses the phrase *putra poutradikrame* and does not use the phrase *poutradikrame* by itself divorced from the word *putra*. In other words, the phrase *putra poutradikrame* is a term of art, whereas the word *poutradikrame* is rarely used in Bengali documents to indicate succession in the male line.

The respondent lays stress on the provision:

"that Nabinkali's son was also to enjoy from generation to generation in the absence of Nabinkali."

and contends that the word "also" signifies that Nabinkali was to enjoy the properties bequeathed to her in the same manner as his son Bipradas was to enjoy properties bequeathed to him. I think the word "also" has this significance and shows that the intention of the testator was to make the gift to his daughter absolute like the gift to his son. The

meaning of every word in an Indian will must always depend on the setting in which it is placed, the subject to which it is related and the locality of the testator from which it may receive its true shade of meaning. The will was drawn outside Calcutta and we know that, outside the presidency towns, the art of conveyancing is but little understood, and the drafting of wills is generally of a very simple and inartificial character. It seems to me that, having regard to the whole frame and wording of the will the intention of the testator was to give Nabinkali an absolute interest and such restrictions as was repugnant to such interest must be disregarded.

Mr. Chakravarti has drawn our attention to the case of *Radha Prasad Mullick v. Ranee Mani Dasee* (5), where there was a gift to the daughters and the sons jointly and their Lordships of the Judicial Committee held that the daughters took only a life-interest. It is always dangerous to construe the words of one will by the construction of more or less similar words in a different will which was adopted by a Court in another case. But on an examination of the case it will appear that there was a gift to the daughters and sons jointly and there was a proviso that, in the event of one of the daughters dying without leaving any surviving male issue, then the share of the deceased daughter is to go to the surviving daughter and her son to the exclusion in both cases of female issue, and in these circumstances it was held that the daughters had only a life estate. In the present case the gift is to the daughter in the same terms as the gift to the son in respect of other properties, and there does not seem to be much resemblance between the present case and the decision of the Judicial Committee just referred to.

The case of estoppel made by the defendant is that the plaintiff himself put the same construction of the will when he took a permanent lease from Nabinkali of the ka schedule property as the defendants are contending for. It is true that this circumstance does not operate as an estoppel and prevent the plaintiff from asking relief on a proper and different construction of the will, but the circumstance is significant as

(5) [1903] 35 Cal. 896=35 I. A. 118=12 C. W. N. 729 (P.C.).



showing that all the parties benefited by the will have proceeded on the footing that Nabinkali took an absolute interest in the ka schedule property. The plaintiff also suffers very little, for, after all, he enjoys the ka schedule properties absolutely subject only to the payment of a fixed rent to the defendant and his successor-in-title.

For the above reasons, I am of opinion that the view taken by the lower Courts is right and that the appeal must be dismissed with costs.

**Rankin, C. J.**—I agree.

**V.B./R.K.** *Appeal dismissed.*

### A. I. R. 1929 Calcutta 805

PEARSON AND PATTERSON, JJ.

*Nirpendra Chandra Sen*—Petitioner.

v.

*Sasadhar Saha and others*—Opposite Parties.

Criminal Revn. No. 191 of 1929, Decided on 2nd July 1929, from decision of Dist. Magistrate, Faridpur, D/- 23rd November 1928.

**Criminal P. C., S. 145**—Whether proceedings should be taken or not is matter within Magistrate's own discretion.

The District Magistrate has no authority in law to direct a subordinate to institute proceedings under S. 145. Whether such proceedings should or should not be taken is entirely a matter within the Magistrate's own discretion.

Where the terms in which the District Magistrate's order is expressed, clearly indicate that the order was intended to leave the Magistrate free to exercise his own discretion in the matter, and he had ample materials before him on which S. 145 proceedings in respect of the whole land in question might be properly based, it cannot be said that the Magistrate failed to exercise his discretion vested in him by law, when he passed an order requiring certain additional land to be included in the proceedings: *A. I. R. 1929 Cal. 751* and *24 Cal. 391, Ref. [P 806 C 1, 2; P 807 C 1]*

*Suresh Chandra Taluqdar and Mohendra Kumar Ghosh*—for Petitioner.

*Mritunjoy Chattopadhyaya and Biraj Mohan Roy*—for Opposite Parties.

**Judgment.**—This Rule is directed against an order of a Deputy Magistrate of Madaripur under S. 145, Criminal P. C., declaring the opposite party to be in possession of certain disputed land.

It is contended on behalf of the petitioner that the order complained of was without jurisdiction, inasmuch as certain additional lands had been included in

the proceedings on which that order was based, not in the exercise of the Deputy Magistrate's own discretion, but in mechanical compliance with a direction given by the District Magistrate.

It is further contended that fresh proceedings should have been drawn up when the additional lands were included, and that the proceedings as finally framed were defective.

What happened was this: On 23rd March 1928, an Assistant Sub-Inspector of Matbarcharh police station submitted a report to the Magistrate to the effect that the petitioner was in possession of the whole of the land in question, that the opposite party were, however, putting forward a claim to be in possession thereof, and that, in order to support their claim, the opposite party had on 21st March 1928 forcibly dug a ditch, planted some plantain trees and erected a hut on the disputed land. On receipt of this report, the Magistrate called for a further report from the officer-in-charge, and on 1st April 1928, the Sub-Inspector reported that some more huts had been erected and some more plantain trees planted on the disputed land, and at the same time submitted a map from which it appeared that the land on which the ditch had been dug, the plantain trees planted and the huts erected, only formed a small portion of the land actually in dispute. The Sub-Inspector's recommendation was therefore that S. 145 proceedings should be started in respect of the portion of the land on which the huts etc., stood, and that a S. 144 notice should be issued on the opposite party in respect of the rest of the disputed land, whereas the Assistant Sub-Inspector's recommendation had been that a S. 144 notice should be issued on the opposite party in respect of the whole of the disputed land.

Acting on the recommendations of the Sub-Inspector, the Magistrate on 3rd April 1928, drew up S. 145 proceedings in respect of the land on which the huts etc., stood, and issued a S. 144 notice in respect of the rest of the disputed land.

The opposite party then moved the District Magistrate against the order under S. 144, with the result that that order was set aside.

In setting aside the order the District Magistrate remarked that:



"the reports do not disclose such imminence of a breach of the peace as would justify an order under S. 144, Criminal P. C., in respect of one portion of the disputed land, and a proceeding under S. 145, Criminal P. C., in respect of the rest,"

and concluded by saying that :

"the Magistrate should include the whole of the disputed land in the proceeding under S. 145, Criminal P. C., and attach the land if such action is called for by the circumstances of the case."

The above order was dated 21st April 1928, and on receipt of a copy thereof, the Magistrate, by his order of 4th May 1928, directed that :

"the land for which an injunction under S. 144, Criminal P. C., was passed, should be included in the proceedings under S. 145, Criminal P. C."

This order was given effect to by amending the proceedings that had already been drawn up in respect of the portion of the land on which the huts etc., stood, and by issuing fresh notices on the parties.

The enquiry was then proceeded with without any further objection from either side, with the result that the opposite party were ultimately declared to be in possession of the whole of the disputed land, i. e., the whole of the land covered by the amended proceedings.

The District Magistrate was moved against the said order, but he declined to interfere, holding that the Magistrate had drawn up proceedings on being satisfied from the reports of the local police that there was a likelihood of a breach of the peace about the land in dispute and further stating that the District Magistrate had given no direction that proceedings under S. 145, Criminal P. C., should be drawn up, even if the Magistrate thought that there was no fear of a breach of the peace, but had merely said that it would be better to draw up proceedings under that section in respect of the whole of the disputed land.

Coming now to the questions at issue before us, it appears to be settled law that District Magistrate has no authority in law to direct a subordinate Magistrate to institute proceedings under S. 145, Criminal P. C.: whether such proceedings should or should not be taken is entirely a matter within the Magistrate's own discretion. The question then arises whether, in the present case, the Magistrate amended the proceedings in the exercise of his own discretion, or because he regarded the District Magistrate's

order of 21st April 1928, as a direction for the inclusion of the whole of the disputed land, which left no room for the exercise of his own discretion in the matter. The terms in which the District Magistrate's order is expressed go against this view, inasmuch as the concluding words are :

"The Magistrate should include the whole of the disputed . . . if such action is called for by the circumstances of the case."

The order was clearly intended to leave the Magistrate free to exercise his own discretion in the matter, but the question is whether the Magistrate did or did not actually exercise that discretion.

Certain expressions used by the Magistrate in the course of the enquiry, suggest the inference that he did not use his own discretion in the matter, but considered himself bound to act under what he regarded as a discretion given by his official superior, the District Magistrate. For example, in para. 1 of his final order, he says that the District Magistrate directed that a proceeding under S. 145, Criminal P. C., should be drawn up for the entire disputed land, and that the whole of the land was accordingly, included in the proceedings.

On the other hand, it is clear from what has been stated above, that the Magistrate had ample materials before him, (viz., the Police Reports of 23rd March and 1st April 1928), on which S. 145 proceedings in respect of the whole of the land in question might properly be based. Those reports were, it is true, in favour of the petitioner, but that is really beside the question. They disclosed the existence of a dispute likely to cause a breach of the peace concerning the whole of the land covered by the amended proceedings, and they therefore formed an adequate basis for these proceedings. The proceedings, both as originally framed and as subsequently amended, referred to the police report and stated that the Magistrate was satisfied from those reports that a dispute likely to cause a breach of the peace existed between the parties: the amendment merely related to the subject matter of the dispute and did not in any way affect the real basis of the proceedings. In view of those circumstances,—and specially in view of the fact that the Magistrate had ample materials before him on



which to base the amended proceedings,—we do not think we would be justified in inferring from a few unguarded expressions used by the Magistrate in the course of the inquiry, that he failed to exercise the discretion vested in him by law,—a discretion that had been expressly left entirely unfettered by the District Magistrate, in his order in the connected S. 144 proceedings.

In coming to the conclusion we are fortified by the views expressed by a Bench of this Court in the case of *Kedar Nath Sikdar v. Bijoy Mandal* (1) in which a distinction was drawn between cases in which the Magistrate had sufficient materials before him on which to base proceedings under S. 145, Criminal P. C., and cases like that of *Kailash Chandra Pal v. Kunja Behari Poddar* (2) in which the Magistrate had no such materials before him, and based his proceedings entirely on the order of the District Magistrate.

As regards the second point raised on behalf of the petitioner, viz., that the amended proceedings are defective, and that fresh proceedings should have been drawn, we do not think there is much force in this, especially as the question has been raised at such a very later stage. The amended proceedings are to all intents and purposes fresh proceedings, and although the terms in which they are couched leave a good deal to be desired, there can be no doubt that they were perfectly well understood by the parties concerned, and that the defects, such as they are, did not make any difficulties, or cause any embarrassment to any one, in the course of the enquiry.

For the above reasons, we are of opinion that the application should be rejected, and the Rule discharged.

R.M./R.K.

Rule discharged.

(1) A. I. R. 1929 Cal. 751.

(2) [1897] 24 Cal. 391=1 C. W. N. 393.

## A. I. R. 1929 Calcutta 807

SUHRAWARDY AND JACK, JJ.

*Jananada Charan Ghattak*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 131 of 1929, Decided on 25th July 1929.

(a) Criminal P. C., S. 237—Charge for substantive offence and not abetment—Conviction for abetment can be sustained though there be no charge for abetment originally.

It cannot be definitely laid down that a person having been charged with the substantive offence cannot be convicted for abetment thereof when he is not charged with it originally. Every case depends upon its own facts and if the facts justify the conviction for abetment, though the person be charged with the commission of the offence itself, there is no bar in law to such conviction provided he is not prejudiced by the absence of such charge: 11 B. H. C. R. 240; 42 Cal. 1094; A. I. R. 1928 Cal. 466; A. I. R. 1927 All. 35; A. I. R. 1927 Cal. 35; A. I. R. 1925 P. C. 130 and A. I. R. 1927 Cal. 63, Ref; 33 Mad. 264 and A. I. R. 1924 Bom. 432, Dist. [P 808 C 1]

(b) Criminal P. C., S. 237—Woman induced to sell her property—Property sold to one and kabala prepared in name of third—Amount made over was Rs. 5 instead of Rs. 300—Accused who wrote the kabala aware of cheating practised and charged under S. 420, Penal Code, but convicted for abetment only—Conviction for abetment held sustainable.

A woman A was induced to sell her property to W under circumstances which made it a clear case of cheating. She told that she was to execute a kabala in favour of someone else for Rs. 300. As a matter of fact the kabala was written in favour of W to the knowledge of J, the writer of the instrument, and a bundle of money purporting to be Rs. 300 was made over to A. It was subsequently found to contain small coins and pice worth Rs. 5. On these facts as elaborated in the evidence the accused were charged under Ss. 120-B and 420, Penal Code. J was convicted under S. 420 read with S. 114, Penal Code. There was no charge framed under S. 114. Facts deposed by the complainant and the evidence of the witnesses proved that J wrote the kabala in the name of W, and the circumstances under which money was handed over show that J was privy to the commission of the substantive offence.

Held: that the conviction for abetment could be sustained and absence of charge did not prejudice him. [P 803 C 1]

*Suresh Chandra Talukdar* and *Amrita Lal Mukherjee*—for Petitioner.

*Nirmal Chandra Chakraverty*—for the Crown.

**Suhrawardy, J.**—The only question of law argued before us on behalf of the petitioner is that his conviction for abetment of the substantive offence, though he was not charged with it originally, is erroneous in law. Three persons were tried on a charge under S. 420, I. P. C. The petitioner is the third accused and he is said to have taken part in carrying out the purpose of the cheating. They were further charged under S. 120-B for conspiracy. The facts are



that one Alekjan Bibi was induced to sell her property to accused 1 Wazaddi under circumstances which made it a clear case of cheating. She was told that she was to execute a kabala in favour of someone else for Rs. 300. As a matter of fact that kabala was written in favour of Wazaddi to the knowledge of the petitioner and a bundle of money purporting to be Rs. 300 was made over to Alekjan Bibi. It was subsequently found to contain small coins and pice worth Rs. 5. On these facts as elaborated in the evidence the accused were charged under Ss. 120-B and 420, I. P. C. The petitioner was convicted under S. 420 read with S. 114, I. P. C. and sentenced to three months rigorous imprisonment, though there was no charge framed under S. 114. It is argued that there being no such charge against the accused he could not be convicted under that section. There is some divergence of opinion on the question as to whether a person having been charged with a substantive offence can be convicted for abetment thereof. It is not necessary to refer to all the various cases that have been cited before us bearing upon this point, for I think the right view of the question raised before us is that it cannot be definitely laid down that a person having been charged with a substantive offence cannot be convicted for abetment thereof. Every case depends upon its own facts and if the facts justify the conviction for abetment, though the person was charged with the commission of the offence itself, there is no bar in law to such conviction. The principle is what was laid down long ago in *Reg v. Chand Nur* (1) where it is said that if evidence adduced in support of the charge for the substantive offence does not give notice to the accused of all the facts which would constitute abetment he cannot be convicted of abetment. This question was considered in the case of *Indar Chand v. Emperor* (2). Woodroffe, J., who was third Judge, to whom the case was referred on account of difference of opinion between two Judges observed at p. 1133 :

"I am not prepared to hold as a universal rule that in no case can there be a conviction for abetment where the charge is only for the substantive offence."

(1) 11 B. H. C. R. 240.

(2) [1915] 42 Cal. 1094=33 I. C. 289=19 C. W. N. 1239.

The same view has been expressed in the unreported case of the *Emperor v. Kadir* (3) by C. C. Ghose, J., in these words :

"It is true that there was no charge of abetment of murder against the present appellant before the jury but in my opinion it cannot be laid down as a universal rule that in no circumstances whatsoever where there is a charge for a substantive offence and there is no charge of abetment of that offence can the person so charged with substantive offence be convicted of abetment of that offence'.

The same view has been expressed in *Emperor v. Mohabir Prosad* (4) and *Dibakar v. Saktidhar Kaviraj* (5). A great deal of support for this view is to be obtained from the decision of the Judicial Committee in *Begu v. Emperor* (6) where the accused was charged under S. 302, I.P.C., but convicted under S. 201, I. P. C., for destroying the evidence for the commission of that offence. Their Lordships remarked :

"A man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made."

I must, therefore, submit with great respect that the view taken in *Hulas Chand Baid v. Emperor* (7) by one of the Judges and adopted by the other Judge and couched in general language is not supported by authority. There are some cases which have held to the contrary but which seemed to have proceeded only upon the reading of S. 238, Criminal P. C. and make no reference to the other relevant S. 237. *Padmanaba v. Emperor* (8) and *Emperor v. Rughya Nagya* (9).

We have next to consider as to whether in the words of the Judicial Committee there is evidence such as to establish the charge of abetment and whether the accused has, by the absence of the charge of that offence, been prejudiced. The fact deposed to in the complainant's evidence and the evidence of her witnesses has been found by the Judge to be that the petitioner wrote the kabala in the name of accused 1 ; and the circumstances under which the money was actually made over to Alekjan show that the petitioner was a party in the

(3) A. I. R. 1928 Cal. 466.

(4) A. I. R. 1927 All. 35=49 All. 120.

(5) A. I. R. 1927 Cal. 520=54 Cal. 476.

(6) A. I. R. 1925 P. C. 130=6 Lab. 226=32 I. A. 191 (P.C.).

(7) A. I. R. 1927 Cal. 63.

(8) [1910] 33 Mad. 264=5 I. C. 145=20 M. L. J. 84.

(9) A. I. R. 1924 Bom. 432.



cheating. He brought the receipt from the Sub-Registrar's office and made it over to accused 1. It was further proved that the petitioner was to make over the money to the complainant but he refused to do so as there was a danger if the bundle was opened before the Sub-Registrar. These facts sufficiently prove that the petitioner was privy to the commission of the substantive offence by accused 1. Upon these facts the petitioner's conviction was based and he had full notice that he had to meet the allegations in his defence.

The petitioner was further charged under S. 120-B. But it appears that no order was passed under that section by any of the Courts below. We have therefore ample authority under S. 423, Criminal P. C., to alter the finding and convict the accused under S. 120-B on the finding of fact arrived at by the learned Sessions Judge who says :

"it is clear that if Wazaddi was to carry through his plot successfully he would need the help of some one to write the deed. The circumstances under which the deed was written and in particular the circumstances under which the money was actually made over show that Gnanendra must have been a privy to the plan."

In any view of the case the accused has been rightly convicted and sentenced.

The rule is therefore, discharged. The petitioner's bail bond should be cancelled. He must serve out the remainder of the sentence.

**Jack, J.**—I agree. I would only like to add that in my opinion whether a man can be convicted without a separate charge on a charge of abetment of the principal offence depends upon the circumstances of the case. But it can only be done where the circumstances bring the case under S. 237, Criminal P. C. In the present case I think the circumstances are such as to bring the case under S. 237 and I think the Court was justified in convicting the accused inasmuch as the absence of a separate charge was not likely to prejudice the petitioner. I think, however, that in this particular case the trial Court should have convicted the accused under S. 120-B, I. P. C. The learned Judge finds that there is no direct evidence to sustain the charge under S. 120-B against four accused persons. It is not easy to understand what he means by this inasmuch as the evidence on which he con-

victed the petitioner under S. 420/114 was in itself sufficient to convict him on the charge under S. 120-B. On the findings arrived at by both the Courts below the petitioner was clearly guilty under S. 120-B and he ought to have been convicted under that section. But inasmuch as the appellant has not been prejudiced by the procedure adopted it is not necessary for us to interfere.

V.B./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 809

MITTER AND S. K. GHOSE, JJ.

*Satindra Nath Sen and others*—Accused—Petitioners.

v

*Emperor*—Opposite Party.

Misc. Criminal Case No. 194 of 1929,  
Decided on 20th September 1929.

**Criminal P. C., S. 526**—Where susceptibilities of accused are moved by fact that Magistrate has outside knowledge of proceedings, case should be transferred.

A Judge or Magistrate having outside knowledge in respect of matters which form the subject matter of the proceedings before him and having such knowledge from outside the Court before the actual hearing of these proceedings commences is in a position of embarrassment in dealing with the case. The question is not in these cases as to whether the Magistrate having such outside knowledge will utilise that knowledge for the purpose of decision in the case but the question is whether there can be any reasonable apprehension in the minds of the accused persons that the Magistrate having the outside knowledge before him may not be betrayed by it into taking a view which the evidence might not support. Where the susceptibilities of the accused persons are reasonably moved by the reason of the fact that the Magistrate has outside knowledge not based on evidence on record, the case should be transferred from him: *Sergeant v. Dale*, 2 Q. B. D. 558; 20 Cal. 857 and 23 Cal. 495, *Ref.* [P 812 C 1, 2]

*B. C. Chatterjee, N. R. Das Gupta, Suresh Chandra Taluqdar and Radhika Ranjan Guha*—for Petitioners.

*A. K. Bose*—for the Crown.

**Mitter, J.**—This is an application under S. 526, Criminal P. C., on behalf of *Satindra Nath Sen* and 13 others for transfer of certain proceedings that are pending against them under S. 110, Cls. (e) and (f), Criminal P. C., from the file of the District Magistrate of Barisal before whom these proceedings are now pending.

The proceedings, when they were first started, were being heard by a Magistrate



of that District, Mr. B. R. Sen, and an application was made to this Court for transfer of these proceedings from the file of Mr. Sen to the file of some other Magistrate in the district, to this Court. That application was heard by my learned brothers C. C. Ghose, J. and Jack, J., on 17th July 1929, and the learned Judges said in that case that having regard to the peculiar circumstances of the cases in which the present accused had been involved and in order to allay whatever suspicions or apprehensions might exist in the minds of the petitioners it was desirable that the case should be transferred from the file of Mr. Sen to the file of Mr. Hutchings, the District Magistrate. It was pointed out in that judgment that as against Mr. Hutchings nothing had been suggested and nothing could be suggested and the learned Judges were satisfied that if the case went to him, and was tried by him from the point which had been reached before Mr. Sen, adequate justice would be done to the accused. In that view, the learned Judges directed a transfer of the proceedings to the file of Mr. Hutchings. Mr. A. K. Basu, Government Counsel who is now appearing on behalf of the Crown was also then representing the Crown and he assented to that order of the learned Judges, dated 17th July. The matter was, accordingly being heard by Mr. Hutchings, the District Magistrate and up to now about 91 witnesses have been examined for the prosecution and cross-examined. During the course of these proceedings it appears that Mr. Hutchings, the learned District Magistrate, gave out in the course of a conversation with Mr. N. R. Das Gupta, counsel for the petitioners, outside the Court that he had personal knowledge of certain matters in respect of which these proceedings had been initiated. I shall advert to these matters in detail later.

After this information was communicated by Mr. Hutchings outside the Court, to the learned counsel, it appears that a petition was put in before the learned District Magistrate in which it was stated that the District Magistrate should not try the case and that the petitioners intended making an application for transfer to the High Court because of three reasons. It was said first that the learned District Magistrate had personal knowledge of certain incidents

in the Barisal Exhibition, and some of the overt acts in connexion with that Exhibition which form some of the charges on which these proceedings under S. 110 are based. It was pointed out, in the second place, that the learned District Magistrate had outside knowledge in respect of incidents in connexion with the Laukati Union and he knew all the state of affairs in respect of that Union the incidents in connexion with which form the subject matter of some of the overt acts in respect of the S. 110 proceedings. It was further pointed out that the learned District Magistrate, in the third place, had acquired certain knowledge in connexion with the incidents the subject matter of controversy in the S. 110 proceedings from certain confidential report of Mr. Blandy, who was the previous Magistrate of the district.

The application which mentioned these facts was presented to the District Magistrate who directed the application to the filed. Subsequently on the basis of these facts which the petitioners say have been revealed by the District Magistrate himself, the petitioners feel that the case had better not be tried by the learned District Magistrate.

Mr. Chatterjee appearing for the petitioners has made it plain to us that he has nothing to say personally against the District Magistrate but he contends that having regard to the facts disclosed by the District Magistrate himself in the course of these proceedings his client's susceptibilities are moved in respect of this, namely, that even at this stage it is better that the learned District Magistrate should not try this case with the outside knowledge in respect of some of the incidents in his mind.

The matter was heard on a previous day when the Deputy Legal Remembrancer, Mr. Bhattacharya appeared for the Crown and Mr. Chatterji offered that if the Crown gave up the charges with regard to the Exhibition and with regard to the Union Board he would not press for a transfer of the case from the district. Mr. Bhattacharya put himself in communication with the District Magistrate and today we have heard Mr. A. K. Basu, Government Counsel, who now appears on behalf of the Crown. Mr. Basu is unable to agree on behalf of the Crown to give up the charges in respect of the Exhibition and, with regard to the



incidents connected with the Laukati Union, Mr. Basu says that he is prepared to stand by the offer made by Mr. Bhattacharya that the Government was willing to give up this charge. To this, however, Mr. Chatterji does not agree. We have, therefore, now to consider this application for transfer on its merits.

It is stated by Mr. Basu that this transfer application should not be allowed in view of the fact that it was at the suggestion of Mr. Chatterji that the case was transferred to Mr. Hutchings and that Mr. Basu told the Court at that time that there was no officer in that district who was more intimately connected with the matter than Mr. Hutchings and who had a full knowledge of the circumstances. It is said, that Mr. Chatterji agreed to a transfer to Mr. Hutchings and it is argued on behalf of the Crown that it does not lie in the mouth of the petitioners to have the case retransferred from the file of Mr. Hutchings, more particularly when the prosecution case has almost come to a termination, so far as the evidence of witnesses is concerned. On the other hand, it is submitted on behalf of the petitioners that they are making this application as they are compelled to make it in view of the revelations, very candidly made by the learned District Magistrate himself both in respect of what was said to counsel as well as in the explanation which has been read to us by Mr. Basu. It is necessary to refer to particular parts of the explanation in order to consider whether in view of what has been said here, is it or is it not desirable that Mr. Hutchings should further deal with these proceedings. The learned District Magistrate says with regard to the Barisal Exhibition thus :

"I had no connexion officially or unofficially with the Barisal Exhibition in January 1929, although at the time I was holding the post of Additional District Magistrate, Barisal, I had no connexion with the organization of the Exhibition nor with its policy or with the policy of the District Magistrate towards it. I did, however, visit it as a spectator on many occasions and I observed the following incidents related by witnesses in Court: I saw young persons picketing on the road outside the exhibition and I saw the persons lying down to prevent the entry of the public through the main exhibition gate. I also walked up and down the outside exhibition gate to see that the methods adopted by the picketters did not result in an affray. In short, I observed the general methods adopted

by the picketters but I had no knowledge from my own observation of the identity of any of the persons who took part in the picketting or by whom they were directed or what their motives were. I can say that from a conversation with persons who had knowledge of these things, I came to know that the picketters were organised and controlled by Satin Sen's party and eventually by Satin Sen himself. I also heard but did not observe that they had used offensive language to members of the public including ladies and there were at times considerable apprehensions that their actions might lead to affrays or even serious rioting."

With regard to the exhibition, the learned District Magistrate further said:

"I likewise recall and know from personal observation that after the exhibition special patrols were placed along the roads for the protection of officials and others. I did not issue the orders for these patrols, nor can I say who did so. But I saw the patrols myself and was informed of their purpose. I likewise recall that on a certain day in January on which Satindra Nath Sen was arrested under S. 107, Criminal P. C. and that I was attending the Races when the District Magistrate requested me to hold myself in readiness to assist him in dealing with a procession which it was feared to force its way up to the exhibition, and I likewise recall that the District Magistrate informed me that he had ordered the arrest of Satindra Nath Sen under S. 107, Criminal P. C. as he had received information that respectable citizens of Barisal apprehended a serious breach of the peace unless such action were immediately taken. Of the sources of this information or what orders were actually issued, I have no knowledge."

So much is said by way of explanation by the District Magistrate in regard to the incidents of the Barisal Exhibition.

With regard to the Unions the following explanation is given by the learned District Magistrate :

"The only extra judicial knowledge that I had of the Laukati incident arose from my study of a file regarding the spread of the Village Self Government Act in the District of Barisal. From this I gained the impression that there was opposition to Union Boards at a place called Laukati, that Satindra Nath Sen took part in the dispute, that on a certain occasion he came in conflict with the police and was reported both to have pushed or struck the police officers and to have received a slight injury himself. Of the details of the incident I have no personal knowledge. As regards the other Union Boards, my extra-judicial knowledge of them may be said to consist in this that in the file above referred to, it was recorded that opposition to Union Boards existed in them and was strengthened by the action of volunteers and politically minded persons who fostered discontent with a view to embarrassing the District authorities, and that in several Unions, the Boards had to be either superseded or the operations-



of the Act suspended. This I trace from my recollection of a note based on reports of local officers at the time."

It has been contended on behalf of the accused that the explanation reveals at least with regard to the incidents connected with the exhibition that the District Magistrate had knowledge of the incidents which were the subject matter of the proceedings before him in connexion with the exhibition from outside sources; and as such it is not desirable on general principles which are accepted in all the Courts that the District Magistrate, having such outside knowledge, should try the case which is before him. It is true that the District Magistrate has not been cited as a witness with reference to these matters and as a matter of fact the learned counsel has abandoned any such case. But at the same time it is difficult to shut one's eyes to the fact that a Judge or a Magistrate, having outside knowledge in respect of matters which form the subject matter of proceedings before him, and having such knowledge from conversations outside the Court before the actual hearing of these proceedings commences, is in a position of some embarrassment in dealing with the case. The question is not in these cases as to whether the Magistrate, having such outside knowledge, will utilise that knowledge for the purpose of decision in this case, but the question is whether there can be any reasonable apprehension in the minds of the accused persons that the District Magistrate, having this outside knowledge before him may not be betrayed by such outside knowledge into taking a view which the evidence might not support. As I have said at the very outset, possibly Mr. Hutchings could have kept this knowledge out of the proceedings when he was dealing with these proceedings, but the point of view from which the transfer application has to be looked into is whether the susceptibilities of the accused persons are not reasonably moved by reason of the fact that the District Magistrate has, at least in connexion with some incidents, which form the subject matter of the proceedings, outside knowledge or knowledge which is not based on the evidence on the record.

In cases of this description, the rule which has been followed was laid down in a very early English case, the case of

*Sergeant v. Dale* (1) which has been followed in this Court. It is pointed out in that case by Lush, J. that in matters like this:

"The law has regard, not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

This view of the learned Judge has been followed in several other cases in this Court to some of which reference might be made. For instance, the case of *Girish Chandra Ghose v. Queen Empress*, (2) and the case of *Dupeyron v. Driver* (3).

We have been at pains to consider this question to which we have given our most careful consideration. Although it seemed at the outset extremely inconvenient to transfer the case which has almost come to a termination and in which as many as 91 witnesses have already been examined, yet we think, having regard to the incidents that have happened, and to what the District Magistrate himself has said that it would not be right to allow this case to remain in the file of Mr. Hutchings.

The question next arises whether this case should be transferred outside the district. In respect of this matter I asked Mr. Basu and he says that if any transfer is to be made at all, it should be made to the Court of Mr. Roxburgh, the Chief Presidency Magistrate, Calcutta. To this also the accused have no objection.

In these circumstances we direct that these proceedings now pending before the District Magistrate be transferred to the file of the Chief Presidency Magistrate, Calcutta, to be taken up from the point which it has reached in the Court of the District Magistrate.

The learned District Magistrate of Barisal will send the record of this case to the Chief Presidency Magistrate, Calcutta, with the greatest possible expedition.

S. K. Ghose, J.—I agree.

R.M./R.K.

Petition allowed.

(1) [1878] 2 Q. B. D. 558=46 L. J. Q. B. 781=37 L. T. 153.  
(2) [1893] 20 Cal. 857.  
(3) [1896] 23 Cal. 495.



**A. I. R. 1929 Calcutta 813**

PEARSON AND PATTERSON, JJ.

*Inasaddar Ali and others*—Petitioners.  
v.*Isimulla and others*—Opposite Party.

Criminal Revn. No. 106 of 1929, Decided on 21st June 1929, from order of Addl. Dist. Magistrate, Sylhet, D/- 11th February 1929.

(a) Criminal P. C., S. 139-A — Magistrate cannot depute another Magistrate to make enquiry and report.

Section 139-A contemplates an enquiry by Magistrate himself and he cannot depute another Magistrate to make the enquiry and report. [P 813 C 2]

(b) Criminal P. C., Ss. 139-A and 537—Omission to conduct enquiry by Magistrate himself is irregularity incurable by S. 537.

A Magistrate in proceedings under S. 133 has no jurisdiction to make over the enquiry under S. 139-A to any Magistrate subordinate to him, and omission to conduct it himself is an irregularity incurable by S. 537.

The reason for the above proposition is that the Magistrate has to decide upon either staying the proceedings or further proceedings under S. 137 or 138 and this decision necessitates his considering the reliability of the evidence and proper valuation of it, which both he is better fitted to do if he himself undertakes it. Mere reading of the enquiry as made by a Subordinate Magistrate and acting upon it does not enable him to do this work efficiently. [P 813 C 2]

*Priya Nath Dutt*—for Petitioners.*Benoyendra Nath Palit*—for Opposite Parties.**Judgment.**—This Rule is directed against an order passed in proceedings under S. 133, Criminal P. C., relating to alleged obstruction of a public path. The conditional order was passed by the Additional District Magistrate on 5th June 1928. On 20th June the opposite party No. 3 appeared and denied the existence of the right, and 6th July was fixed for taking evidence. On 6th July all the opposite parties appeared and gave a denial of the right, whereupon the Magistrate passed an order making the case over to Babu A. M. Dam, E. A. C. for enquiry and to report to the existence of a public path. His report was submitted after enquiry, and the report was in favour of the existence of the right. On 17th August the Additional District Magistrate took the report into consideration and acted upon it by passing an order declaring it to be a public path. Matters then proceeded before a jury, the majority of whom found that the ob-

struction should be removed. This Rule was issued on the ground that the provisions of S. 139-A had not been complied with, and that the Magistrate had no jurisdiction to direct an enquiry by another Magistrate as to the existence of the right. There was also a question as regards the constitution of the jury to which it is unnecessary to refer further in view of our decision.

It is conceded that the terms of the S. 139-A contemplate an enquiry by the Magistrate himself; there is no such provision in proceedings under Chap. 10 for deputing a subordinate Magistrate to make the enquiry as is to be found under Chap. 12 expressly laid down by the terms of S. 148. It is, however, said that in effect the Magistrate did hold the enquiry himself by reading and acting on the report of the subordinate Magistrate and there has been no prejudice; that the accused participated in all the proceedings in the subsequent stage: and that the omission of the Magistrate to enquire is a mere irregularity which is cured under S. 537. We are of opinion that the matter cannot be disposed of in this manner. Upon the result of the enquiry depends the subsequent procedure—either a stay of proceedings, or a further step under S. 137 or 138. The test is whether there is or is not reliable evidence in support of the denial of the existence of the alleged public right. The value of the evidence is a matter better determined by the Magistrate if he has heard it himself than if, as appears from the order sheet in the present case, he merely “read the report” of his subordinate. Moreover the Magistrate to whom the enquiry was deputed in the present case was, we are told, a Third Class Magistrate whereas the opening words of S. 133 shows that the intention is that this class of proceeding should be in the hands either of a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class. We accordingly are of opinion that the Magistrate had no jurisdiction in the present case to make over the enquiry as he did, and for these reasons the Rule must be made absolute. Fresh proceedings may be instituted if necessary.

V.B./R.K.

*Rule made absolute.*



\* A. I. R. 1929 Calcutta 814

B. B. GHOSE AND PANTON, JJ.

*Ashutosh Nandi and another*—Appellants.

v.

*Kundal Kamini Dasi and others*—Respondents.

Appeal No. 301 of 1928, Decided on 15th March 1929, from appellate order of Dist. Judge, Birbhum, D/- 19th April 1928.

\* (a) Civil P. C., S. 144—S. 144 applies only where decree is reversed and not where title from purchase under a different proceeding in execution of one decree is questioned in another suit.

Section 144 only applies where the decree is varied or reversed and it does not apply to a case where, as the result of a different suit, the title of a person derived by purchase under quite a different proceeding in execution of a decree which stands unreversed is questioned. [P 814 C 2]

(b) Decree—Finality of—Decree of appellate Court in one suit does not annul that of another suit.

The decree of an appellate Court in one suit cannot be held to have the legal effect of annulling or altering ipso facto a decree made by a subordinate Court, in another suit: 40 *Mad.* 299, *not Foll.* 10 *M. I. A.* 203, *Expl.*; 3 *Cal.* 30 (*F.B.*) and 1 *Pat. L. J.* 43, *Rel. on.* [P 815 C 2]

\* (c) Civil P. C., S. 144—Object.

The object of S. 144 is to provide a speedy and simple remedy for any party who has suffered by reason of an erroneous decree made by a Court of first instance and it does not apply to a case where the Court has to decide questions of conflicting rights under different decrees which may be very complicated. [P 815 C 2]

*Bankim Chandra Mukherjee and Bon Behari Mukherjee*—for Appellants.

*Jatish Chandra Sarkar*—for Respondents.

**B. B. Ghose, J.**—This is an appeal by a purchaser of a holding in execution of a rent decree. It appears that there was a litigation between respondents 1 and 2, and respondents 3 and 4 as to the title to the property in question. When they were litigating with regard to the property, the landlord, respondent 3, brought a suit for rent and obtained a decree against respondent 4 who was said to be his recorded tenant. In execution of that decree, the holding was sold and purchased by the appellant. The title suit between the respondents was decreed in favour of respondent 2 and dismissed as regards respondent 1 in

the trial Court. There were two appeals against that decree and ultimately the title to the property was found in favour of both respondents 1 and 2. The proceeding out of which this appeal arises was instituted by respondents 1 and 2 under S. 144, Civil P. C., for recovery of possession of the property which was purchased by the appellant in execution of the rent decree.

It was said that the result of the litigation between respondents 1 and 2 on the one hand and respondents 3 and 4 on the other was that the rent decree obtained by respondent 3 against respondent 4 was reversed and, therefore, the applicants were entitled to restitution by way of recovery of possession from the auction-purchaser at the rent sale by the present proceedings. The trial Court held that S. 144 applied to the case and this opinion was affirmed by the learned District Judge on appeal by the auction-purchaser. Against that order the auction-purchaser who was the opposite party in the trial Court has preferred this appeal. His contention is that it is not a matter which falls within the provisions of S. 144 of the Code, that this section only applies where the decree of a Court of first instance is varied or reversed on appeal and it does not apply to a case where, as the result of a different suit, the title of a person derived by purchase under quite a different proceeding in execution of a decree which stands unreversed is questioned. In my opinion this contention is sound and must be accepted. A decree can only be said to be varied or reversed by an appeal, review or revision.

It may be possible that the result of a subsequent suit may affect the right of a person under a decree obtained in a previous suit but it seems to me that it would be straining the meaning of words to say that the previous decree is reversed or varied by the subsequent decree. Apart from authorities, which I shall presently discuss, it seems to me that the provision that the Court which is to make a restitution is the Court of first instance implies a Court the decree of which is reversed by a Court of appeal. Take for instance this case, where the decree for rent might have been passed by one Court, and confirmed on appeal in execution of which the appellant purchased



the property. The suit for title between the respondents might have been tried by another Court which ultimately succeeded on appeal. Which Court of first instance is to make restitution? The legislature would not have left the matter unprovided for if it was contemplated that a decree might be reversed by a separate suit. Reference may be made to S. 583 of the Code of 1882 which has been replaced by S. 144 of the present Code, if there is any doubt about the matter. That section provided that any party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal was to apply to the Court which passed the decree against which the appeal was preferred.

In my opinion reference to an appeal was omitted in S. 144 because it was not necessary having regard to the expression "Court of first instance" the decree of which is varied or reversed. The learned advocate for the respondent, however, relies upon the case of *Subbarayudu v. Seshasani* (1), in support of his contention that S. 144 applies to cases where a decree may be held to have been reversed otherwise than in first or second appeal. There the learned Judges came to their conclusion "not without some hesitation." They referred to the case of *Shama Purshad v. Hurro Purshad* (2), (at pp. 211 and 212) as supporting their view. In that case their Lordships laid down the general principle of law about which there can be no question. The facts, however might probably be considered as lending support to the view of the Madras Court. But that case has been explained by the Privy Council in the case of *Naganna Naidu v. Venkatapayya Ravi* (3) (at pp. 305 to 307 of 50 I. A.). Referring to *Shama Purshad's* case (2), their Lordships say:

"In that case the Judicial Committee in applying the test already quoted, namely, "whether the decree or judgment under which the money was originally recovered had been reversed or superseded," were of opinion that it was plainly intended by the order in Council in that case that all the rights and liabilities of the parties should be dealt with under it, and it would be in contravention of the order to permit the decrees obtained pend-

ing the appeal on which it was made to interfere with this purpose. It was pointed out . . . . . that such decrees were mere subordinate and dependent decrees, which could no longer be held to have remained in force when the decree on which they were dependent had been reversed."

Their Lordships further said that they preferred the reasonings and conclusions set forth in the dissentient judgment of Garth, C. J., in the case of *Jogesh Chunder v. Kali Churn* (4). The learned Chief Justice said:

"I have searched in vain to find any other instance in which the decree of an appellate Court in one suit has been held to have the legal effect of annulling or altering ipso facto a decree made by a subordinate Court in another suit."

I respectfully agree with the observation and hold that S. 144 refers only to cases where a decree of the Court of first instance is reversed on appeal or revision. This view of S. 144 has been taken by the Patna High Court in the case of *Chintaman Singh v. Chuni Sahu* (5).

It seems to me that the object of S. 144 is to provide a speedy and simple remedy for any party who has suffered by reason of an erroneous decree made by a Court of first instance and it does not apply to a case where the Court has to decide questions of conflicting rights under different decrees which may be very complicated.

I, therefore, hold that the decision of the Court below is not correct.

The result is that this appeal is allowed and the application of the respondents dismissed with costs in both the Courts. We fix the hearing-fee in this Court at three gold mohurs.

**Panton, J.**—I agree.

V.B./R.K.

*Appeal allowed.*

(4) [1877] 3 Cal. 30=1 C. L. R. 5 (F.B.).

(5) [1916] 1 Pat. L. J. 43=34 I. C. 747=3 Pat. L. W. 95.

**A. I. R. 1929 Calcutta 815**

**RANKIN, C. J.**

*Kanti Chandra Tarafdar and another*  
—Appellants.

*v.*  
*Radha Raman Sirkar and others*—  
Respondents

Appeal No. 82 of 1929, Decided on 26th April 1929, against original decree of Sub-Judge, Bardwan, D/- 5th March 1929, in Title Suit No. 160 of 1923.

(1) [1917] 40 Mad. 293=3 M. L. W. 235=31 M. L. J. 366=33 I. C. 739=(1916) M. W. N. 155.

(2) [1868] 10 M. I. A. 203=3 W. R. 25 (P.C.).

(3) A. I. R. 1923 P. C. 167=46 Mad. 895=50 I. A. 301 (P.C.).



(a) Court-fees Act, Sch. 2, Art. 17—Valuation of memorandum of appeal for court-fee—Appeal against preliminary decree in suit for accounts—Final decree passed subsequently—Art. 17 does not apply—Court-fee must be paid on amount of final decree.

Article 17 was never intended to apply to a case where a person with a definite decree for a particular amount of money against him seeks to set it aside. The question whether or not the decree is at the moment capable of being executed without payment of certain amount by the plaintiff as additional court-fee is not a question which affects the method in which the relief in a memorandum of appeal may be valued. [P 816 C 2]

Where the defendant has already appealed against the preliminary decree, and in the meanwhile the final decree is passed against him, it is the final decree that the appellant attacks and there is no escape from the conclusion that it is on the amount of final decree that the court-fee must be paid. Due allowance will be made for court-fee already paid. [P 817 C 2]

(b) Court-fees Act, S. 7 (4) (f)—Application to memorandum of appeal.

The amount payable on the memorandum of appeal is prima facie governed by the same words as govern the plaintiff's liability to pay court-fee when he brings his suit. [P 816 C 2]

*D. N. Bagchi and Mohini Mohan Bhattacharji*—for Petitioners.

*Surendra Nath Guha and Amulya Chandra Sen*—for Government.

**Judgment.**—In this case, the plaintiff brought a suit for accounts against two defendants as executors of the plaintiff's grandmother. He valued his suit so far as regards the claim for accounts at Rs. 1,000 and this he appears to have done quite reasonably and correctly under sub-Cl. (f), sub-S. (4), S. 7, Court-fees Act.

A preliminary decree for accounts was made against the two defendants and from this they appealed to the High Court paying full court-fee so far as regards the claim for accounts, viz., on Rs. 1,000. They paid apparently a court-fee on Rs. 1,300 altogether. A stay of execution was asked for from this Court but was refused and the suit in the Court below proceeded; after an enquiry and report by a commissioner a final decree was made in the plaintiff's favour for Rs. 6,418 as the amount due from the defendants upon the taking of the accounts. The judgment did not require the plaintiff as a condition precedent to deposit an additional court-fee

within a given time nor did it order that on his failure to do so, the suit should be dismissed. It appears that there is no provision in the Statute Law requiring the Court to make an order in that form. There is, however, a provision by S. 11, Court-fees Act, which is as follows :

"If the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee be actually paid and the fee which would have been payable had the suit comprised the whole of the profits or accounts so decreed shall have been paid to the proper officer."

Thereupon, the defendants bring in this Court an appeal from the final decree and the question before me is the question of the proper amount of the court-fee that they must pay upon their memorandum of appeal. It appears to me to be prima facie clear that the amount payable upon this memorandum of appeal is governed by the same words as governed the plaintiff's liability to pay court-fee when he brought his suit. It is governed by Cl. (f), sub-S. (4), S. 7, Court-fees Act :

"Suits for accounts according to the amount at which the relief sought is valued in the memorandum of appeal."

The Registrar, I think, viewed this matter exactly in the proper way. The question is the liability being according to the amount at which the relief sought is valued in the memorandum of appeal is it proper in this appeal to say that under Art. 17, Sch. 2, it is impossible to value the relief or is it open to the appellant to say that it is possible to value the relief, but that he can justify a valuation that is less than the sum of Rs. 6,418 by reason of the fact that the decree of the lower appellate Court as it stands is not at this moment a decree which can be executed without payment of further court-fee. In my judgment, it is reasonably clear that Art. 17, Sch. 2, cannot be applied in these circumstances at all. It was never intended to apply to a case where a person with a definite decree for a particular sum of money against him seeks to set it aside. The question whether or not a decree is at this moment capable of being executed without payment of a certain amount of money by the plaintiff as a court-fee is not, in my judgment, a question which affects the method in which the relief in



a memorandum of appeal of this character can be valued. It is in no way for this Court to estimate or value the chances of the plaintiff paying the necessary court-fee in order to get execution. The appeal is an appeal from a decree. The execution of the decree seems to me to be an extraneous and collateral matter altogether. It is the decree which establishes the liability. The mere fact that the plaintiff would have to pay a fee to enforce the liability is not a matter which affects the fact that the defendants here are endeavouring to get rid of a liability of Rs. 6,418. One may consider this matter from the strict point of view of theory. It might quite well be that the plaintiff would never need to apply to enforce his claim by execution. He might have a cross-claim which he might set off. There might be other ways in which he might be able to utilize his decree. It cannot be said that there is anything defective in the decree itself and as the plaintiff is at the present moment not concerned with any question of execution it does not seem necessary that this question of execution should be taken to affect the case at all.

It has been contended by Mr. Bagchi that the reason why the Judge in the Court below did not insist upon payment of a further court-fee as a condition precedent was that if the appeal against the preliminary decree succeeded the additional court-fee paid by the plaintiff in respect of the final decree would be paid in vain since the final decree would be brought to the ground if the preliminary decree were set aside. I do not know whether that was the motive of the learned Judge or not but this question cannot depend upon the motive of the learned Judge in the Court below. It is said to be inequitable that the defendants should have to pay a court-fee on Rs. 6,418 when, so far, the plaintiff has never had to pay a court-fee upon that amount. Equity and equality are sometimes two different things. What the plaintiff had to pay is not to my mind relevant on the question of what the defendants should pay. Defendants have thought fit to appeal against the decree. They have sufficient respect or fear for the decree to make it seem worth while to bring the appeal against the decree itself. It does seem to me

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that even if it turns out that the plaintiff has been treated in a lenient way consistent with the court-fees Act that is not any reason why in a matter of this kind I should treat the defendants otherwise than in accordance with the meaning of the statute. It is very probable that the plaintiff will pay additional court-fee and in that case the question of equity will vanish altogether. I cannot think that the expression used in the course of discussing another matter in the case of *Kanchan Mandar v. Kamala Prosad Chaudhuri*, (1) ought to be regarded as in any way an authority on the point. It is quite true that in putting a hypothetical case the learned Judges said :

"If mesne profits had been decreed for a higher sum than what is claimed in the plaint and if the plaintiff had obtained a decree for such sum upon payment of additional court-fees, the defendants might have been called upon to pay the difference."

The learned Judges there put the case which was the usual case but their remarks cannot be treated as impliedly deciding a case in which the plaintiff got a decree without immediate payment of additional court-fees.

I have been carefully through the note made by the Registrar in this matter and agree in the view which he takes. It is quite clear upon the authority of the case I have already mentioned and also on the case of *Ram Mandar v. Maharani Nawlakhati*, (2) that for the purpose of this appeal the defendants will get credit for what they have already paid in connexion with the appeal from the preliminary decree, the principle being that the defendants are in the end resisting certain claim and on that they have come to Court and they do not have to pay the court-fees twice over. I am satisfied that the figure at which the Registrar has assessed the liability in his reference is the correct figure and confirm it.

V.B./R.K.

Reference answered.

(1) [1912] 16 C. L. J. 564 = 15 I. C. 550

(2) A. I. R. 1924 Fa. 694 = 9 Pat. 111

Advocate of the Court

Jammu &amp; Kashmir

Srinagar.



## \*A. I. R. 1929 Calcutta 818

B. B. GHOSE AND PANTON, JJ.

*Ambika Ranjan Mujumdar*—Judgment-debtor—Appellant.

v.

*Manikganj Loan Office, Ltd.*—Decree-holder—Respondent.

Appeal No. 497, of 1927, Decided on 22nd February 1929, from Original Order of 4th Sub-Judge, Dacca, D/- 28th February 1927.

\* (a) Civil P. C., S. 39 (c)—Territorial jurisdiction is condition precedent to a Court executing decree—Attachment before judgment does not make any difference—O. 21, R. 64 does not apply—Civil P. C., O. 21, R. 64.

Where it is necessary in execution of a decree for money to sell properties not within the local limits of the jurisdiction of the Court which passed the decree, the sale of the properties can only be effected by the Court within the local limits of which the property is situate and that the property was attached by an order of attachment before judgment, along with properties within the jurisdiction does not make any difference: nor is O. 21 R. 64 applicable: 17 Cal. 699 (F.B.), *Rel. on.*; 25 Cal. 179, *Ref.* [P 818 C 2]

(b) Civil P. C., O. 21, R. 66—Gross undervaluation of properties in sale proclamation misleading intending purchasers—Sale should be set aside.

If the gross undervaluation of the properties in the sale proclamation is such as must have debarred the intending purchasers from bidding at the sale and offering reasonable value, the sale should be set aside: 20 All. 412 and 13 C. L. J. 192, *Foll.* [P 819 C 2]*Atul Chandra Gupta and Satish Chandra Sinha*—for Appellant.*Sarat Chandra Roy Chowdhury and Ramgati Sarkar*—for Respondent.

**Judgment.**—This is an appeal by the judgment-debtor against an order refusing to set aside the sale of certain properties in execution of a decree obtained by the respondent and purchased by him. The first objection refers to certain properties within the districts of Pabna and Rangpur. The properties were sold by the Subordinate Judge having jurisdiction in the district of Dacca. The learned Subordinate Judge has held that under S. 39, Civil P. C., the Court which passed the decree for money could sell properties belonging to the judgment-debtor situate outside its jurisdiction. He comes to that conclusion, because in S. 39 the language is that:

"the Court which passed a decree may send it for execution to another Court."

He held that the word "may" does not mean "shall" or "must." Having come to that conclusion he held that the Court

which passed the decree could execute the decree by selling properties situate outside its territorial jurisdiction. There cannot be any doubt that this construction is not correct. Where it is necessary in execution of a decree for money to sell properties not within the local limits of the jurisdiction of the Court which passed the decree, the sale of the properties can only be effected by the Court within the local limits of which the property is situate. It is only necessary to refer to the Full Bench case of *Prem Chand Dey v. Mokhoda Debi* (1), at p 703. The learned advocate for the respondent sought to support the decision of the Subordinate Judge not on the ground on which he put it and in fact he stated that that ground cannot possibly be supported but on a different ground. His argument was that these properties had been attached at the instance of the decree-holder before judgment, and that being so, under O. 38, R. 11, Civil P. C., it was not necessary to attach these properties afresh in execution of the decree obtained by the respondent. He next referred to O. 21, R. 64 and his argument was that the Dacca Court was the Court executing the decree because there were other properties situate within the territorial jurisdiction of the Dacca Court. He then laid stress upon the opening words of O. 21, R. 64 namely:

"any Court executing a decree may order that any property attached by it and liable to sale . . . shall be sold."

He contended that as the Dacca Court was the Court executing the decree and the properties in question were attached by it, it can sell the properties. It was further argued in support of the contention that where a Court passes a decree on a mortgage by which the properties situated within the local limits of the jurisdiction of the Court and also those outside such local limits are mortgaged, the Court which passed the decree can sell the properties situated within both the jurisdictions. Similarly, as properties were attached before judgment both within and outside the local limits of its jurisdiction, the Dacca Court might sell all the properties attached by it before judgment. This argument would imply that the effect of attachment is the same as a mortgage. But that is not so. It

(1) [1890] 17 Cal. 693 (F.B.).



has been pointed out by their Lordships of the Privy Council in the case of *Moti Lal v. Karrabuddin* (2), that attachment confers no title. It only prevents a person from alienating the property. There is no analogy, therefore, between the case of a decree for sale of properties passed on a mortgage and a mere attachment before judgment where a decree for money is passed in favour of the plaintiff. The argument based on the wording of O. 21, R. 64 also seems to me to be incapable of the construction which is sought to be put upon it. That rule is one of a series of rules which deals with the mode of execution of a decree by a Court having jurisdiction to execute the decree and it has no reference to the question as to the jurisdiction of the Court which should execute a decree. The question of jurisdiction must be governed by the Full Bench case of *Prem Chand Dey v. Mokhoda Debi* (1), cited above. It is also expedient that in such a case as this the property should be sold by the Court within the territorial limits of which it is situate. The disadvantage which a judgment-debtor is likely to suffer by a sale effected by a Court situated at a great distance from the property can very well be imagined. One cannot expect to find a bidder for properties situated within the districts of Pabna and Rangpur, particularly of small shares, if those properties are sold at Dacca. We are of opinion that the Dacca Court had no jurisdiction to sell the properties outside the local limits of its jurisdiction. The sale of the properties within the districts of Pabna and Rangpur must accordingly be set aside.

The next objection on the part of the appellant is with regard to the sale of eight items of property given at pp. 6 and 7 of the paper-book. The contention of the appellant with regard to these properties is that the valuation given in the sale proclamation by the decree-holder was unconscionably low. It is not necessary to give in detail the valuations given with regard to all the properties. It would be sufficient to say that a property the value of which is given as Rs. 2 was purchased by the decree-holder himself for Rs. 300; another property which was valued at Rs. 5 was purchased by the decree-holder for Rs. 150 and so

on. The judgment-debtor gave evidence to the effect that the value of these properties was considerably higher. This evidence was supported by two documents one of which was a sale certificate by which a three-annas odd share of property No. 10 given at p. 7 of the paper-book was purchased for Rs. 5,700. The appellant's share would be worth according to that valuation Rs. 950. The decree-holder purchased it for Rs. 150. The other seven properties were purchased by a kabala for Rs. 13,000 and odd in 1916. According to that the plaintiff's one sixth interest would be valued at Rs. 2,000 and odd. The decree-holder purchased those properties for Rs. 515 by adding up the prices he paid for each item. Whether the present price of the properties has increased or diminished they having deteriorated, we need not consider. The important fact is that the decree-holder himself purchased the properties at many times more than the value given in the sale proclamation. That itself brings the case within the decision of their Lordships of the Privy Council in the case of *Saadatman Khan v. Phul Kuar* (3) see also *Basanta Kumari v. Ram Kanai* (4). The gross under-valuation of the properties must have deterred intending purchasers from bidding at the sale and offering reasonable value. The sale of those properties, therefore, should also be set aside.

The appeal with regard to these properties must accordingly be allowed. The appellant is entitled to his costs ten gold mohurs.

V.B./R.K.

*Appeal allowed.*

(3) [1893] 20 All. 412=25 I.A. 146=2 C.W.N. 550=7 Sar. 383 (P.C.).

(4) [1911] 13 C. L. J. 192=9 I. C. 698.

## A. I. R. 1929 Calcutta 819

MUKERJI AND MULLIK, JJ.

*Barkat Ali Haji and others*—Plaintiffs—Appellants.

v.

*Prasanna Kumar Talukdar and others*—Defendants—Respondents.

Appeal No. 1627 of 1927, Decided on 5th March 1929.

(a) Evidence Act, S. 115—"Permitted another person to believe a thing"—Meaning explained.

By the words "permitted another person to believe a thing" etc., the section contemp-

(2) [1898] 25 Cal. 179=24 I.A. 170=1 C.W.N. 639=7 Sar. 222 (P.O.).



lates that not merely may there be active inducement on the part of the declarant for a belief in the mind of another person but it is enough if the declaration is such by which the declarant in the ordinary course permits somebody else to believe in the truth of the declaration and to act on that belief. [P 821 C 1]

(b) Evidence Act, S. 115—Acts or declarations need not be intentional.

The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself or must have acted with an intention to mislead or deceive. What the law and Indian Statute mainly regard is the position of the person who was induced to act and the principle on which the law and the statute rest is that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. So long as there is no duty cast upon the person induced not to rely upon the inducer's statement but to make further inquiries the word "intentionally" is satisfied: 20 Cal. 296 (P.C.), *Foll.* [P 821 C 2]

(c) Evidence Act, S. 115—Representation involving mixed question of law and fact is a "thing."

A representation that the interests of a deceased had devolved upon the persons making the representation is a "thing" within the meaning of S. 115 as it is not a question of law but is mixed question of law and fact. [P 821 C 2]

*Panchanan Ghose*—for Appellants.

*Chandra Shekhar Sen*—for Respondents.

*Biraj Mohan Mazumdar*—for Deputy Registrar.

**Judgment.**—This appeal has arisen out of a suit for rent. The suit was decreed by the trial Court. The defendants then preferred an appeal during the pendency of which one of the plaintiffs respondents named Raja Mia died. The death of this person took place admittedly some time in the year 1925. The fact of his death, however, was not brought to the notice of the lower appellate Court by any of the parties. On 8th March 1926, the lower appellate Court allowed the appeal and reversing the decree of the trial Court dismissed the suit. The remaining plaintiffs then preferred this present appeal.

The contention that is sought to be urged on behalf of the said appellants is that the decree of the lower appellate Court in so far as it was a decree passed

in an appeal which was not properly constituted, the suit out of which the said appeal has arisen being one for rent and the decree from which that appeal was taken being a joint decree for rent in favour of all the plaintiffs, was a nullity inasmuch as one of the plaintiffs had died and his heirs had not been substituted in his place. The answer which the respondents give to this contention is that they were misled by the fact that the present appellants had instituted other suits for rent against them alleging that the interest of Raja Mia in the properties had vested in themselves only.

In order to understand the respective contentions of the parties it is necessary to give a few dates and facts. On 30th July 1925, that is to say when the appeal in the present case was pending before the lower appellate Court, the remaining plaintiffs instituted another suit for rent against the respondents in which they stated that Raja Mia having died, his interest had vested in his uncles, plaintiffs 4, 5 and 6 Abdul Hakim, Amir Hamja and Badsha Mia. The plaint in this suit was verified by all the plaintiffs in the suit including plaintiff 1 Barkat Ali Haji. This second appeal was filed in this Court on 21st June 1926 and the main ground of the appeal was the invalidity of the decree due to Raja Mia's death. On 22nd May 1928 the said Barkat Ali Haji swore to an affidavit in which he stated that Raja Mia had died on 8th August 1925 but that no application for substitution of his heirs had been made in the lower appellate Court and that Court made a decree against all the plaintiffs including Raja Mia who was dead. It will appear therefore that the date of Raja Mia's death as given in the said affidavit could not be correct, because though it was stated therein that Raja Mia died on 8th August 1925, in the plaint to which I have already referred which was filed on 30th July 1925 it was stated that Raja Mia had already died. After filing the appeal to this Court on 21st June 1926 accompanied with the aforesaid affidavit of Barkat Ali the said remaining plaintiffs, including the said Barkat Ali Haji instituted another suit for rent against the respondents on 16th September 1926 purporting to claim the entire rent and without making any mention of anybody else as the heir of the said Raja Mia.



The facts set out above speak for themselves. They show that while in one set of proceedings the appellants before this Court were instituting suits for rent and getting decrees therein on the footing of they themselves or at least some of them having acquired the interest of Raja Mia, in the appeal which they filed in this Court they have sought to make out that Raja Mia had left other persons, and on them Raja Mia's interest had devolved as heirs. The respondents contend that in view of the fact that representations were made by the appellants in the collateral proceedings, that is to say in the two suits for rent, it should be held that the said appellants are estopped from raising in the present appeal the contention that they are not the only heirs of Raja Mia. It seems to us that it would be whittling down the provisions of S. 115, Evidence Act, to allow the appellants to raise this contention. That section states:

"When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

What is said on behalf of the appellants is that the representations contained in the plaint of 1925 were not intended to be acted upon by the defendants and that in point of fact the defendants knew that there were other persons who survived after the death of Raja Mia and that as defendants in the suit they were bound not to take the statements in the plaint as correct but to make further enquiries and ascertain whether the statements were correct or not. We may say at once that we entirely disagree with this contention. This contention overlooks the words "permitted another person to believe a thing" etc. Not merely may there be active inducement on the part of the declarant of a belief in the mind of another person, but it is enough if the declaration is such by which the declarant, in the ordinary course, permits somebody else to believe in the truth of the declaration and to act in that belief.

It is next said that there was no intention on the part of the remaining plaintiffs that the respondents would act on the representation and that the word

"intentionally" which appears in the section has not been satisfied. The answer to that is to be found in the decision of the Judicial Committee in the case of *Sarat Chander Dev v. Gopal Chunder Laha* (1). The word "intentionally" has been explained in that decision. In that decision what their Lordships have said is this:

"The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act, and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do."

We are of opinion that so long as it cannot be said that there was any duty cast upon the defendants not to rely upon the statement made in the plaint but to make further enquiries, and in this case we are not in a position to hold that there was any such obligation on the part of the respondents, it cannot be said that the word "intentionally" as used in S. 115, Evidence Act, has not been satisfied. We may state that nothing has been shown to us which would even faintly suggest that the respondents had the least suspicion that the representation was not in fact true.

Then it is contended that the question as to whether the persons left out and not substituted were heirs or were not heirs of Raja Mia is a question of law and therefore it is not a "thing" within the meaning of the section. The representation that was made was that the interest of Raja Mia had devolved upon some of the plaintiffs. That, in our judgment is a "thing" within the meaning of the section, not being a question of law, but a mixed question of law and fact, because it may have been in various ways that the interest of Raja Mia had

(1) [1892] 20 Cal. 296=19 I. A. 203=6 Sar. 224 (P.C.).



passed on to other persons and not merely by heirship.

The matter may be looked at from another point of view also. There is the fact of the omission on the part of the present appellants to bring to the notice of the lower appellate Court the fact of the death of Raja Mia and also the fact that he had other heirs. Now, omission also is one of the things that is mentioned in S. 115. If in addition to the active representation contained in the plaint of 1925 there was the omission on the part of the present appellants to allege before the lower appellate Court that the heirs of Raja Mia had not been substituted, it is only reasonable to hold that the respondents were confirmed in their belief as to the truth of the statement contained in the plaint, and it being confirmed in that belief they did not take any steps to make an application for getting an order for substitution the appellants in our opinion are doubly estopped by reason of the provisions of S. 115. We are clearly of opinion that the question that is sought to be raised by the appellants is one which they are not permitted to raise by reason of the provisions of S. 115.

We accordingly find against the contention that has been urged on behalf of the appellants and we dismiss the appeal with costs.

V.B./R.K.

*Appeal dismissed.*

### \* A. I. R. 1929 Calcutta 822

CUMING AND LORT-WILLIAMS, JJ.  
*Emperor.*

v.

*C. A. Mathews—Accused.*

Criminal Jury Ref. No. 5 of 1929, Decided on 29th July 1929, made by Addl. Sessions Judge, 24-Parganas.

\* (a) Evidence Act, S. 33—Warrant case—Evidence of witness before charge is framed is not admissible—Criminal P. C., S. 256.

In a warrant case until the stage provided for in S. 256 is reached the accused has no right to cross-examine and consequently the evidence of a witness given before framing of the charge is not admissible under S. 33: 8 C. W. N. 388, Ref. [P 824 C 1]

(b) Interpretation of Statutes—Rule of practice in conflict with law—Law must be followed.

When a rule of practice or prudence or whatever else it may be called conflicts with the law as laid down by the legislature the Judge is bound to follow the law: 41 Cal. 446, Ref. [P 824 C 1]

(c) Evidence Act, S. 114, Illus. (b)—“May” is not “must” and evidence of accomplice stands on same footing as other evidence.

Although S. 114, Illus. (b), provides that a Court may presume that the evidence of an accomplice is unworthy of credit, unless corroborated, “may” is not “must” and no decision of Court can make it “must.” Therefore in spite of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy of credit and must be corroborated. It is for the Court to consider after taking into consideration all the circumstances one of which being that he is an accomplice whether it does or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice. [P 824 C 1, 2]

(d) Evidence Act, S. 138—S. 138 deals with order of proceedings not with rights of parties.

Section 138 deals not with the rights of the party but only provides the order in which the proceedings are to be conducted. [P 823 C 2]

*Nagendra Nath Banerji and Jatindra Nath Mukerji—for the Crown.*

*K. N. Chowdhury and Probodh Ch. Chatterji—for Accused.*

**Cuming, J.**—This is a reference under S. 307, Criminal P. C. by the learned Additional Sessions Judge of 24-Parganas in the case of one C. A. Mathews. C. A. Mathews was tried by the learned Additional Sessions Judge of 24-Parganas sitting with a jury on a charge of conspiring with a number of other persons to dishonestly and fraudulently induce intending candidates for the post of travelling ticket checkers in the E. B. Ry. administration to deliver moneys to him by deceiving these persons into a belief that they would on such delivery receive appointments on a monthly pay of Rs. 30 and an allowance of Rs. 15. He was further charged with conspiring with the same persons to cheat a number of persons by obtaining from them moneys as gratification other than legal remuneration from intending candidates for the post of travelling ticket checkers in the said railway, after deceiving them into a belief that they after the delivery of the money would get appointments as stated in the first charge. The jury by a majority of three to two found the accused not guilty. The learned Additional Sessions Judge being of opinion that the accused was guilty under S. 120-B read with S. 161, I. P. C. has referred the case to this Court. It will be seen that originally Mathews was being



tried by the Police Magistrate, Sealdah, jointly with a number of other persons who were alleged to be his co-conspirators. Mathews then claimed to be tried as a European British subject and hence he was committed to Sessions and has been tried alone.

The case for the prosecution is briefly this: The accused is a sub-officer of the E. B. Ry. and was in charge of the travelling ticket inspection section of the railways. He with a number of other persons who conspired with him induced a large number of persons to give him various sums of money on the pretext that they would be appointed as travelling ticket checkers. These persons worked for various periods of time on the railway and in the month of September 1927, their services were dispensed with. The case for the prosecution is that Mathews had no authority to make such appointments, that these persons were not properly speaking appointed at all by the railway and that Mathews took from these persons various sums of money as a consideration for giving them the appointments. The case of the defence as set forth by Mathews in his statement in the Sessions Court was that the appointments of almost all these persons had been sanctioned by the Chief Auditor and that he never took any money from them as a reason for their appointments in the railway. It is further suggested by the learned counsel for Mathews that these persons whom he appointed were unpaid probationers and that when their work was found unsatisfactory their services were dispensed with. I say advisedly that this was a case of counsel, because this portion of Mathew's case finds no place in his statement to the Court and is inconsistent with it. There is no suggestion in Mathews' statement in the Sessions Court that they were appointed as unpaid probationers.

I shall first of all deal with the two points of law that arise in this case. The first point deals with the admissibility of the evidence of Mr. W. F. Milne, the Chief Auditor. The facts are these: Mr. Milne was examined as a witness in the Court of the Police Magistrate at Sealdah. At that time apparently the case was being treated as a warrant case and Mathews had been tried together with the other accused. At the close of

Mr. Milne's evidence the accused were called on to cross-examine him. This they refused to do. The reason for calling on them at that time to cross-examine Mr. Milne when the charge had not been framed was that Mr. Milne was very ill and was proceeding to England shortly, which he actually did on 2nd May. Subsequently Mathews made an application to be tried as a European British subject. This was allowed and the result was that he was committed to Sessions as I have already stated.

The prosecution now desire to put in as evidence under S. 33, Evidence Act, the statement of Mr. Milne before the Police Magistrate. S. 33 provides that in certain circumstances evidence given in one judicial proceeding is relevant in a subsequent judicial proceeding provided that the adverse party in the first proceedings had the right and opportunity to cross-examine. That the accused had the opportunity of cross-examining this witness, is I think, quite clear. He was asked to do so and he refused so to do. But I think it is also clear that at the stage at which the case had arrived he had no right to cross-examine. S. 252 provides that the Magistrate will take all evidence as may be produced in support of the prosecution. S. 254 provides for the drawing up of the charges. S. 256 provides for the cross-examination of the prosecution witnesses which takes place after the charge. Now as far as I can see the accused in a warrant case has no right to cross-examine the prosecution witnesses until after the charge has been framed. The Magistrate may in his discretion allow him to do so, and probably if the accused requested would allow him to do so but the accused cannot claim as of right to cross-examine until the charge has been framed. S. 138, Evidence Act, on which the prosecution rely deals not with the rights of the party but only provides the order in which the proceedings are to be conducted: see the case of *Ashirbad Muchi v. Maju Muchini* (1) where it was held that the Magistrate should give the accused an opportunity to cross-examine even though the charge may not be framed. But that is not the same as saying that the Court must give him an opportunity. No doubt S. 256 does not prohibit cross-examination at

(1) [1904] 8 C. W. N. 888.



a previous stage but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that until the stage of the case provided for in S. 256 is reached the accused has no right to cross-examine. That being so in the present case the accused had no right to cross-examine and so the evidence of Mr. Milne is not admissible in evidence under S. 33.

The next point that has been argued is that the evidence of the principal witnesses who deposed to the accused taking money is the evidence of accomplices and so must be corroborated. S. 133, Evidence Act, provides the complete answer to this proposition, for it provides that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accomplice. No doubt there is a rule of prudence and practice to warn juries of the danger of convicting on the uncorroborated evidence of an accomplice though at the same time it is open to the Court to hold that it is not illegal to do so. But it is not correct. I think, to say that the rules of prudence and practice or whatever else they may be called can have the force of law is to supersede the express provisions of the legislature. That might perhaps have some force where the law is what is known as Judge-made law. Here in India there is no Judge-made law, for the law is to be found in the Codes and the Judges can only apply the law and do not make the law. To hold otherwise is to substitute for the enactments of the legislature the opinions of the individual Judges. When a rule of practice or prudence or whatever else it may be called conflicts with the law as laid by the legislature I am obviously bound to follow the law. S. 114, Illus. (b) no doubt provides that a Court may presume that the evidence of an accomplice is unworthy of credit unless corroborated, but "may" is not "must" and no decision of the Court can make it "must." It seems to me, therefore, that in spite of all that has been said to the contrary in law the evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy of credit and must be corroborated. It is for the Court to consider after taking into consideration all the circumstances one of which being that he is an accom-

plice whether it does or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to a miscarriage of justice.

It is to be remembered that there are, it may be said, many grades of accomplices. They vary from the man who, for example, with his own hand committed a murder to the man who as in the present case it is alleged offered a bribe to another when the latter is being tried for taking the illegal gratification and to that extent aided the accused in committing his offence of taking an illegal gratification. For this man is not strictly speaking guilty of the offence of which the other is being tried and he certainly does not come strictly within the meaning of the term accomplice if we accept the definition of the term accomplice as given by Subrahmanya Ayyar, J. in the case of *Ramasawmi Gounden v. Emperor* (2) or by Glover, J. in the case of *Queen v. Ram Sahoy* (3) Subrahmanya Ayyar, J. held that the term accomplice signifies a guilty associate in crime or where the witness sustains such a relation to the criminal act that he could be jointly indicted with the accused. Glover, J. states:

"I understand an accomplice witness to be one who is either being jointly tried for the same offence and makes admissions which may be taken as evidence against a co-prisoner or who has received a conditional pardon on the understanding that he is to tell all he knows and who may at any moment be relegated to the dock."

The witnesses whom it is now sought to stigmatise as accomplice could not be tried for the offence with which the accused is now tried. They are, if anything, guilty of an entirely different offence, namely, of offering the bribe. They do not come within the definitions I have just referred to. However, it is not necessary to further pursue this point. The view which I take is that the evidence of an accomplice should be received on its own merits taking into consideration all the circumstances of the case and its truth or falsity tested by the usual tests which are applied. To hold otherwise is to hold something which is entirely contrary to the law. In India we have the Codes and by the Codes we are to be guided and it is not

(2) [1904] 27 Mad. 271=14 M. L. J. 226.

(3) 20 W. R. Cr. 19.



for the individual Judges or Courts to alter the express provisions of the Codes by what are termed rule of practice or prudence. That is for the legislature and that the legislature alone can do. As a very learned Judge of this Court the late Chief Justice Sir Lawrence Jenkins pointed out:

"Not one jot or one tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court": *In re, An Attorney* (4) (at p. 454).

The learned Judge was there dealing with S.-195, Criminal P. C. and pointed out that if all the various expressions of opinion are to be read as of universal application the enactment of the legislature would pass out of recognition. And I am equally prepared to say that if all the observations as to the necessity of corroboration and the amount of or what constitutes corroboration of an accomplice were to be read as law S. 133, Evidence Act, would equally pass out of existence. Like this learned Judge I prefer to take my stand on the sections themselves. If a jury may act on the uncorroborated evidence of an accomplice a Judge may certainly do so. If the evidence of an accomplice requires to be corroborated in all material particulars then obviously it is a waste of time to examine the accomplice at all for his testimony becomes unnecessary. (His Lordship then considered evidence and proceeded). To my mind all these facts go to prove beyond a shadow of doubt that Mathews, Bose, Huq, Mitter and others were all parties to a conspiracy to get illegal gratifications from the various victims who have been examined and others to procure them appointments.

There is a further fact that, as far as I can see there were really no appointments at any time for these men. No attempt has been made to prove that there were. Mathews contends that all these men were duly appointed by the Chief Auditor or their appointments were sanctioned by him. The witness who could have proved this was Mr. Milne, the Chief Auditor. This witness was examined by the prosecution in the Magistrate's Court. He was in a bad state of health and was about to leave for England. The accused had an opportunity to cross-examine him and refused to do so. They were well aware at

that time that he had to leave for England and hence if they did not then cross-examine him they would probably have no other opportunity of so doing. They, however, deliberately refrained from so doing. That being so they can hardly complain that Mr. Milne's evidence is not available. It is to be remembered that even if they cross-examined Mr. Milne then they had a right to further cross-examine him after the charge has been framed. They could not have been prejudiced in any way if they had put necessary questions to Mr. Milne at that time even if he were not available for cross-examination later on. On Mathews' own showing these appointments had to be approved by the Chief Auditor. If that were so why did he refrain from cross-examining the Chief Auditor. None of these men's names ever appeared in any salary bill except one. No explanation has been given of this by Mathews. His counsel suggests that they were unpaid probationers. As I have already remarked Mathews never suggested any such thing.

I am therefore of the same opinion as the learned Additional Sessions Judge that Mathews was guilty of conspiracy to take bribes as charged. It is necessary for me in coming to this finding to take into consideration the verdict of the jury and the opinion of the Judge. In dealing with the opinion of the Judge and verdict of the jury it is to be remembered that these persons all of them saw the witness. The Judge and two of the jurors were of opinion that the accused was guilty and the remaining three jurors were of opinion that he was innocent. Little assistance, therefore, will be got from considering the opinion of the persons who actually saw the witnesses, they being equally divided—three believed the witnesses and three apparently disbelieved them.

It is not necessary for me to deal with the other charge, namely, that of cheating.

To my mind the fraud which has been perpetrated on these men was mean and cruel. They were, as far as evidence shows, young men in very poor circumstances, and felt some difficulty in raising the money. It may be said, no doubt, in one sense they were participators in the crime, because they offered bribes. After all they were really trying to get ap-



pointments. We accept the reference and sentence the accused C. A. Mathews to undergo rigorous imprisonment for six months under S. 120-B read with S. 161, I. P. C.

**Lort-Williams, J.**—I agree that the accused ought to be convicted and sentenced as ordered by my learned brother.  
V.B./R.K. *Accused sentenced.*

### A. I. R. 1929 Calcutta 826

B. B. GHOSE AND PANTON, JJ.

*Madhab Gobinda Ray*—Appellant.

v.

*Secy. of State*—Respondent.

Appeal No. 107 of 1926, Decided on 5th December 1928, from Original Decree of Special Land Acquisition Judge, 24-Parganas, D/- 2nd March 1926.

Land Acquisition Act (1 of 1894), S. 23—Damages for loss of business can be granted only when person pursuing business is compelled to give it up or carry it on elsewhere at loss but not in case where person was using corpus of land for business.

Loss of business means that a man pursuing some trade or business is compelled to give it up or to carry it on elsewhere, which would give him less profit than what he was making at the former place. It is only in this case that the claimant can lay claim to damages on account of loss of business. And a person is not entitled to claim damages for loss of business, which he was making at the former place by using the corpus, the result of which use would be to make the property altogether valueless after a lapse of time.  
[P 827 C 2]

*Jogesh Chandra Roy, Gopalchandra Das and Nerodbandhu Roy*—for Appellant.

*Surendranath Guha and Nasim Ali*—for Respondent.

**B. B. Ghose, J.**—This is an appeal by claimant No. 5 against the award of the District Judge in a matter of land acquisition by which the learned District Judge varied the award of the Collector by increasing it to the extent of about Rs. 4,000. The land acquired is about 4 bighas in area which was divided in two plots by the Collector. Both the plots were divided into two belts and the total amount awarded by the Collector with the statutory allowance came up to Rs. 5,669-15-8. Before the Collector, the claimant asked for plot No. 2 at the rate of Rs. 7,000 per bigha and plot No. 3 at the rate of Rs. 5,000 per bigha, together with compensation for

loss and damage to business to the extent of Rs. 10,000, altogether Rs. 39,775. In his application for reference, the claimant only claimed the same amount in a lump without specifying the amount he claimed separately, either as value of the land or for loss of business. The land acquired with other lands was purchased by the claimant by a kabala, dated 8th December 1919. The total area conveyed by that document was  $32\frac{1}{2}$  bighas and the price paid was Rs. 45,000. On 19th December 1919, the claimant purchased by a document which purported to sell a half share of 21 bighas 10 cottas for Rs. 10,000. It is urged on behalf of the claimant that this kabala included about 3 bighas of land included in the previous kabala. The claimant purchased another piece of land, 1 bigha  $17\frac{1}{2}$  cottas in area, for Rs. 2,250 on 15th December 1920. These three plots are apparently in the same locality. The declaration was made in December 1920. The learned Judge took an average of the price of these three purchases per bigha and came to the conclusion that the market value of the land would be a little under Rs. 1,200 per bigha. Calculating the price of the area acquired, he came to the conclusion that the actual value would be about Rs. 5,000. To that he added what he considered to be the loss to the business of the claimant and he allowed damages at Rs. 4,000. Adding these two figures with the statutory allowance he varied the award of the Collector to Rs. 10,400 which was reduced to Rs. 9,800 by correcting a mistake in the calculation and Appeal No. 72 of 1927 was preferred on account of this correction.

In the appeal on behalf of the claimant the same amount which was claimed in the Court below was claimed. The principal ground upon which the claim rested was that the Judge made a mistake in taking an average price of the three purchases stated above. The argument was that out of the lands purchased within the  $32\frac{1}{2}$  bighas area 14 bighas were in the possession of mokarari tenants paying Rs. 5 or Rs. 6 as rent and the value of that area could not by any means exceed Rs. 100. Therefore, the value of Rs. 45,000 should be calculated on about 22 bighas of land. This argument is answered on behalf of the Secretary of



State by pointing out to us the recitals in the kabala itself by which the claimant purchased the property. The recitals are that only a small portion of the lands is in the possession of temporary thika tenants whom the claimant might eject at any time. The claimant himself has given evidence in this case. He is a business man and a person of education and position. From him we may naturally expect definite evidence with regard to matters of claim. He himself states that he does not know the lands which were in the possession of tenants nor does he know how many tenants there were on the lands. Apparently, there was no investigation on his part as regards the truth or otherwise of the statement that he made in his examination-in-chief, about 14 bighas being in the possession of mokarari tenants. There is no evidence whatsoever that between the date of purchase in 1919 of the 32½ bighas of land by the claimant and the date of the declaration land values had increased to any appreciable extent in that part of the locality. On the other hand, it appears from the claimant's own kabala of 15th December 1920, that the land values were about the same. Therefore, in calculating the market value of the lands acquired, it cannot be said that the learned Judge was wrong in taking an average of the price that was paid on account of the lands purchased by the claimant himself only a year before the acquisition. It is urged, however, that the Collector valued a portion of the land which was only 17 cottas in area at the rate of Rs. 2,000 per bigha and, therefore, the claimant was entitled to have the market value of the whole of the area acquired at the rate of Rs. 2,000 per bigha.

Now, if the claimant really accepts the valuation of the Collector who went to the locality and valued different portions of the land according to its character, then the value would be much less than he claims it to be. But even assuming that Rs. 2,000 per bigha would be the valuation of the land the total amount of the market value of the land would be only Rs. 8,000. Let us take that as the basis of valuation by accepting the entire contention on behalf of the claimant. The next thing that was urged on behalf of the claimant

was that the learned Judge has given Rs. 4,000 for loss of business which ought to have been at least Rs. 10,000 as claimed in the petition of the claimant before the Collector, if not more. Evidence was given on behalf of the claimant that he intended to use 3 bighas of land for the purpose of making bricks and he examined an expert to show that by making an excavation of 15 feet on this land, the claimant could manufacture 64 lacs of brick. The first difficulty in accepting the evidence is that no boring was made on the land: nobody could tell whether there was any soil fit for making bricks down to the depth of 15 feet in the land. The claimant himself gives evidence that on the contiguous land he was making bricks and that it was exhausted after he had made six lacs of bricks. It is unnecessary to pursue that question, because in my opinion "loss of business" does not mean the profit you make by using the corpus, the result of which would be that after some lapse of time, the property would be altogether valueless:

"Loss of 'business' means that a man pursuing some trade or business is compelled to give it up or to carry it on elsewhere, which would give him less profit than what he was making at the former place."

In that case he would be entitled to compensation on that account. There is no evidence that the claimant cannot carry on the trade of brick-making on the other land that he has on account of the acquisition, nor is there any evidence that he could not obtain any other lands to carry on the trade of brick-making in the vicinity. To give the market value of the land and, in addition compensation for loss which, the claimant says, has happened to him for being prevented from taking the corpus of the land would really be giving the value of the land twice over. Under the circumstances, in my opinion, nothing could be claimed by the claimant for any loss of business. There is another remarkable thing which was not expected from the claimant of the position of the present appellant that no definite evidence has been given as to what his profits were before the acquisition and what loss he has suffered in his business after the acquisition. No account books have been filed, although we have been told that a mass of papers had been produced in the Court below.



The claimant himself says that from his account books profit and loss cannot be calculated. Under these circumstances, to claim anything for the loss of business on the ground as purported to have been proved by the so called expert is of no substance whatsoever. The appeal is dismissed with costs, as accepting the market value as urged by the appellant the total award is not below that amount.

**Panton, J.**—I agree.

V.B./R.K.

*Appeal dismissed.*

### A. I. R. 1929 Calcutta 828

SUHRAWARDY AND JACK, JJ.

*Sirish Chandra Banerjee and another*  
—Defendants 1 and 2—Appellants.

v.

*Debendra Nath Banerjee and others*—  
Plaintiffs—Respondents.

Appeal No. 992 of 1929, Decided on  
26th July 1929.

(a) Civil P. C., O. 40, R. 3—Receiver of debuttar property cannot grant lease without sanction of Court—Concealment and misrepresentation of material facts from Court—Authority to grant is vitiated.

A receiver appointed in respect of a debuttar property has no power to lease the debuttar property without the sanction of the Court and any misrepresentation or concealment of material facts from the Court in connexion with the proposed lease would vitiate the authority of the receiver to grant the lease.

[P 828 C 2]

(b) Civil P. C., O. 40, R. 3—Receiver of debuttar property—Lease—Concealment of relationship of receiver and lessee—But for concealment sanction doubtful—Unless lease disadvantageous and not for benefit of estate, it cannot be cancelled.

Where in a lease granted by the receiver of the debuttar property there is concealment of relations of lessee and receiver and it is possible that the Court might not have granted the sanction to the lease or at least scrutinized the terms of the lease more clearly if it were aware of the facts, unless it can be shown that the lease in any way was disadvantageous one and not to the benefit of the debuttar estate it cannot be cancelled.

[P 829 C 1]

(c) Civil P. C., O. 40, R. 3—Receiver of debuttar property granting lease—Reason to suspect fraud at inception not sufficient for cancellation.

In cases of lease by a receiver of the debuttar property the fact that there was reason to suspect fraud at its inception is not sufficient ground for the cancellation of the lease.

[P 829 C 1]

(d) Hindu Law—Religious endowment—Compromise to perform puja by rotation—Idol cannot be moved.

Where there are more than one shebait and it is compromised to worship and perform

Puja by each of them in turn it is not admissible to move the idol from place to place according to the convenience of co-shebait but it should be kept in a place where it can be conveniently worshipped in turn by parties.

[P 829 C 2]

*Brojo Lal Chakravarti, Sitaram Banerjee and Dwipendra Mohan Ghose*—for Appellants.

*Sarat Chandra Basak and Jitendra Kumar Sen Gupta*—for Respondents.

**Jack, J.**—The appeal has arisen out of a dispute as to the rights of the parties in a debuttar estate. The only two questions arising in this appeal are: (1) whether a lease granted by a receiver appointed by the Court to defendant 2 has been rightly cancelled by the lower appellate Court: (2) whether the lower appellate Court was correct in holding that the plaintiffs as co-shebait with defendant 1 were entitled to remove the idol to their exclusive custody for seven and half months of the year. The appellants contend that the decision of the lower appellate Court on both these points is not justified in the circumstances of the case.

The lease was cancelled on the grounds: that (1) the receiver concealed from the Court the fact that the lessee was her own grandson and a brother of Sirish Chandra Banerjee the adopted son of Bama Sundari the previous shebait of the six annas share by virtue of a compromise with Promotho Nath Banerjee. The latter was the predecessor of the plaintiffs and shebait under the compromise of the ten annas share, in whose place the receiver was appointed by the Court. He died in 1924 and the receivership has been terminated by the Court.

The receiver has of course no power to lease the debuttar property without the sanction of the Court and the Court below has quite rightly held that any misrepresentation or concealment of material facts from the Court in connexion with a proposed lease would vitiate the authority of the receiver to grant the lease. In the present case there was such concealment and it is possible that the Court might not have granted sanction to the lease or at least might have scrutinized the terms more closely had it known of the relationship. Another objection is that in the lease an additional clause was introduced which was not contained in the terms proposed in the



application for sanction, i. e., that if the lessee was not paid the price of any permanent structures as settled by an engineer appointed by both parties, he would not be bound to give up the property. According to the application (the terms proposed which were sanctioned by the Court) the shebait was to pay to the lessee the full value of all such structures erected by the lessee. That being so, if the value was not paid the lessee would certainly be entitled at least to a lien on the property, so that the added clause did not really add very much to the terms sanctioned.

The first objection is more serious and had it been shown that the lease was in any way a disadvantageous one and not for the benefit of the debuttar estate then I certainly think it should be cancelled. On the findings, however, arrived at by the Court of first instance which have not been upset by the learned appellate Judge it appears that the lease has been to the advantage of the estate and there seems every reason to think that its continuance will be for the advantage of the estate. In these circumstances it is doubtful if there was any fraud practised on the Court or intended when the lease was granted. No attempt has apparently been made to erect permanent structures and the clause entitling the lessee to continue in possession not having received the sanction of the Court would not be binding on the shebait and cannot be deleted from the lease. There seems to be some ground for the surmise of the trial Court that if the lease is cancelled it will lead to wastage of the property through disputes between the shebait and, in the circumstances, since the continuance of the existing lease (apart from the clause about retaining possession on the expiry of the lease) appears to be for the benefit of the estate, the fact that there is reason to suspect fraud at the time of its inception does not seem to be a good ground for cancelling it entirely. Ground 7 of the appeal indicates that the lessee wishes to continue the lease with the objectionable added clause deleted and we think that the order of the Court of appeal below should be modified accordingly.

The remaining point is regarding the removal of the idol. Under the terms of the compromise between Pramatha and Bamasundari, Pramatha was entitled to

worship the deity at any place convenient to him during his pala or turn of worship. The trial Court, however, refused the prayer of the plaintiffs that they might move the idol holding that to do so would endanger the puja. The idol has been in a rented house in Kidderpore for the last 35 years but there is no specific temple for it and in the circumstances we think that the appellate Court was right in holding that the plaintiffs could not be refused their right under the terms of the compromise to have the idol during their seven and half months pala where they can worship it conveniently. The appellants, however, rightly object to the removal of the idol from place to place especially as the plaintiffs have no suitable place to keep it. In the circumstances we are inclined to favour the proposal referred to in the trial Court to construct a separate abode for the idol on a part of the debuttar estate where it could be conveniently worshipped in turn by the parties. This suggestion was discussed in our presence by the representatives of the parties and it was agreed that a suitable building should be erected, the expense being met from the land acquisition funds which are due to the estate. A receiver will be appointed under the direction of the Court (if possible some one who will act without expense to the parties) for this purpose. The defendants object to provision in the building for accommodation for the shebait and we think that this is not necessary. The trial Court will also decide when the time of worship of the parties will commence should there be any disagreement on this point.

The appeal is allowed accordingly. The lease will remain in force excluding the clause entitling the lessee to remain in possession after the termination of the lease—and a building will be erected as speedily as possible for the residence of the idol under the direction of the Court where the plaintiffs and defendants can worship it for seven and half and four and half months respectively.

The case will accordingly be remitted to the trial Court for the purposes indicated. The parties will pay their own costs.

**Suhrawardy, J.**—I agree.

V.B./R.K.

*Case remanded*



## A. I. R. 1929 Calcutta 830

GRAHAM AND MITTER, JJ.

*Ramjoy Modak and others*—Plaintiffs  
—Appellants.

v.

*Durga Charan Nath and another*—  
Defendants—Respondents.Appeal No. 1748 of 1927, Decided on  
22nd May 1929, from appellate decree  
of 2nd Sub-Judge, Sylhet, D/- 9th March  
1927.(a) Landlord and tenant—Abandonment  
—Gift of whole or part of tenancy and re-  
pudiation or relinquishment or abandon-  
ment of rent is necessary—Mere cessation  
in payment of rent is not sufficient to  
infer abandonment entitling re-entry.In order to entitle a landlord to re-enter  
it must be shown that there has been trans-  
fer by way of gift either of the whole or part  
of the holding and repudiation or relinquish-  
ment or abandonment of the tenancy with  
reference to the remainder by either the  
original tenant or the heirs of the said  
tenant. Mere cessation of payment of rent  
for a short period prior to the suit is not  
sufficient to infer abandonment. [P 831 C 1]

(b) Civil P. C., S. 20—Cause of action.

Cause of action must be antecedent to the  
suit and so no cause of action can be founded  
on any allegations made in the proceedings.  
[P 830 C 2, P 831 C 1]*Birendra Kumar De*—for Appellants.*Biswa Nath Roy and Birendra Lal  
Das Chowdhury*—for Respondents.**Mitter, J.** — This is an appeal by  
the plaintiffs and arises out of a suit  
brought by them on the allegation that  
the lands were originally held by one  
Dina Nath at a jama of Rs. 8-3-0 and  
that Dina Nath made a gift of the entire  
holding on 5th March 1327 B. S. to de-  
fendant 1 and that defendant 1 took  
possession of the jote on 13th November  
1923 and that consequently there has  
been an abandonment by the old tenant  
of this holding which entitles the plain-  
tiffs to re-enter. The defence of defen-  
dant 1 in substance was that the entire  
jote of Dina Nath was not transferred  
to him by the deed of gift and there  
has not been an abandonment of the jote  
by the heirs of the old tenant, Dina Nath  
having died since the execution of the  
deed of gift. The Court of first instance  
found that there has been a gift of the  
entire holding of Dina Nath and basing  
its decision on this finding decreed the  
plaintiffs' suit and declared the plain-  
tiffs' maliki right to the lands in suitand directed that they do get khas pos-  
session therein after ejecting the defen-  
dants. Against this decision an appeal  
was taken to the Court of the second  
Subordinate Judge of Sylhet. The Sub-  
ordinate Judge came to the conclusion  
that there has not been a transfer by  
way of gift of the entire holding, that  
out of 27 keyars which is the area of  
the holding the deed of gift covers only  
15 keyars and there has not been any  
abandonment as after the deed of gift  
the widow of Dina Nath, the original  
tenant, used to be in possession of the  
lands reserved by Dina Nath through  
bhagidar tenants. On this view the  
lower appellate Court reversed the de-  
cision of the Court of first instance and  
dismissed the plaintiffs' suit. The  
plaintiffs have consequently brought this  
second appeal and the main contention  
before us on behalf of the plaintiffs ap-  
pellants has been that there has not  
been a proper finding on the question of  
abandonment by the lower appellate  
Court and the case should be remitted  
to him in order that he may re-hear the  
appeal on the question of abandonment.The finding of the lower appellate  
Court that the widow of Dina Nath pos-  
sessed a portion of the holding even  
after the deed of gift cannot be ques-  
tioned in second appeal. Dina Nath  
died in 1329 B. S. and his widow Bi-  
sakha who succeeded him died in 1330  
B. S. i. e. sometime in 1923. According  
to the finding of the lower appellate  
Court the widow was in possession till  
1923 and the present suit was commen-  
ced on 12th June 1924. It has been  
argued by the learned advocate for the  
appellants that as no rent has been paid  
by Dina Nath's daughter who succeeded  
to Dina Nath's holding after the death  
of Bisakha the lower appellate Court  
should have inferred that there has been  
an abandonment of the holding. It has  
also been stated that in the written  
statement which had been filed by Dina  
Nath's daughter in Court in this case  
she has disclaimed any interest in this  
tenancy and it is said that that is suffi-  
cient to entitle the landlord to re-enter.  
With reference to the written state-  
ment it is enough to state that no cause  
of action could be founded on any allega-  
tion made in the pleadings. The cause  
of action must be antecedent to the suit.  
In order to entitle the landlord to re-



enter, it must be shown that there has been transfer by way of gift either of the whole or part of the holding and repudiation or relinquishment or abandonment of the tenancy with reference to the remainder by either the original tenant or the heirs of the said tenant. The written statement which is filed in the course of the suit does not show that there has been a repudiation of the tenancy prior to the institution of the suit. It could not give rise to the cause of action for this suit. Neither do we think that the mere fact that for a very short period rent had not been paid by the heirs of Dina Nath can justify the landlord to consider that the holding has been abandoned by the old tenant. It would not be right having regard to the shortness of the period intervening between the cessation of the payment of the rent and the date when the suit was instituted to infer abandonment by the original tenant even assuming that the question of abandonment is a question to be inferred from the facts found. It has been pointed out in the Full Bench case of *Dayamayi v. Ananda Mohan Roy* (1) that the question as to whether there has been an abandonment depends on the circumstances of each case. We are not satisfied that the facts on which reliance has been placed by the learned advocate for the appellants constitute an abandonment.

The result is that the appeal fails and must be dismissed with costs.

**Graham, J.**—I agree.

V.B./R.K.

*Appeal dismissed.*

(1) [1914] 42 Cal. 172=20 C. L. J. 52=27 I. O. 61=18 C. W. N. 971 (F.B.)

### A. I. R. 1929 Calcutta 831(1)

C. C. GHOSE, J.

*Sm. Mati Bala Dasi*—Defendant 1—Petitioner.

v.

*Raj Narain Dutt and another*—Defendant 2—Opposite Parties.

Civil Rule No. 879 of 1929, Decided on 26th July 1929, in the matter of Title Suit No. 1745 of 1927, from order, D/- 24th May 1929, of Munsif, Burdwan.

Civil P. C., S. 115—Interlocutory orders.

High Court cannot interfere with interlocutory orders under S. 115, except in special circumstances. [P 831 C 2]

*Sitaram Banerji and Bijoy Prosad Sinha Roy*—for Petitioner.

*Byomkesh Bose*—for Opposite Parties.

**Judgment.**—The order complained of is an interlocutory order made in a suit which has not yet come on for hearing. The settled practice of this Court is not to interfere with such orders under S. 115, Civil P. C., except in very special circumstances. The present case is not, in my opinion, within that rule applicable to very special circumstances. The result is that the Rule is discharged with costs—hearing fee one gold mohur.

V.B./R.K.

*Rule discharged.*

### A. I. R. 1929 Calcutta 831(2)

CUMING, J.

*Dwitiar Chand Mandal and another*—Plaintiffs—Petitioners.

v.

*Dharanidhar Mandal and others*—Defendants—Opposite Parties.

Civil Revn. No. 701 of 1929, Decided on 15th August 1929, against order of Munsif, 2nd Court, Jhenidah (Jessore), D/- 4th March 1929.

(a) Civil P. C., Sch. 2, Para. 16—Objections against award must be taken in lower Court and cannot be taken for first time in revision.

Any objection or point against an award must be taken in the lower Court; a point, which could have been taken but was not taken in the lower Court cannot, for the first time, be allowed to be taken in revision.

[P 832 C 1]

(b) Civil P. C., Sch. 2, Para. 10—Case referred to three arbitrators—Only two arbitrators acting—To hold that only two arbitrators had full authority to act is to commit either error of law or of fact.

A case was referred to the arbitration of three gentlemen. Only two of these gentlemen acted and took evidence. The third arbitrator took no part in the arbitration.

**Held:** that the Munsif in holding that only two of the arbitrators had full authority to act and submit an award was guilty of either error of law or error of fact. [P 832 C 2]

(c) Civil P. C., S. 115—Error of law or fact is no ground for inference in revision.

The fact that a Court is guilty of error of law or error of fact is no ground for interfering with his decision in revision: 80 Cal. 337, *Rel. on.* [P 832 C 2]



*Mukunda Behari Mullick*—for Petitioners.

*Chandra Sekhar Sen*—for Opposite Parties.

**Judgment.**—The facts of the case out of which this rule has arisen are briefly these: The petitioners brought a suit in which they claimed a right of passage over two plots of land, dags Nos. 1665 and 1666, in order to have access to a certain tank. The case was referred to the arbitration of three gentlemen. It appears from the Munsif's finding that only two of these gentlemen acted and took evidence. Arbitrator 3 took no part in the arbitration. These two arbitrators submitted an award in which they gave the plaintiffs a right of way over another plot, dag No. 1670. The learned Munsif held that two of the arbitrators had full authority to act and submit a binding award; and, therefore, he gave a decree in terms of the award filed.

Ground 1 urged by the plaintiffs who have obtained this rule is that the arbitrators had given a path over a piece of land which was not the subject-matter of the suit, namely, plot 1670. The answer to this contention is that this point was never taken, as far as I can see, before the Munsif, and I am not prepared to allow the party to take in revision a point which he could have but did not take in the lower Court. The same remark applies to ground 2 which is that the plaintiffs, petitioners, were not given an opportunity of placing their case before the arbitrators. There is no suggestion in the judgment of the learned

Munsif that any such objection whatsoever was taken by the petitioner.

The last ground taken is that the learned Munsif was not correct in holding that two of the arbitrators had full authority to act and submit a binding award. Now, as far as I can see from the terms of the reference it was all the three of the arbitrators who had to enquire into the matter although an award would be signed and submitted by only two. The learned Munsif in holding that only two of the arbitrators had full authority to act and submit an award is guilty of either error of law or error of fact. But the fact that the Court is guilty of error of law or error of fact is no ground for interfering with his decision in revision. The present case in many respects resemble the case of *Kali Charan v. Sarat Chandra* (1). I am, therefore, of opinion that it is not open to me in revision to interfere with the judgment of the learned Munsif even though it is passed upon an error of law or error of fact. It cannot be said that he had no jurisdiction to decide the matter or that he failed to exercise a jurisdiction which he had or that he had exercised his jurisdiction with material irregularity. Nor do I see that any injustice has been done to the petitioners. What he wanted is a right of way to a certain tank. That right he has got, although he did not get the right over the particular passage.

The rule is, therefore, discharged with costs. Hearing-fee one gold mohur.

V.S./R.K.

*Rule discharged.*

(1) [1903] 30 Cal. 397=7 O. W. N. 545.

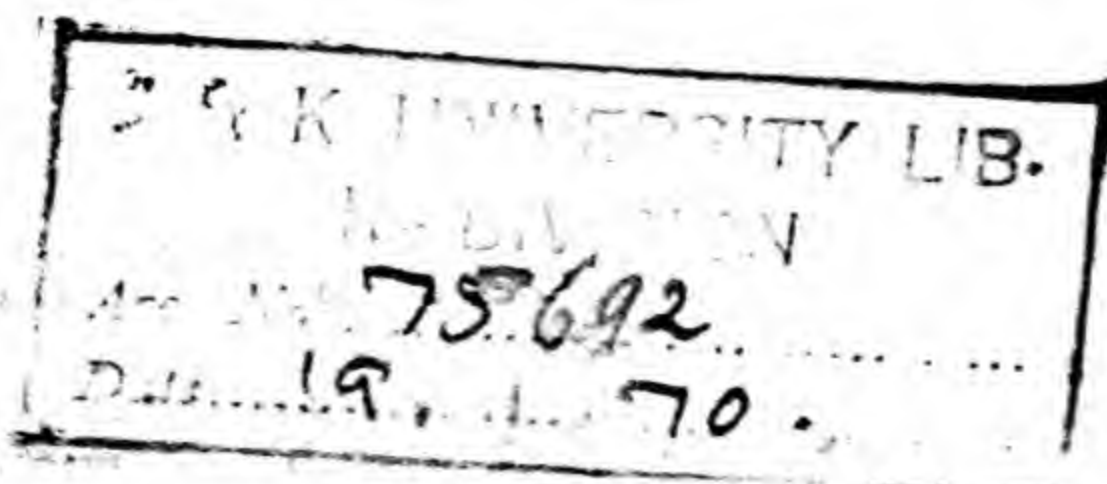
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